

PUERTO RICO

HEARING BEFORE THE COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

THE REPORT BY THE PRESIDENT'S TASK FORCE ON
PUERTO RICO'S STATUS

NOVEMBER 15, 2006



Printed for the use of the
Committee on Energy and Natural Resources

U.S. GOVERNMENT PRINTING OFFICE

33-148 PDF

WASHINGTON : 2007

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

COMMITTEE ON ENERGY AND NATURAL RESOURCES

PETE V. DOMENICI, *New Mexico, Chairman*

LARRY E. CRAIG, Idaho	JEFF BINGAMAN, New Mexico
CRAIG THOMAS, Wyoming	DANIEL K. AKAKA, Hawaii
LAMAR ALEXANDER, Tennessee	BYRON L. DORGAN, North Dakota
LISA MURKOWSKI, Alaska	RON WYDEN, Oregon
RICHARD M. BURR, North Carolina,	TIM JOHNSON, South Dakota
MEL MARTINEZ, Florida	MARY L. LANDRIEU, Louisiana
JAMES M. TALENT, Missouri	DIANNE FEINSTEIN, California
CONRAD BURNS, Montana	MARIA CANTWELL, Washington
GEORGE ALLEN, Virginia	KEN SALAZAR, Colorado
GORDON SMITH, Oregon	ROBERT MENENDEZ, New Jersey
JIM BUNNING, Kentucky	

FRANK MACCHIAROLA, *Staff Director*
JUDITH K. PENSABENE, *Chief Counsel*
BOB SIMON, *Democratic Staff Director*
SAM FOWLER, *Democratic Chief Counsel*
JOSH JOHNSON, *Professional Staff Member*
AL STAYMAN, *Democratic Professional Staff Member*

CONTENTS

STATEMENTS

	Page
Acevedo-Vilá, Hon. Aníbal, Governor of Puerto Rico	24
Berrios Martínez, Rubén, President, Puerto Rican Independence Party	33
Bingaman, Hon. Jeff, U.S. Senator from New Mexico	2
Burr, Hon. Richard, U.S. Senator from North Carolina	9
Craig, Hon. Larry E., U.S. Senator from Idaho	9
Domenici, Hon. Pete V., U.S. Senator from New Mexico	1
Fortuño, Hon. Luis G., Resident Commissioner of Puerto Rico, U.S. House of Representatives	29
Landrieu, Hon. Mary L., U.S. Senator from Louisiana	37
Marshall, C. Kevin, Deputy Assistant Attorney General, Office of Legal Coun- sel, Department of Justice	14
Martinez, Hon. Mel, U.S. Senator from Florida	3
Menendez, Hon. Robert, U.S. Senator from New Jersey	7
Salazar, Hon. Ken, U.S. Senator from Colorado	6

APPENDIXES

APPENDIX I

Responses to additional questions	49
---	----

APPENDIX II

Additional material submitted for the record	71
--	----

PUERTO RICO

WEDNESDAY, NOVEMBER 15, 2006

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 2:30 p.m., in room SD-106, Dirksen Senate Office Building, Hon. Pete V. Domenici, chairman, presiding.

OPENING STATEMENT OF HON. PETE V. DOMENICI, U.S. SENATOR FROM NEW MEXICO

The CHAIRMAN. Please come to order. Thank you, everyone. Mr. Marshall, are you all alone? You're alone at the table, but are you otherwise? There is nobody that will sit with you? I'm just kidding. It just looks kind of strange, but we'll see what happens here.

Thank you to everybody for coming. We're glad to have you here in the U.S. Senate. I'm sorry we don't have one of our new rooms, but this is the best we have and we hope that it is adequate.

With that, let me open, and let me then go to Senator Bingaman and then to Senator Martinez, recently honored with an appointment by the President as chairman of the Republican National Committee, for which we congratulate you.

With that, let me suggest that we are here at a hearing on a report from the President's task force on Puerto Rico's status. The committee shall come to order.

The purpose of the hearing is to receive testimony on the December 2005 report from the President's task force on Puerto Rico's Status. I am pleased to convene this important hearing to discuss the White House report. I appreciate the attendance of our witnesses and that many elected public officials from Puerto Rico have traveled long distances to join us here today. Thanks to all of you.

Before beginning, I want to express my gratitude for all those serving in the Armed Forces from Puerto Rico. I also want to commend those living in Puerto Rico that make their voices heard in local referenda, dealing with their political status. As I understand it, it is not uncommon to have more than 75 percent of the populous vote on referenda dealing with options of political status. Puerto Ricans deserve an opportunity to be consulted regarding their future and its relationship—their relationship with the U.S. and I will work as closely as I can with all parties involved prior to proceeding with any status change.

I am pleased that the White House issued the task force report. This is an important first step in understanding the non-territorial forms of government for Puerto Rico. No matter how we proceed,

we ultimately need to be assured that the majority of the people of Puerto Rico will have their voice heard.

I want the witnesses, who have come here today, I want them to know how grateful we are and I look forward to hearing their testimony.

Now, before I introduce the witnesses that are going to testify, let me yield to who today is the ranking member but will be chairman in a couple of weeks, 3 or 4 weeks. But we'll go as it is and we'll yield to the ranking member. That's Senator Bingaman, my co-colleague from New Mexico.

Senator Bingaman.

**STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR
FROM NEW MEXICO**

Senator BINGAMAN. Thank you very much, Mr. Chairman. I appreciate you having this important hearing. I'm pleased that the committee will have the opportunity here in the final days of this 109th Congress to receive testimony on the report of the President's task force on Puerto Rico's Status.

Over the years, this committee has put many hours into hearings and the consideration of legislation, but enactment has often been frustrated by a lack of consensus in the Congress and in Washington and in Puerto Rico. In recent years, there have been developments that may have changed that political dynamic. For example, the United States has dramatically reduced its military presence on the island. Second, the possessions tax credit has been fully phased out. And third, the free association relationships have been established with three nations in the Pacific.

More recently, this report, that Mr. Marshall is going to testify about, from President Bush's task force has reaffirmed legal positions which seem to me well founded and that were provided to the committee several years ago by the Clinton administration. In two of those findings in particular I would allude to, the current relationship with Puerto Rico is based on the territorial clause and second, that the mutual consent provisions in the new commonwealth proposal cannot be accommodated under the U.S. Constitution. However, with respect to the report's recommendations for legislation, I think it is too early to determine if there is sufficient consensus in the House and the Senate and also whether there is a commitment by this administration to move forward with legislation.

This is an issue of great importance to the people of Puerto Rico. They deserve an opportunity to be consulted. Today is an opportunity to hear what the prospects for consensus are and I will continue to work with you and consult closely with others here on the committee and officials from Puerto Rico and the administration before we proceed. So thank you again for having the hearing. I look forward to hearing the witnesses and continuing to work with you on this issue.

The CHAIRMAN. Thank you very much, Senator Bingaman. Now we have some additional members of the panel who have arrived. On our side, we have distinguished Senator Martinez and it's noteworthy that we have two additional Senators on the Democratic

side, one a new member—not the newest, but a new member from Colorado, Senator Salazar.

It's always a privilege. I'm sure we will hear some insightful questions from you about this situation.

And then we have Senator Menendez. He's newly elected also, so we congratulate you, for the record, on your election and we're glad that you were able to make it here with us today, Senator. Thank you very, very much.

I think the rules would now say we go to Senator Martinez, and then to the Democratic side, to Senator Menendez. Please proceed, Senator. Whatever time you want is yours.

**STATEMENT OF HON. MEL MARTINEZ, U.S. SENATOR
FROM FLORIDA**

Senator MARTINEZ. Thank you, Mr. Chairman, and thank you so much for holding this very important hearing today. I want to express to you my real personal gratitude for making time for this, for the diligent work of the staff. I also want to thank Ranking Member Bingaman for his work on making this hearing possible.

I also just want to take a moment to recognize de una calidad bienvenida to so many people who have traveled here from Puerto Rico to be with us today; most of all, and first and foremost, Governor Acevedo, but also, of course, our Congressman, Luis Fortuño, and the many other elected officials. Mayor O'Neil I know is here and I'm sure there are many others that represent the people of Puerto Rico in different elected offices. So I welcome all of you and look forward to continuing this discussion on this very important issue.

When considering Puerto Rico's status, it is clear that we have been left in an untenable circumstance regarding what the future will hold for the citizens of Puerto Rico. This hearing is critical in answering many of the questions that have, for too long now, gone unanswered. Although it isn't likely that we will hear all the answers today, we are certainly moving in the right direction. This hearing will give us an opportunity to review our Nation's policy toward Puerto Rico—how we got it where we are—and it will also give us an opportunity to discuss where we are heading.

However, first and foremost, we should start by clarifying one point: Puerto Rico is undoubtedly a territory of the United States. Puerto Rico is subject to the Territorial Clause of the U.S. Constitution and, therefore, a territory of the United States since 1898. That has not changed in the last 108 years.

Federal authorities including GAO, CRS, DOJ, State, the Supreme Court, the U.S. House of Representatives and successive U.S. Presidents, including the legislative history of Law 600, which provided Puerto Rico to write a local constitution, and the record of this committee, all make clear that the status of Puerto Rico remains under the Territorial Clause since 1898.

It is for this reason that, as we begin our debate on Puerto Rico's future, we do not forget the obvious—that Puerto Rico is a territory of the United States. What does this mean? Practically, it means that our Federal laws are applicable in Puerto Rico, yet the U.S. citizens of Puerto Rico do not have adequate or proportionate representation to decide those laws. And a government based on rep-

representative democracy clarifying this situation is an absolute necessity.

Mr. Chairman, in order to begin the process of resolving this matter, we need to start by asking one important question: Why is Puerto Rico the only territory in the United States to be granted U.S. citizenship by Congress, while at the same time not being put in a position to establish a permanent relationship with the United States? When the Congress conferred U.S. citizenship for the territories of Alaska and Hawaii, the U.S. Supreme Court interpreted it to mean that the U.S. Constitution applied and those territories were incorporated into the Union. When Congress conferred U.S. citizenship for Puerto Rico, the U.S. Supreme Court deviated from the Alaska and Hawaii precedents and ruled that the Constitution did not apply.

This meant that Congress could govern the U.S. citizens of Puerto Rico under the same unincorporated territory doctrine that applied to non-citizens in the Philippines when it was in transition to independence. Although Congress has been active on this issue, it has not taken the necessary steps to resolve Puerto Rico's status. As a result, some U.S. citizens of Puerto Rico have created a number of unconventional status ideologies and doctrines that combine features of statehood, territorial status and independence. The ideologies and doctrines may be ill-advised or even legally flawed in some respect but they are a direct result of U.S. citizens simply trying to fill the void left by the U.S. Congress.

These doctrines, which now complicate the issue of Puerto Rico's status, most likely would not have been created had Congress not overlooked its responsibility for a territorial status resolution.

I mention this not to chastise previous Congresses but to urge my colleagues to take this matter up in an expeditious fashion, to address it fully and to resolve it finally. As I said earlier, this is long overdue and the people of Puerto Rico deserve their say.

As a result, I have introduced legislation that would move this process forward. It would not dictate the status of Puerto Rico but it would begin a process whereby a resolution of this matter could be reached. This hearing is a critical step toward finding a workable solution and I'm pleased that both sides of this important debate are represented here today and will present testimony to our committee.

While some people support the White House report, others oppose it. Both sides have valuable perspectives and are important to this debate, because both sides have the best interests of Puerto Rico at heart. It is with a tone of civility that we should open this hearing, because there is, I believe, a firm understanding that we are here today to determine what is in the best interests of all U.S. citizens in Puerto Rico and are here to better understand the constitutional options available to future generations of U.S. citizens living in Puerto Rico. Thank you, Mr. Chairman.

[The prepared statement of Senator Martinez follows:]

PREPARED STATEMENT OF HON. MEL MARTINEZ, U.S. SENATOR FROM FLORIDA

Mr. Chairman, I want to personally thank you for calling this important hearing. The issue of Puerto Rico's status is of great interest to me and many of my constituents in Florida, and it is an issue where a meaningful resolution is well overdue.

When considering Puerto Rico's status, it is clear that we have been left in an untenable circumstance regarding what the future will hold for the citizens of Puerto Rico.

This hearing is critical in answering many of the questions that have, for too long now, gone unanswered. Although it is unlikely that we will hear all the answers today, we are certainly moving in the right direction.

This hearing will give us an opportunity to review our nation's policy toward Puerto Rico, how we got where we are, and will also give us an opportunity to discuss where it is we are heading.

However, first and foremost, we should start by clarifying one point: Puerto Rico is undoubtedly a territory of the United States.

Puerto Rico is subject to the Territorial Clause of the US Constitution, and therefore a Territory of the US since 1898. That has not changed in the last 108 years.

Federal authorities (including GAO, CRS, DOJ, State, US Supreme Court, US House of Representatives, successive US Presidents) including the legislative history of Law 600 (which provided for Puerto Rico to write a local constitution), and the record of this Committee, all make clear that the status of Puerto Rico remains under the Territorial Clause since 1898.

And it is for this reason that, as we begin our debate on Puerto Rico's future, we do not forget the obvious—that Puerto Rico is a territory of the United States.

What does this mean? Practically, it means that our federal laws are applicable in Puerto Rico, yet the United States citizens of Puerto Rico do not have adequate or proportional representation to decide those laws. In a government based on representative democracy, clarifying this situation is of absolute necessity.

Mr. Chairman, in order to begin the process of resolving this matter, we need to start by asking one important question: why is Puerto Rico the only territory in U.S. history to be granted U.S. citizenship by Congress, while, at the same time, not being put in a position to establish a permanent relationship with the United States?

When the Congress conferred U.S. citizenship for the territories of Alaska and Hawaii, the U.S. Supreme Court interpreted that to mean the U.S. Constitution applied and those territories were incorporated into the union.

When Congress conferred U.S. citizenship for Puerto Rico, the U.S. Supreme Court deviated from the Alaska and Hawaii precedents and ruled that the Constitution did not apply.

This meant that Congress could govern the U.S. citizens of Puerto Rico under the same unincorporated territory doctrine that applied to non-citizens in the Philippines when it was in transition to independence.

Although Congress has been active on this issue, it has not taken the necessary steps to resolve Puerto Rico's status.

As a result, some U.S. citizens of Puerto Rico have created a number of unconventional status ideologies and doctrines that combine features of statehood, territorial status and independence.

These ideologies and doctrines may be ill-advised or even legally flawed in some respects, but they are the direct result of U.S. citizens simply trying to fill the void left by Congress.

These doctrines, which now complicate the issue of Puerto Rico's status, most likely would not have been created, had Congress not overlooked its responsibility for a territorial status resolution.

I mention this not to chastise previous Congresses, but to urge my colleagues to take this matter up in an expeditious fashion, to address it fully, and to resolve it, finally. As I said earlier, this is long overdue, and the people of Puerto Rico deserve their say.

As a result, I have introduced legislation that would move this process forward. It would not dictate the status of Puerto Rico, but it would begin a process whereby a resolution on this matter could be reached.

This hearing is a critical step toward finding a workable solution, and I am pleased that both sides of this important debate are represented here today and will be presenting testimony to our Committee.

While some people support the White House report; others oppose it—both sides have valuable perspectives and are important to this debate, because both sides have the best interests of Puerto Rico at heart.

It is with a tone of civility that we should open this hearing, because there is, I believe, a firm understanding that we are here today to determine what is in the best interests of all U.S. citizens in Puerto Rico and are here to better understand the constitutional options available to future generations of U.S. citizens living in Puerto Rico.

The CHAIRMAN. Thank you very much, Senator.
Now it's the Senator from Colorado.

**STATEMENT OF HON. KEN SALAZAR, U.S. SENATOR
FROM COLORADO**

Senator SALAZAR. Thank you very much, Chairman Domenici and Ranking Member Bingaman, for holding this hearing on this very important issue. I also shout out my greetings to Governor Acevedo, as well as to Luis Fortuño and Ken McClintock and others who are here from Puerto Rico, who have traveled so far. Welcome here to your Nation's capital as well.

When President Clinton signed Executive Order 13183, establishing the President's task force on Puerto Rico, to help answer the questions that the people of Puerto Rico have asked for years regarding the options for their future status and the process for realizing an option, I doubt that he or those advising him expected that the task force would take so many years to make a recommendation.

However, now that the task force has acted, I believe that the 3.9 million people of Puerto Rico deserve a response from this Congress. With Capitol Hill buzzing from the election and the changes in the House and the Senate, I appreciate very much the attention that the Energy Committee is giving to this issue today. Not all issues are receiving this kind of attention in Washington on these days.

I am very eager to hear from today's panels of leaders and experts on this issue of the future of Puerto Rico. I look forward to hearing from the Deputy Assistant Attorney General, Kevin Marshall, with respect to the task force report. Likewise, I am very interested in learning more about the thoughts and reactions to the report from representatives from Puerto Rico's political parties, Governor Acevedo, Resident Commissioner Fortuño and Rubén Berríos Martínez.

All of you in Puerto Rico and those of us who are interested in the future of the island have lived with this issue for a very long time. Notwithstanding the status of Puerto Rico, the people of Puerto Rico have been great citizens of the United States and have contributed greatly to this Nation.

I am sure you will use this forum to share your unique perspective. I believe that our committee will benefit very much from your views. I hope you can offer us clear and practical ideas for moving forward. I have come to learn more about the unresolved question of what is Puerto Rico's status through conversations with Puerto Rican leaders on different sides of this issue and by traveling, within the last year, to Puerto Rico with my friend, Senator Mel Martinez.

I recognize the great responsibility that this committee placed in providing Puerto Ricans with the means to determine the ultimate status of their island. That is why, with 13 other Senators, we introduced the Puerto Rico Democracy Act.

Our bill would implement the first step of the task force recommendations by authorizing a plebiscite that would ask Puerto Ricans to decide if they would like to remain in their current status as a U.S. territory or pursue some other permanent, non-territory

option. In either case, Congress would be responsible for assisting with and respecting the desires of the people.

If the people determine that they are satisfied with their current political situation, Congress may revisit the issue in the future. If, on the other hand, Puerto Ricans elect to pursue a permanent non-territory option, Congress would have to authorize a mechanism to ascertain that new status.

My interest, very simply stated, is to provide the people of Puerto Rico with a voice in their future. For more than 100 years, the U.S. Government has allowed the question of Puerto Rico and its future simply to linger.

As we look ahead to the 110th Congress, it is my hope that this committee will keep Puerto Rico on the agenda and that we can help the people of Puerto Rico in moving forward on this issue.

Once again, Mr. Chairman, I thank you for today's hearing and I look forward to hearing from the panel today.

The CHAIRMAN. Thank you very much, Senator. Let me see. Since there are so many people, I do want to be fair with the Senators and the people in terms of time consumed. The next one who would come up here would be you, Senator Menendez. I think what we'll do, if you don't mind, is go to you with an opening statement, but ask you in advance if you could tell us that it would be limited in how long that opening statement might be.

Senator MENENDEZ. Well, Mr. Chairman, I'll be, I think, within the timeframe that we normally would have here.

The CHAIRMAN. Will you do that?

Senator MENENDEZ. Yes, sir.

The CHAIRMAN. All right. We're going to do the same with you, Senator Burr. Do you want to even take less? You're going to do half the allowed? Well then, he agreed to that, now that's the order. Thank you. You will follow him with half the time allotted.

Senator Menendez, you're next.

**STATEMENT OF HON. ROBERT MENENDEZ, U.S. SENATOR
FROM NEW JERSEY**

Senator MENENDEZ. Thank you, Mr. Chairman. Thank you for your kind wishes to our ranking member and soon-to-be-chair, as well. I appreciate him and our colleagues; Governor Anibal Acevedo, too; the Resident Commissioner, Congressman Fortuño; the President of the Puerto Rican Independence Party; and all who have come here. We welcome you.

Now, many of you think we are here to talk about Puerto Rico and Puerto Rico policy, but what we are actually here to talk about today is not policy, but process. Every member of the Senate knows that the process matters. Every member of the Senate knows that the process you set up to debate amendments and to vote on amendments can determine the outcome. That is why we spend hours debating about how we are going to debate. That is why members of the Senate, who know Senate procedure, can win on process even when they could lose on policy. So there is no group of people who should understand better than this group of Senators that when it comes to the future of Puerto Rico, process matters.

And every American understands that a rigged vote creates a false outcome. I have always said that when it comes to Puerto

Rico, we must have an unstacked and unbiased process that allows the people of Puerto Rico to determine their own future. And I would hope that every member of the Senate would support an unstacked and unbiased process, whether the outcome was statehood, independence or commonwealth.

Unfortunately, the White House Task Force and certain legislation in both the House and the Senate create a process that in my mind, is designed to get a specific outcome. I know that for many people, the idea of a plebiscite or a referendum by the people sounds like a good idea. Why not let the people vote on the options to determine their future? But that is not actually what the White House Task Force proposes. Unfortunately, the process set up by the White House Task Force does not let the people of Puerto Rico hold a clear side-by-side vote on the three options: statehood, independence or commonwealth. And here is where we see, once again, that process matters.

Rather than creating a process where all three options are voted on side-by-side, the White House Task Force sets up a rigged, two-step process designed to kill the commonwealth option in the first vote and then not allow it as part of a second vote.

First, the voters will be asked to vote for or against moving to a permanent, non-territorial status. According to the White House Task Force, the people of Puerto Rico will be asked to say whether they wish to remain a U.S. territory subject to the will of Congress.

Let me be clear. This is not a vote for or against the commonwealth as we know it. In fact, the definition of the commonwealth as described in the report is designed to scare people into voting against the commonwealth. The report gives the false impression that under the commonwealth, Puerto Rico is a colony and that people could lose their U.S. citizenship. The definition of commonwealth is so warped that even those who support the current commonwealth status would likely vote against it.

So the first vote doesn't even allow the people of Puerto Rico to vote for or against a real commonwealth. In fact, the vote would be designed to get a commonwealth-sounding option voted down by scaring people. And by making the first vote a separate vote on commonwealth status, you increase the number of people voting against it by creating an alliance between those who might support independence and statehood. So after killing the commonwealth option, the second vote would only allow voters to choose statehood or independence.

You may ask why the White House task force did not recommend a straight side-by-side vote of the three options. You may ask why the White House Task Force included a definition of commonwealth that is designed to scare Puerto Ricans. I cannot answer those questions, although I look forward to getting some answers today. It reminds me of the point I began with today, and this is where I'll end.

Process matters. If you cannot win in an outright vote, then stack the process so your side wins. I say the people of Puerto Rico deserve better than a stacked process designed so one side can win. The people of Puerto Rico deserve to determine their own future. The people of Puerto Rico, as American citizens, have the right to a fair and unbiased process. That's why I support legislation that

will bring the people of Puerto Rico together to build consensus in their own land. It puts the future of Puerto Rico in the hands of Puerto Ricans. It allows Puerto Ricans to tell Congress what they want rather than the other way around. And that, Mr. Chairman, is what I hope we would see.

I would remind everyone that the issue here is not whether you support statehood, independence or commonwealth. The issue is creating a process that is fair. The bottom line is that a rigged process creates a false outcome and the people of Puerto Rico deserve a fair process and a true outcome.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator. Now, we're going to have Senator Burr for half the time allotted, so that means 2½ minutes.

**STATEMENT OF HON. RICHARD BURR, U.S. SENATOR
FROM NORTH CAROLINA**

Senator BURR. I thank the Chair. I thank the ranking member. The CHAIRMAN. It's hard to breathe in 2½ minutes.

Senator BURR. But this Senator can do it.

The CHAIRMAN. All right. Let's go.

Senator BURR. I thank the Chair and I thank the ranking member for the opportunity to have such a distinguished group of witnesses here today.

The self-determination process for Puerto Rico must be a fair and transparent process. We have a very important responsibility to ensure that any process that leads to the consideration of the 51st State in the Union be conducted in a way that is fair to all involved. We owe it to our constituents and to our common citizens in Puerto Rico.

The sanctity of the Union and our commitment to the democratic principles must guide how we treat this sensitive and significant process of self-determination. While I have concerns about the task force report that we are here to examine today, I do respect Puerto Ricans' right to self-determination. S. 2304 simply recognizes Puerto Rico's right to self-determination. Our founding fathers' belief in the importance of a Constitutional Convention led to the formation of the United States of America. Therefore, we must recognize their wisdom and move this process forward through local consensus first and for congressional consideration thereafter.

I look forward to the hearing we are here to learn from. I pledge and look forward to working with the Governor and with the Resident Commissioner as further issues are explored in what I think is an extremely important issue about the Commonwealth of Puerto Rico.

I thank the Chair.

[The prepared statement of Senator Craig follows:]

PREPARED STATEMENT OF HON. LARRY E. CRAIG, U.S. SENATOR FROM IDAHO

To give some context to today's hearing the record should include some relevant history of the Committee's oversight role in support of status resolution for Puerto Rico.

On January 17, 1989, the Governor of Puerto Rico, acting as head of his political party, co-signed a letter with the heads of the other two major political parties in Puerto Rico, seeking federal support for and participation in a process to resolve the

“ultimate political status” of Puerto Rico. In response, from 1989 to 1991 the U.S. Congress expended a significant amount of time and effort trying to help our fellow American citizens in Puerto Rico resolve the political status question for that U.S. territory.

In 1994 the duly-constituted Legislative Assembly of Puerto Rico formally petitioned the U.S. to approve a commonwealth proposal that garnered less than a majority of votes in a locally sponsored vote conducted in 1993. The 1994 petition asked Congress to define what status options it was willing to consider. In 1997 the local legislature renewed its petition and asked Congress to sponsor a federally recognized vote based on legally valid status definitions Congress would be willing to consider.

In 1998 the House answered the petition when it debated and passed on a recorded vote legislation containing legally valid definitions of statehood, independence and commonwealth. However, the Senate never acted on similar bipartisan legislation I sponsored, and instead passed a resolution confirming the territorial clause power of Congress with respect to the status of Puerto Rico.

At that point the local Puerto Rican government called a plebiscite based on the general principles of status options contained in the House passed bill. In that vote statehood received 46.5%, the highest vote of any political status option on the ballot. Independence received 2.5%, and separate nationhood with a treaty of free association like the compact for Micronesia received .02%.

The commonwealth option on the ballot was based on governing U.S. Supreme Court rulings and federal law defining the current status as that of a U.S. territory, and this option received .01% of the vote. This represented a 99.9% rejection of the current commonwealth defined by federal law as a territory.

That left only one option on the ballot, which was “None of the Above”, and it received 50.2% of the vote. Thus, a ballot option that did not define any political status got the most votes, and we will never know what the vote would have been for the actual status options if “None of the Above” had not been on the ballot.

What we do know is that the local pro-commonwealth Party in Puerto Rico rejected the House passed definition of commonwealth and the version thereof on the 1998 local plebiscite ballot. This was because both the House bill and 1998 ballot correctly stated that as a commonwealth Puerto Rico remains subject to the authority of Congress under the territorial clause in Art. IV, Sec. 3 of the U.S. Constitution.

The reason the local commonwealth party rejected the House passed definition of commonwealth is that in 1998 the Governing Board of that party adopted its official platform confirming that party’s long held ideology that commonwealth is not territorial but is instead a form of separate sovereign nationhood. The 1998 party platform asserts that:

- Puerto Rico is not a U.S. territory and therefore is not subject to the power of Congress under the territorial clause
- Puerto Rico is a nation which conducts relations with the U.S. on “bilateral” basis under a “compact” formed by approval of the local constitution in 1952
- Commonwealth means Puerto Rico is a “free associated state” with separate national sovereignty that exists on a plane of international equivalence with the United States
- Commonwealth means Puerto Rico has its own separate international identity and can conduct its own foreign relations, including its own trade relations, even while it enjoys domestic status as a U.S. customs territory
- While not yet recognized by the United States, so that further development of the bilateral compact is required, federal powers in Puerto Rico are only those delegated by Puerto Rico or retained under the compact
- The compact is binding on the United States and cannot be altered without Puerto Rico’s consent
- U.S. law applies in Puerto Rico only as provided consistent with the compact
- New federal laws do not apply unless consented to by Puerto Rico under the compact
- The compact guarantees federal programs, tax exemptions and U.S. citizenship in perpetuity under a political union that cannot be ended without consent of Puerto Rico

On the basis of that platform the commonwealth party declared the House passed bill and the commonwealth option on the 1998 plebiscite ballot biased in favor of statehood. In other words, since the House bill and 1998 ballot accurately defined commonwealth as it exists under federal law rather than conforming to the local party’s platform, the House language was seen as biased towards statehood by some.

While I do not believe it is the job of Congress to choose sides in determining what form of political status the Puerto Ricans will decide, I do believe it is the responsibility of Congress to provide the legal framework for the decision they must make.

DEFINING STATUS OPTIONS

Given this history, it is clear that defining status options under federal law and determining which of these Congress is willing to consider is the single most imperative requirement for status resolution. The territorial clause vests Congress with the primary authority and responsibility to define options and sponsor an orderly and informed process of self-determination. Unfortunately, in 1991 and 1998, Congress was not willing to sustain the effort required to fulfill its constitutional role.

Congress has been determining the future status of territories since 1796, when the first U.S. territory outside of an existing state joined the union as a new state. After considering local status votes and petitions, the United States has subsequently admitted 32 territories as states, with one territory becoming an independent nation. Additionally, three U.S.-governed U.N. trust territories have become free associated states under a treaty with the United States.

Yet in 108 years of U.S. administration, there has never been a Congressionally-sponsored status referendum in Puerto Rico. Congress has yet to recognize a Puerto Rican vote on status as a legitimate and informed act of self-determination among options compatible with the U.S. Constitution.

The 1952 vote to adopt a local constitution did not present political status options to the voters and in fact was not a status vote at all. A 1967 vote favoring a now obsolete and non-viable commonwealth, the 1993 vote, and the 1998 vote, all failed to produce a majority for a status option that Congress would accept as compatible with federal law.

EXECUTIVE BRANCH INITIATIVES

Given this lamentable history of Congressional inaction, the efforts to resolve Puerto Rico's status advanced by President Bush in 1992, President Clinton in 2000, and President Bush in 2003, are to be commended. If these three Administrations had not provided leadership on this issue, we would not be as far along as we are building a record that provides a foundation for ultimate action by Congress.

The Report by the President's task force on Puerto Rico's Status is a mercifully condensed but fully complete and adequate summarization of the Puerto Rico status process to date. It makes sound recommendations as to next steps for further progress. Accordingly, this hearing on the White House report is timely and important if for no other reason than it adds the White House report and the views of the witnesses about it to the record before this Committee in anticipation of future legislation.

In addition to examining the White House report closely, we need to begin the process for considering legislation proposed to implement the recommendations in the Report, which was prepared by the Administration's senior officials responsible for policy relating to Puerto Rico's status. S. 2661, sponsored by Mr. Martinez and Mr. Salazar, represents a very restrained and even minimalist approach, essentially an up or down vote on continuing the current status or seeking a new status that is not territorial.

Instead of the relatively comprehensive self-determination process contained in the 1998 House-passed bill, S. 2661 is essentially a measure favoring gradualism in order to enable the political process to take it one step at a time. That is appropriate because the first goal and highest responsibility of Congress is not to promote statehood, independence, or continued territory status, but to facilitate informed self-determination.

Under this bill, there would never be the need for Congress or Puerto Rico to define or sponsor a vote on statehood, independence, or free association, unless there is first a majority vote to end the current status and seek a non-territory status. Since 1993, there has not been a majority vote for any political status option, and in 1998 virtually the entire population rejected commonwealth defined as territory status. So it is important to end minority rule on status, which refers to the 46.5% vote for statehood in 1998 or the 48.67% vote for an unrealistic and unconstitutional commonwealth option in 1993.

Those pluralities in local votes can and should be replaced by majorities in votes recognized by the United States, and the proposal to determine if a majority favor the current status as defined by federal law or seek a non-territory status is fair to all three status options and all three major political parties in Puerto Rico.

Of course, because the White House report and the Martinez-Salazar bill define the Commonwealth of Puerto Rico as a territory, some in the commonwealth party argue that the intent of the Martinez-Salazar bill and the report are both biased in favor of statehood. As a cosponsor of the Martinez-Salazar bill, I reject that label of bias, and believe that this bill would simply provide a mechanism for the people of Puerto Rico to determine a legally acceptable political status.

The local commonwealth party remains committed to the proposed development of commonwealth under the 1998 party platform described above. Indeed, on December 28, 2005, shortly after the White House report was issued, the Governor of Puerto Rico, in his capacity as head of the commonwealth party, stated that the 1998 platform for development of commonwealth “reflects our aspirations for autonomous development . . . We are ready to undertake this development when the United States demonstrates the maturity to recognize that this type of relationship is what . . . both countries need.”

At a House hearing on the White House report conducted on April 27, 2006, the commonwealth party witnesses argued that a vote on remaining a territory or seeking a new non-territory status is biased in favor of statehood because supporters of statehood and independence could “gang up” and vote for a non-territory status.

The commonwealth party witnesses also asserted that a vote on the current status as defined by federal law is unfair because the commonwealth party does not accept the definition of the current status under federal law, and so their definition of commonwealth is unfairly excluded from the process.

To address these implausible arguments we begin with the fact that under Article VI of the U.S. Constitution federal law is the supreme law of the land. That includes federal law applicable to Puerto Rico as long as it is a territory under U.S. sovereignty. If federal law defines Puerto Rico as a territory, which it does, then a majority vote to seek a new non-territory status is a majority vote against the current status regardless of what new non-territory status the voters may prefer.

Further, it is the responsibility of the federal and local government to ensure that commonwealth proposals the U.S. Department of Justice has labeled “illusory” and “deceptive” are not allowed to appear on self-determination ballots.

What would be truly unfair and biased would be to include an unviable option on the ballot in a status vote. That is what happened in 1993, when a definition of commonwealth that was constitutionally unrealistic and legally invalid was presented to voters. This results in an “artificial plurality” for a commonwealth option that does not exist and is impossible.

In the history of U.S. territorial law, statehood and independence are the normative options. Territorial status is normative as a temporary status until the territory is ready for statehood or independence. What is not normative is for a territory to be granted U.S. citizenship, develop internal self-government under a locally adopted constitution, but remain in that status for an indefinite period lasting decades, without any action by Congress leading to incorporation and statehood, or even independence.

It is understandable that in the absence of a federal policy on status local political parties would begin to develop their own status definitions that would benefit their interests. At the same time, those definitions might not fit within U.S. federal law or under the constitutional definition of a territory.

For example, the United Nations recognized free association as an alternative to integration with another nation or full independence, but in international law that is based on separate sovereign nationhood, and the retention by each party of the right to full independence through unilateral termination of the association. If a majority of voters in Puerto Rico want free association, that is a legally valid and politically realistic status option. The same is true of statehood, it is a well-defined legally valid status.

FEDERAL RESPONSIBILITY FOR STATUS RESOLUTION

Historically, territory status was temporary until the conditions were right for statehood. That was the Northwest Ordinance incorporated territory model and it worked just fine for 30 territories that became states in that way. Then territorial law became a little more complicated when we acquired sovereignty over Alaska, the Philippines, Puerto Rico and Hawaii.

The organic laws Congress enacted to govern these territories created a good deal of confusion and ended up in the U.S. Supreme Court. The court decided that Alaska and Hawaii were incorporated territories under the U.S. Constitution, based on Northwest Ordinance model, because Congress had conferred U.S. citizenship to the people of Alaska and Hawaii. However, the Philippines and Puerto Rico were to be

governed by Congress without extension of the U.S. Constitution because Congress had not extended U.S. citizenship.

Accordingly, Congress adopted and eventually implemented a policy leading to independence for the Philippines. However, in the meantime Congress extended U.S. citizenship to Puerto Rico. This should have triggered the same result it did earlier for Alaska and Hawaii, including extension of the U.S. Constitution and incorporation into the union under a policy leading to eventual statehood.

However, instead of following its own precedent in the Alaska and Hawaii cases, the new Supreme Court justices who decided the Puerto Rico case ruled that Congress could extend citizenship but not the U.S. Constitution, and still govern Puerto Rico in the same manner as it did the Philippines when it had a non-citizen population and was on its way to independence.

More than anything else, that flawed judicial ruling is the source of the problem Congress is having on resolving the matter of political status for Puerto Rico. The White House report on Puerto Rico's status correctly calls on Congress to establish a self-determination process that restores the historical integrity of federal territorial law and policy by enabling Puerto Rico to choose a path leading to statehood or separate nationhood, which now can include either independence or a status recognized under later U.N. decolonization standards and known as free association.

In the meantime, we need to recognize that historically and legally Puerto Rico's status is a judicially imposed anomaly, and like most anomalies it has unintended consequences for the nation and the residents of Puerto Rico. Although ratified by Congress through statutory policies accepting the "unincorporated territory" doctrine created by court ruling, Congress has never come to grips with the fundamental question of what ordered scheme of liberty, what rights and duties, exist for U.S. citizens in an unincorporated territory.

Instead, because the courts gave Congress permission to govern U.S. citizens in unincorporated territories without extending the U.S. Constitution, and to govern U.S. citizens in Puerto Rico the same way Congress governed non-citizens in the Philippines prior to its independence, Congress went ahead an extended U.S. citizenship to the populations of other unincorporated territories.

And why not? The ruling of the U.S. Supreme Court in the case of Puerto Rico made conferral of U.S. citizenship a consequence free activity.

Or, did it? To understand what we have done by deviating from the Alaska and Hawaii precedents, to understand what Justice Taft did when he wrote an opinion based on his personal intellectual preferences instead of the doctrine of *stare decisis* embodied in the Supreme Court's ruling on Alaska and Hawaii, we need to look at exactly what we have wrought in Puerto Rico.

If Puerto Rico chooses separate nationhood, then conferral of U.S. citizenship will end. But if the people of Puerto Rico choose to retain American citizenship, Congress must enable, and perhaps even require, the residents of Puerto Rico and the nation to complete the transition to full and equal status through statehood.

I am pleased that the Chairman has called for this hearing today and I hope that we can move forward with legislation in the next Congress to address this difficult situation.

The CHAIRMAN. Thank you very much.

Senator BURR. Have it duly noted that I did not use all the time.

The CHAIRMAN. You didn't do it in half the time, but we're not going to argue. See, it just shows you with 32 seconds left, so we used a lot more than half of 5. Oh, all right.

Now, ladies and gentlemen, we're going to proceed now, in the following manner: Kevin Marshall, Deputy Assistant Attorney General, Office of Legal Counsel, is going to testify now; and then he will be followed by the Honorable Governor of the Commonwealth of Puerto Rico; and then there will be two witnesses with the Governor; and then the Congressman, two Congressmen will join together and they will become the next panel.

So we might proceed, Mr. Marshall, how much time do you need to explain the position of the executive branch?

Mr. MARSHALL. Five minutes, if I get it just right.

The CHAIRMAN. Oh, you don't need to be in that much of a hurry. This is very important. We're going to give you 10 minutes and you talk slow.

[Laughter.]

The CHAIRMAN. Thank you very much, Mr. Marshall.

STATEMENT OF C. KEVIN MARSHALL, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. MARSHALL. Thank you, Mr. Chairman and Ranking Member Bingaman, for inviting me to discuss the working report of the President's task force on Puerto Rico's Status. I'm a Deputy Assistant Attorney General in the Justice Department's Office of Legal Counsel. As the Attorney General's designee on the task force, I serve as its co-chair along with the Deputy Assistant to the President and Director for Intergovernmental Affairs, Rubén Barrales.

The status of Puerto Rico and the options regarding that status have been issues for many years. President George H. W. Bush, in a 1992 memorandum, recognized that Puerto Rico's current commonwealth stature grants it significant self-government authority, described Puerto Rico as a territory, and directed that it be treated like a State.

President Clinton, in establishing the task force in 2000, made it the policy of the executive branch to help answer the questions that the people of Puerto Rico have asked for years regarding the options for the island's future status and the process of realizing an option.

The task force was required to consider and develop positions on proposals, without preference among the options, for the commonwealth's future status. Its recommendations are limited, however, to those options permitted by the Constitution.

In establishing the task force, President Clinton also expressly recognized that Puerto Rico's ultimate status has not been determined and noted the different visions for that status within Puerto Rico.

Although Puerto Rico held a plebiscite in 1998, none of the proposed status options received a majority. Indeed, none of the above prevailed because of objection to the ballot definition of the commonwealth option.

Some in Puerto Rico have proposed a new commonwealth status. That, among other things, could not be altered without the mutual consent of Puerto Rico and the Federal Government. In October 2000, a few months before President Clinton established the task force, William Treanor, who held the same position in the Office of Legal Counsel that I now hold, testified that such a proposal was not constitutional.

Seeking to determine the constitutionally permissible options and recommend a process for realizing one of the options, the task force considered all status options objectively, without prejudice. We sought input from all interested parties and met with anyone who requested a meeting.

The task force issued its report last December and concluded that there were three general options under the Constitution for Puerto Rico's status: One, continue its current status as a largely self-governing territory; two, admit Puerto Rico as a State; or three, make Puerto Rico independent.

The primary question regarding options is whether the Constitution allows a commonwealth status that could be altered only by mutual consent.

Since 1991, the Justice Department has consistently taken the position the Constitution does not. The task force report reaches that conclusion as well. The report, of course, is not a legal brief, but it does outline the reasoning and includes, as appendixes, two extended analyses by the Clinton Justice Department, one of which was sent to this committee in 2001. Thus, the new commonwealth position, as the task force understands it, is not consistent with the Constitution.

Any promises that the United States might make regarding Puerto Rico's status as a commonwealth would not and could not be binding on a future Congress. Puerto Rico may remain in its current status indefinitely, but it would remain subject to Congress's authority under the Constitution to regulate U.S. territories.

The report provides additional details on the other two permissible options, statehood and independence. Additional copies of the report have been provided to the committee for your convenience.

With regard to process, the task force sought to ascertain the will of the people of Puerto Rico in a way that provides clear guidance for future action by Congress. The key is to provide clear guidance, first to speak unambiguously about the constitutional options and second, to structure the process so that popular majorities are likely.

The task force therefore recommends a two-step process. The first step is simply to determine whether the people of Puerto Rico wish to remain as they are. We recommend that Congress provide for a federally sanctioned plebiscite on this question. If the vote is to remain as a territory, then the second step would be periodic plebiscites to inform Congress of any change in views.

If the first vote is to change Puerto Rico's status, then the second step would be another plebiscite in which the people would choose between statehood and independence.

Consistent with our presidential mandate, this recommended process does not seek to prejudice the outcome, even though it is structured to produce a clear outcome. Puerto Ricans have before voted by a majority to remain as a commonwealth. They may do so again. In addition, the process does not preclude action by Puerto Rico itself to express its views.

At the first step, the task force recommends a plebiscite to occur on a date certain. If Congress wished to ensure that some action occurred, but not preclude local initiative, it could allow a sufficient period before that date certain.

Thank you for this opportunity to share the views of the task force. I have submitted my written statement for the record and I look forward to taking your questions.

[The prepared statement of Mr. Marshall follows:]

PREPARED STATEMENT OF C. KEVIN MARSHALL, DEPUTY ASSISTANT ATTORNEY
GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Thank you, Mr. Chairman and Ranking Member Bingaman, for inviting me to discuss the work and report of the President's task force on Puerto Rico's Status. President Clinton established the Task Force in December 2000, and President Bush has

continued it through amendments of President Clinton's Executive Order. The Task Force consists of designees of each member of the President's Cabinet, and the Deputy Assistant to the President and Director for Intergovernmental Affairs, Rubén Barrales. I am a Deputy Assistant Attorney General in the Justice Department's Office of Legal Counsel. As the Attorney General's designee on the Task Force, I serve as its Co-Chair, along with Mr. Barrales.

The status of Puerto Rico, and the options regarding that status, have been issues for many years. In 1992, for example, President George H.W. Bush issued a Memorandum that recognized Puerto Rico's popularly approved Commonwealth structure as "provid[ing] for self-government in respect of internal affairs and administration," described Puerto Rico as "a territory," and directed the Executive Branch to treat Puerto Rico as much as legally possible "as if it were a State." He also called for periodically ascertaining "the will of its people regarding their political status" through referenda.

President Clinton, in his order establishing the Task Force, made it the policy of the Executive Branch "to help answer the questions that the people of Puerto Rico have asked for years regarding the options for the islands' future status and the process of realizing an option." He charged the Task Force with seeking to implement that policy. We are required to "consider and develop positions on proposals, without preference among the options, for the Commonwealth's future status." Our recommendations are limited, however, to options "that are not incompatible with the Constitution and basic laws and policies of the United States."

On the same day that he issued his Executive Order, President Clinton also issued a Memorandum for the Heads of Executive Departments and Agencies regarding the Resolution of Puerto Rico's status. That memorandum added that "Puerto Rico's ultimate status has not been determined" and noted that the three major political parties in Puerto Rico were each "based on different visions" for that status. Although Puerto Rico held a plebiscite in 1998, none of the proposed status options received a majority. Indeed, "None of the Above" prevailed, because of objection to the ballot definition of the commonwealth option.

Some in Puerto Rico have proposed a "New Commonwealth" status, under which Puerto Rico would become an autonomous, non-territorial, non-State entity in permanent union with the United States under a covenant that could not be altered without the "mutual consent" of Puerto Rico and the federal Government. In October 2000, a few months before President Clinton established the Task Force, the House Committee on Resources held a hearing on a bill (H.R. 4751) incorporating a version of the "New Commonwealth" proposal. William Treanor, who held the same position in the Office of Legal Counsel that I now hold, testified that this proposal was not constitutional.

Thus, the Task Force's duties were to determine the constitutionally permissible options for Puerto Rico's status and to provide recommendations for a process for realizing an option. We had no duty or authority to take sides among the permissible options.

The Task Force considered all status options, including the current status and the New Commonwealth option, objectively and without prejudice. We also attempted to develop a process for Congress to ascertain which of the constitutional options the people of Puerto Rico prefer. We sought input from all interested parties, including Governor Acevedo-Vilá. The members met with anyone who requested a meeting. I myself had several meetings with representatives of various positions, and also received and benefited from extensive written materials.

The Task Force issued its report last December and concluded that there were three general options under the Constitution for Puerto Rico's status: (1) continue Puerto Rico's current status as a largely self-governing territory of the United States; (2) admit Puerto Rico as a State, on an equal footing with the existing 50 States; or (3) make Puerto Rico independent of the United States.

As indicated in my discussion of the 1998 plebiscite and the origins of the Task Force, the primary question regarding options was whether the Constitution currently allows a "Commonwealth" status that could be altered only by "mutual consent," such that Puerto Rico could block Congress from altering its status. Since 1991, the Justice Department has, under administrations of both parties, consistently taken the position that the Constitution does not allow such an arrangement. The Task Force report reiterates that position, noting that the Justice Department conducted a thorough review of the question in connection with the work of the Task Force. The report is of course not a legal brief. But it does outline the reasoning, and it includes as appendices two extended analyses by the Clinton Justice Department. The second of these is a January 2001 letter to this Committee, a copy of which was sent to the House Committee on Resources on the same date. The report

also cites additional materials such as Mr. Treanor's testimony and the 1991 testimony of the Attorney General.

The effect of this legal conclusion is that the "New Commonwealth" option, as we understand it, is not consistent with the Constitution. Any promises that the United States might make regarding Puerto Rico's status as a commonwealth would not be binding. Puerto Rico would remain subject to Congress's authority under the Territory Clause of the Constitution "to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." Puerto Rico receives a number of benefits from this status, such as favorable tax treatment. And Puerto Rico may remain in its current Commonwealth, or territorial, status indefinitely, but always subject to Congress's ultimate authority to alter the terms of that status, as the Constitution provides that Congress may do with any U.S. territory.

The other two options, which are explained in the report, merit only brief mention here. If Puerto Rico were admitted as a State, it would be fully subject to the U.S. Constitution, including the Tax Uniformity Clause. Puerto Rico's favorable tax treatment would generally no longer be allowed. Puerto Rico also would be entitled to vote for presidential electors, Senators, and full voting Members of Congress. Puerto Rico's population would determine the size of its congressional delegation.

As for the third option of independence, there are several possible ways of structuring it, so long as it is made clear that Puerto Rico is no longer under United States sovereignty. When the United States made the Philippines independent in 1946, the two nations entered into a Treaty of General Relations. Congress might also provide for a closer relationship along the lines of the "freely associated states" of Micronesia, the Marshall Islands, and Palau. The report explains, with a few qualifications, that, "[a]mong the constitutionally available options, freely associated status may come closest to providing for the relationship between Puerto Rico and the United States that advocates for 'New Commonwealth' status appear to desire."

With regard to process, the Task Force focused on ascertaining the will of the people of Puerto Rico. In particular, we sought to ascertain that will in a way that, as the report puts it, "provides clear guidance for future action by Congress." The keys to providing clear guidance are, first, to speak unambiguously about the options the Constitution allows and, second, to structure the process so that popular majorities are likely. The inconclusive results of the 1998 plebiscite, as well as an earlier one in 1993, did not strike us as providing clear guidance to Congress.

We therefore have recommended a two-step process. The first step is simply to determine whether the people of Puerto Rico wish to remain as they are. We recommend that Congress provide for a federally sanctioned plebiscite in which the choice will be whether to continue territorial status. If the vote is to remain as a territory, then the second step, one suggested by the first President Bush's 1992 memorandum, would be to have periodic plebiscites to inform Congress of any change in the will of the people. If the first vote is to change Puerto Rico's status; then the second step would be for Congress to provide for another plebiscite in which the people would choose between statehood and independence, and then to begin a transition toward the selected-option. Ultimate authority of course remains with Congress.

Two points about this recommended process merit brief explanation. First, consistent with our presidential mandate, it does not seek to prejudice the outcome; it is structured to produce a clear outcome. At least once before, Puerto Ricans have voted by a majority to retain their current Commonwealth status. They may do so again. But it is critical to be clear about that status. Second, our recommended process does not preclude action by Puerto Rico itself to express its views to Congress. At the first step, we recommend that Congress provide for the plebiscite "to occur on a date certain." We did not, of course, specify that date. But if Congress wished to ensure that some action occurred but not preclude the people of Puerto Rico from taking the initiative, it could allow a sufficient period for local action before that "date certain." If such action occurred and produced a clear result, there might be no need to proceed with the federal plebiscite.

The Task Force knows well the importance of the status question to the loyal citizens of Puerto Rico and to the nation as a whole. We appreciate the Committee's commitment to this matter and the opportunity to share our views.

Senator CRAIG [presiding]. Well, Kevin, thank you very much for that statement. I'm sure my colleagues have questions. Senator Domenici has stepped out and will be back in a few moments, but we'll continue to proceed through the panel and to build this record.

Please describe the process involved in putting the task force together. Also, please describe what Federal agencies were involved and to what extent the political parties of Puerto Rico were involved in the process.

Mr. MARSHALL. The composition of the task force is determined by the Executive Order establishing it, under which every cabinet agency has a representative on the task force. I'm the representative of the Attorney General. Every other cabinet agency was represented. I remember your second part, what was the third part of your question?

Senator CRAIG. Political parties.

Mr. MARSHALL. The members of the task force, particularly my co-chair and my predecessor in my current position, met with representatives of all the political parties in Puerto Rico.

Senator CRAIG. And your sense is by doing that they felt they had adequate input into the process?

Mr. MARSHALL. I can't speak for them, but they did provide input. Whether they consider it adequate or not, I don't know.

Senator CRAIG. Some have argued that there is an "irrevocable compact" between the United States and Puerto Rico. Can you please discuss the validity of that statement?

Mr. MARSHALL. The task force concludes that view is incorrect. That's a view that the Justice Department first took in 1959 and was repeated many times since then. I don't think that's a fair reading of what Public Law 600 tried to do, and as we also explained, even if it had tried to do that, it would violate the Constitution.

Senator CRAIG. So your basis for finding or viewing that as different from the earlier status was you viewed it as a violation of the Constitution, to have it interpreted as irrevocable; is that correct?

Mr. MARSHALL. We don't think it should be interpreted as irrevocable. If it were, that would violate the Constitution.

Senator CRAIG. OK, I see. In your testimony—in his testimony, the Governor says that one of the disturbing conclusions of the report is that the U.S. citizens born in Puerto Rico may be deprived of their citizenship at any time because of the statutory nature of it. Would you comment? Would you please make comment on that observation?

Mr. MARSHALL. The task force addresses citizenship of Puerto Ricans only in one context, which is if Puerto Rico were to become independent. If Puerto Rico became a State, I think it's pretty obvious that Puerto Ricans would be citizens, and if Puerto Rico remains as a territory, I don't think there is any likelihood that Congress would try to revoke that citizenship, so it wasn't something we even needed to address.

Senator CRAIG. OK. The report makes findings regarding the mutual consent provisions of a new commonwealth. Was there an analysis made of other provisions of that proposal, and if so, would you please provide it to the committee?

Mr. MARSHALL. I'm not sure what other provisions are in question. The focus of the task force was on the constitutionality of a mutual consent provision.

Senator CRAIG. And that was the scope of your—

Mr. MARSHALL. That is what we were focusing on, is what options the Constitution allows.

Senator CRAIG. Well then, please describe the current status, in reference to your report, of the Commonwealth of Puerto Rico, that the report finds.

Mr. MARSHALL. Our view is that constitutionally, the Commonwealth of Puerto Rico is a territory, but it is a territory that has a large amount of self-government authority with regard to its internal affairs.

Senator CRAIG. Thank you.

Mr. Chairman.

The CHAIRMAN [presiding]. Thank you very much, Senator. Now I yield to Senator Bingaman.

Senator BINGAMAN. Well, thank you very much, Mr. Chairman.

Mr. Marshall, let me ask, is it your position that the report that you have helped co-chair here represents the views of the Bush administration? Do the recommendations in that report represent the views of the Bush administration or is there some difference between task force recommendations and what you believe the Bush administration supports?

Mr. MARSHALL. The administration has not taken any public position on the task force report, but the Executive Order creating the task force didn't contemplate that the President would publicly approve or disapprove of the report. So a direct answer to your question—whether there is any difference between the administration and the task force report—I would just say I don't know.

Senator BINGAMAN. So, at this time, we do not have a position by the administration; is that an accurate statement?

Mr. MARSHALL. Yes.

Senator BINGAMAN. I know in Governor Acevedo's testimony, he refers to a memorandum by Charles Cooper and Michael Reisman. Have you had a chance to review those? Do you have any response to those that you could provide, either for the record or a shortened response at this point?

Mr. MARSHALL. Mr. Cooper, as I understood it, represented—the Governor and I met with him and other lawyers at least twice and they provided me the memoranda in support of the new commonwealth position, particularly in support of its constitutionality. And I reviewed those and we considered those and our public response to those is the report itself.

Senator BINGAMAN. So you disagreed with his conclusions?

Mr. MARSHALL. Yes.

Senator BINGAMAN. The report, the task force report, notes that the United States has established these successful free-association relationships with three new nations within the former U.S.-administered trust territory of the Pacific Islands. There are important differences, obviously, between the situation in Puerto Rico and in those areas, but I wonder if the U.S. model for free association should be more fully explored to see if it can help in developing a solution to Puerto Rico's status issue. Do you have a view on that?

Mr. MARSHALL. What the report says is that the free association model seemed to us to come closest to what the new commonwealth position wants, within the constraints of the Constitution. As you

suggest, there would be policy considerations as to whether and how that might work with regard to Puerto Rico. The one that the report flags is the large difference in population between Puerto Rico and those three Pacific territories.

Senator BINGAMAN. OK. We have two bills that have been introduced here in the Senate, as I understand it, in response to the task force report. There is S. 2304, which would provide congressional authorization for a constitutional convention in Puerto Rico with the purpose of proposing to Congress a new compact of association or statehood or independence, and there is S. 2661, which would authorize the first plebiscite that is recommended by your task force. Could you give us any initial reaction to these proposals? Do you have any thoughts as to where Congress needs to go with these proposals?

Mr. MARSHALL. Well, the administration hasn't taken position on either of those bills, so I don't think it would be proper for me to do that here. I would just say that to the extent the bills are consistent with what the report recommends, then the task force would think that they are good ideas.

Senator BINGAMAN. So you would basically say that S. 2661 is consistent with the task force report? Is that what I would be led to believe?

Mr. MARSHALL. I am not intimate enough with that bill to answer that question directly.

Senator BINGAMAN. OK. All right. That's all I had, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

Now I believe it's time to go to Senator Martinez, if you have questions. Let's sort of get ourselves organized here. It's 3:05 and we haven't gotten to the second panel, which consists of three people who want to talk. What do you think? Do you have questions?

Senator MARTINEZ. Not of Mr. Marshall. I don't have any questions for Mr. Marshall.

The CHAIRMAN. No question of this?

Senator MARTINEZ. No.

The CHAIRMAN. All right. Senator Salazar, do you have any questions of Mr. Marshall?

Senator SALAZAR. No.

The CHAIRMAN. You're welcome to now. I'm not trying to—there is time.

Senator SALAZAR. You scare me, Senator, so—

[Laughter.]

Senator SALAZAR. I'm kidding.

The CHAIRMAN. I didn't mean to scare him.

Senator SALAZAR. No, no, Senator, I'm satisfied. I don't have any questions.

The CHAIRMAN. OK.

Senator SALAZAR. Thank you.

The CHAIRMAN. We'll come to you, sir.

Senator SALAZAR. I think the report is self-explanatory. My own view, frankly, is that the legislative proposal that we came up with was different from what the task force recommended. And that's with respect to the legislation that we introduced. But I think that at the end of the day, this dialog is important to begin with and

I think that the task force report did initiate the beginning of this dialog and it's obviously a dialog that will continue into the next Congress.

So thank you, Mr. Marshall.

Mr. MARSHALL. Thank you.

The CHAIRMAN. Thank you very much.

The Senator from New Jersey, Senator Menendez.

Senator MENENDEZ. Thank you, Mr. Chairman. I do have a few questions.

The CHAIRMAN. Please, if you can keep the time to a minimum, I would appreciate it.

Senator MENENDEZ. Well, I will do my best, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator MENENDEZ. Mr. Marshall, how many official visits to Puerto Rico did the task force, as a body, make?

Mr. MARSHALL. As I indicated before, the co-chairman went to Puerto Rico at least twice.

Senator MENENDEZ. So the answer to my question is none?

Mr. MARSHALL. As an entire task force, I believe the answer is none.

Senator MENENDEZ. Puerto Ricans are U.S. citizens, are they not?

Mr. MARSHALL. Yes.

Senator MENENDEZ. How many of them were on the task force?

Mr. MARSHALL. None.

Senator MENENDEZ. None. Did the task force conduct any public hearings in Puerto Rico?

Mr. MARSHALL. I don't believe it conducted formal public hearings. It met with representatives of the each of the political parties.

Senator MENENDEZ. And respecting the leadership of all those political parties, the people of Puerto Rico did not have a say? Did you not conduct any public hearings so that people in Puerto Rico could have a say?

Mr. MARSHALL. Well, I believe the people of Puerto Rico select the leaders of those political parties.

Senator MENENDEZ. Do we not have public hearings where U.S. citizens can come and express their views on different matters? So the bottom line is, you had no public hearings?

Mr. MARSHALL. I don't think so, no.

Senator MENENDEZ. I find it hard to take a report seriously when it has no participation of the Puerto Rican community, when it has no public hearings, and ultimately, it fails to listen to the views of the people whose destiny is ultimately going to be determined. I don't quite understand it.

Let me ask you this: I know that your co-chair, Mr. Barrales, is not here testifying before us today, but he has largely been the public face of that task force, in terms of the trips that he took to Puerto Rico and speaking with others. Are you aware that, as the co-chair of the task force, in July 2004, he went to Puerto Rico and publicly expressed his support for Puerto Rico becoming the 51st State?

Mr. MARSHALL. I'm not aware that he expressed public approval of statehood. I am aware that he made that trip.

Senator MENENDEZ. OK. If I were to give you a press report, would it improve your recollection?

Mr. MARSHALL. It's not an issue of my recollection, Senator. I was not on the task force in 2004. I joined it in the spring of 2005.

Senator MENENDEZ. Oh, OK. Mr. Chairman, if I can, if we can have for the record a copy of a report that had Mr. Barrales going before a crowd of 40,000 and saying, as the head of the White House Office of Intergovernmental Affairs, that he would like to see Puerto Rico become a State. I think it is important for the record to reflect it.

The CHAIRMAN. But what would the purpose be? I have no objection at all.

Senator MENENDEZ. The purpose is to—he was a co-chair of the task force. The question of the task force was, at the end of the day, to determine a process that isn't stacked. How is it that the co-chair goes and says that he is for a specific option of the three options? I think it is important for the record to reflect that.

The CHAIRMAN. We're going to make—we're going to put it in the record.

[The information follows:]

BARRALES SUPPORTS STATEHOOD FOR PUERTO RICO

Puerto Rico Herald

July 28, 2004

San Juan, July 27 (EFE)—A White House official expressed support for statehood for Puerto Rico at an event Tuesday in which thousands commemorated the 147th anniversary of the birth of pro-statehood leader Jose Celso Barbosa.

Rubén Barrales, head of the White House Office of Intergovernmental Affairs, said he would like to see 51 stars on the U.S. flag.

Barrales' speech before a crowd of more than 40,000 people on Barbosa square in Bayamon, a city next to San Juan, prompted approving shouts and prolonged applause.

Michelle Cuevas, spokeswoman for the pro-statehood New Progressive Party, told EFE that Barrales attended the event in representation of President George W. Bush, and that his statements had the backing of the White House.

She could not state categorically, however, whether Barrales spoke in Bush's name.

Barrales said Puerto Rico would be better off if it had a permanent relationship with the United States to help it achieve its objectives.

Senator MENENDEZ. Thank you, Mr. Chairman.

My last question is, one of the issues most concerning to me in this report states that the Federal Government may relinquish U.S. sovereignty by granting independence or by ceding the territory to another nation. Doesn't that statement create the potential for undue panic and fear by implying that Puerto Rico can be bartered or sold at whim?

Mr. MARSHALL. I'm unaware of any panic that has occurred since the report came out. And I would think that, as a practical matter, given that Public Law 600 has operated for over 60 years, it's not likely to create panic simply to state what the law is.

Senator MENENDEZ. Well, you know, the bottom line is that clearly you don't believe that the United States would cede Puerto Rico to another nation, do you? Is that in any way the expression of this administration's view?

Mr. MARSHALL. No. I would say that the—after I testified at the House and received some questions on that question, what we said

is, there is a difference between what is technically legally permissible and what is desirable or wise or—

Senator MENENDEZ. Let me ask you one last question. Do you really—just to clear the record, do you see any circumstances under which Puerto Ricans, as U.S. citizens, those who have worn the uniform of the United States for a long history, would, in fact, lose their citizenship, short of seeking a status of independence? Even in that case, would you see any way in which they would lose their citizenship in the United States?

Mr. MARSHALL. Short of seeking independence, no. If there were independence, it would be a question that would need to be resolved in figuring out the details of independence.

Senator MENENDEZ. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much. Senator, if you had any additional questions that you would like submitted to the witness for him to answer during the next 30 days—

Senator MENENDEZ. I do, Mr. Chairman.

The CHAIRMAN. We will just do that. Let the record reflect if the Senator desires to ask additional questions of you, Mr. Marshall, you can have 30 days to do it and you'll have 10 days to return questions, if you would.

Mr. MARSHALL. That sounds fair.

The CHAIRMAN. If it's not fair, it's too bad.

[Laughter.]

The CHAIRMAN. Isn't that right?

Senator MENENDEZ. Absolutely. I'm with you.

The CHAIRMAN. We've established the rules here. We don't ask questions.

Senator MENENDEZ. That's why I said they are fair.

The CHAIRMAN. All right. So now, we're going to go to Senator Salazar. Senator, we haven't heard from you. Do you want to inquire? If you have any questions you might submit for him to answer—

Senator SALAZAR. I might have some written questions that I might submit, but I haven't had time.

The CHAIRMAN. All right. Thank you very much, Mr. Marshall. You are excused.

Mr. MARSHALL. Thank you.

The CHAIRMAN. We'll have the next witnesses please come up and take your seats at the table. Panel No. 2. The Honorable Anibal Acevedo—is it Vee-yo or Villa?

Governor ACEVEDO-VILÁ. It's Vilá.

The CHAIRMAN. Vilá. The Governor of the Commonwealth of Puerto Rico, San Juan, Puerto Rico. The Honorable Luis Fortuño, U.S. Congressman, thank you, sir. And the third is the Honorable Rubén Berríos Martínez, President, Puerto Rican Independent Party, San Juan, Puerto Rico.

Did I say your name correctly? Bueno. Gracias. Vayamos, adelante, no? Eso no es, está bien, excusame, no puedo hablar muy bien, vamos a comenzamos con el govenador.

The CHAIRMAN. Thank you very much for joining us and for all the time and trouble you've gone to come here today. Please proceed.

**STATEMENT OF HON. ANÍBAL ACEVEDO-VILÁ,
GOVERNOR OF PUERTO RICO**

Governor ACEVEDO-VILÁ. Muchas gracias. Thank you, Mr. Chairman and Mr. Ranking Member and all the other members. For the record, my name is Aníbal Acevedo-Vilá. I am the Governor of Puerto Rico and also the President of the Popular Democratic Party. Along with my testimony, I am submitting, for the record, two legal studies that ought to be read carefully by all members of this Committee. One is a memorandum on the constitutionality of the commonwealth, prepared by Charles Cooper, the former head of the Office of Legal Counsel at the U.S. Department of Justice. The other is the Reisman Memorandum, prepared by Michael Reisman, Professor of International Law at Yale Law School and one of the most respected scholars on international law and relations. These two studies compliment each other and I urge you to read them carefully.

When you compare the scope of these studies with the 1-page report by the President's task force on Puerto Rico's Status, you will understand why this report cannot be the basis for any serious self-determination process. This report cannot be the basis for the future. Volumes have been written on the legal and constitutional aspect of the status of Puerto Rico; however, the report, under the title of Legal Analysis, dedicates only four and a half pages to analyze the whole legal conundrum on Puerto Rico's status.

The Cooper Memorandum had been submitted to the members of the President's task force several months before the report was issued. Together with the Reisman Memorandum, which was produced after the report, you can get an in-depth understanding of both U.S. constitutional law and international law applicable to the political status of Puerto Rico.

Beyond the lack of depth and real analysis, there are four conclusions that are particularly disturbing in this report. No. 1, that Congress can directly legislate and change the island government structure unilaterally. The logical consequences of this conclusion is that this Congress can abolish the Puerto Rico legislation, fire the Governor, and tomorrow, appoint an emperor or whoever you want to rule Puerto Rico. That is the only logical consequences of this all-or-nothing view of the territorial clause of the Constitution that the report puts forth.

Second, that the Federal Government may relinquish U.S. sovereignty by sending Puerto Rico to another Nation. And I heard Mr. Marshall respond to that question. Forget about the legal analysis—even legally, that's not possible. That's an interpretation that we are a piece of land with no political rights. We're not a piece of land. We're a people. And that report says that we can be given for some currency to China or maybe we might be the solution in Iraq.

No. 3, that the U.S. citizens born in Puerto Rico may be deprived of their citizenship at any time because of the statutory nature of it. And I also heard a response to that, and actually, that was a clear contradiction of the principle that one Congress cannot buy the next one, because when he was pressed, he said, no, no, no, that's only in the case of independence. But Puerto Rico was a territory until 1917 with no U.S. citizenship. So if you think it is good,

that report, that means that tomorrow—that report is telling you that you have the power, tomorrow, to pass another law saying that we are no longer U.S. citizens. I bet anyone to do that and see what the Supreme Court of the United States would do with that.

Fourth, that the Constitution somehow prohibits the U.S. Government from entering into a relationship with Puerto Rico based on mutual consent. The Cooper Memorandum explains in great detail just how ridiculous and legally wrong is the mantra repeated in their report that Congress may not bind itself to a relationship based on mutual consent.

The Reisman Memorandum discusses not only the applicable U.S. constitutional law, but also international law, and reaches similar conclusions. The authors of the report attempt to unjustifiably limit the options available to the people of Puerto Rico in order to create an artificial majority for its statehood. This report does not provide the basis of any legitimate process of self-determination.

As of today, 11 months after the publication of the report, President Bush has not said a word about it. The President is silent and with good reasons. I respect the fact that many Puerto Ricans have legitimate reasons to favor full independence or statehood. I am willing to debate in any public forum why I think the autonomous alternative for commonwealth is the best choice today for Puerto Rico. I'm willing to let the people decide their future status to what is truly a democratic process, but no Puerto Ricans should be forced to accept the premises and conclusions of this report, no matter what political advantage they might think they can get out of it.

What's the next step? The problem with the report is that they lay out a twisted process for a referendum that will unfairly stack the deck in favor of statehood. You need to understand, in every plebiscite with the three options, commonwealth has been the winner—46, 48, 49 percent—second, statehood, and in third place, independence.

By laying out a process in which it is yes or no to commonwealth—not only using their ill-defined way to describe it, but even if it were in a definition acceptable to us—what you will be doing is adding the second and the third place to defeat the first place and then have a run of election between the second and the third one in which the winner takes all. That's not only undemocratic, that's un-American.

And I am here to call this Senate to give the people of Puerto Rico a fair process. The bill introduced by Senator Burr, Senator Lott, Senator Menendez, and Senator Kennedy gives that to the people of Puerto Rico. It only says we, Congress, recognize that you have the self-determination right; that we, Congress, recognize that you can call a constitutional convention and once through that process, you make a decision, and we will respond. It's a fair process, it's an inclusive process, and it's a process that will start in Puerto Rico, not a process like the one recommended by this report in which Congress, if they are following that recommendation would basically be making that decision of the final outcome on behalf of the people of Puerto Rico. And that's a decision that should be all the time in the hands of the people of Puerto Rico. Thank you.

[The prepared statement of Governor Acevedo-Vilá follows:]

PREPARED STATEMENT OF HON. ANÍBAL ACEVEDO-VILÁ, GOVERNOR OF PUERTO RICO

Mr. Chairman and Members of this Committee:

My name is Anibal Acevedo-Vilá. I am the Governor of Puerto Rico and President of the Popular Democratic Party. It is a pleasure to be back here. As you all know, I served in the U.S. House of Representatives as the Resident Commissioner from Puerto Rico from 2001-2004 and I am truly glad to be back.

I appreciate the interest that this Committee has shown in dealing with such an important issue for all Puerto Ricans.

Along with my testimony, I am submitting for the record two legal studies that ought to be read carefully by all the members of this Committee. One is a memorandum on the constitutionality of the Commonwealth prepared by Charles J. Cooper, a former head of the Office of Legal Counsel at the U.S. Department of Justice. The other is a recent memorandum prepared by W. Michael Reisman, Professor of International Law at Yale Law School and one of the most respected scholars on international law and relations. These two studies complement each other and I urge you to read them carefully.

When you compare the scope and depth of these studies with the 14 page Report by the President's task force on Puerto Rico Status, you will understand why this report cannot be the basis for any serious self-determination process. It has been a long journey for the Puerto Rican people. This Report cannot be the basis for the future.

I sincerely hope that this hearing is only the beginning of a broad and inclusive process, not limited to the political parties. The status of Puerto Rico is such a fundamental issue for us that I urge you to be as inclusive as possible. And more importantly, I hope that these efforts result in a true Self Determination process.

The topic of this hearing is the Report issued by the President's task force on Puerto Rico's Status on December 22, 2005. First, let me focus on some-of the legal conclusions of the report that are most questionable.

Volumes have been written on the legal and constitutional aspects of the status of Puerto Rico. The scholarly debate is rich, complex and extensive. However, the Report under the title of Legal Analysis, dedicates only 4 and a half pages to analyze the whole legal conundrum of Puerto Rico's status. If this was a college paper, it would get a grade of D—and that from a lenient and merciful professor. It seems that the drafters of the Report were so eager to get to the conclusions that they forgot to support them and to discuss the applicable law altogether.

The Cooper memorandum that I am submitting to the record had been submitted to the members of the President's task force several months before the report was issued. Together with the Reisman memorandum, you can get an in depth analysis of both U.S. Constitutional Law and International Law applicable to the political relationship between the United States and Puerto Rico. In light of the weight of authorities cited in these memos, it is perplexing that the Task Force Report does not even attempt to mount a legal defense of its conclusions. Some of these conclusions pretend to be supported by a 14 page Department of Justice memorandum on Guam, which as you will see is completely discredited by the thorough legal analysis in the Cooper and Reisman memoranda.

Beyond the lack of depth and real analysis, there are 4 conclusions that are particularly disturbing of this Report.

I. THAT CONGRESS CAN DIRECTLY LEGISLATE AND CHANGE THE ISLAND'S
GOVERNMENTAL STRUCTURE UNILATERALLY

The logical consequence of this conclusion is that this Congress can abolish the Puerto Rico legislature, fire the Governor and appoint an Emperor. That is the only logical consequence of this formalistic—all or nothing—view of the territorial clause of the Constitution that the report puts forth.

II. THAT THE FEDERAL GOVERNMENT MAY RELINQUISH U.S. SOVEREIGNTY BY CEDING
PUERTO RICO TO ANOTHER NATION

Another logical consequence of this conclusion is that maybe you can trade us to the People's Republic of China for some currency value concessions. It is embarrassing that in this day and age, Federal officials will put such a conclusion on paper. It really calls into question the seriousness of this entire exercise.

III. THAT THE U.S. CITIZENS BORN IN PUERTO RICO MAY BE DEPRIVED OF THEIR
CITIZENSHIP AT ANY TIME BECAUSE OF THE STATUTORY NATURE OF IT

Here, I would like to see how the U.S. Courts will rule on an attempt to deprive Puerto Ricans in Florida and in New York of their U.S. citizenship.

The analysis, or lack thereof, of the issue of citizenship is painful. The drafters of the Report adopt without discussion the legal position advocated by some that Congress can revoke the U.S. citizenship of the people of Puerto Rico because we are, allegedly, merely statutory citizens. They do this ignoring vast case law and legal scholars that sustain the contrary position.

This report, at a time in which we are discussing immigration in America and the rights of foreign workers in this country, is outrageous. This report, issued in times of war when our brothers and sisters are sent into harms way in Iraq, is a shame.

IV. THAT THE CONSTITUTION SOMEHOW PROHIBITS THE U.S. GOVERNMENT FROM
ENTERING INTO A RELATIONSHIP WITH PUERTO RICO BASED ON MUTUAL CONSENT

The Cooper memorandum explains in great detail just how ludicrous and legally wrong is the mantra repeated in the Report that the Congress may not bind itself to a relationship based on mutual consent. The Reisman memorandum discusses not only the applicable U.S. Constitutional Law, but also international law, and reaches similar conclusions. The task force report ignores over 200 years of precedent and current legal trends. It is our position that both, the Constitution of the United States and international law, allows the United States and the people of a territory to enter into a bilateral and binding political relationship. The authors of the Report attempt to unjustifiably limit the options available to the people of Puerto Rico in order to create an artificial majority for statehood.

All of these conclusions, if adopted by the United States, would have tremendous political and legal repercussions.

The Report also casts grave doubt as to the value of the commitments made by the United States to the world since in 1952 the United Nations removed Puerto Rico specifically from its list of non-self-governing territories based on representations from both the United States and Puerto Rico. General Assembly Resolution 748 (VIII) recognized "that the people of the Commonwealth of Puerto Rico, by expressing their will in a free and democratic way, have achieved a new constitutional status" and that "in the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity".

As Professor Reisman concludes in his memo, "as a matter of international law . . . since 1952, Puerto Rico has ostensibly existed as a state freely associated with the United States of America." Puerto Rico, thereafter, attained a new status not only under international law, but also under U.S. constitutional law since it no longer could be treated as an unincorporated territory subject to the plenary powers of Congress under the Territorial Clause. Former U.N. Ambassador Jeane Kirkpatrick just couldn't make it more evident when in a recent New York Times Op-Ed stated "quite unbelievably, the Task Force raised questions about Puerto Rico's status that reminded us of what we heard from the Cuban delegation and its communist allies" 25 years ago.

This Report does not provide the basis for any legitimate process of self-determination. As of today, eleven months after the publication of the Report, President Bush has not said a word about it. The President is silent and with good reasons.

I respect the fact that many Puerto Ricans have legitimate reasons to favor full independence or statehood. I am willing to debate in any public forum why I think the autonomous alternative of the Commonwealth is the best choice today for Puerto Rico. I am willing to let the people decide their future status through a truly democratic process. But no Puerto Rican should be forced to accept the premises and conclusions of this report no matter what political advantage they may think they can get out of it. No American citizen should accept the implications of this report. Pro-statehood citizens should not favor statehood because they are threatened or scared by a purposefully biased report. Puerto Ricans should not be scared into voting for statehood because otherwise they may be ceded to Pakistan.

WHAT IS THE NEXT STEP?

The problem with the Report is that they lay out a twisted process for a referendum that would unfairly stack the deck in favor of statehood. What this report

does is an outrageous mathematical exercise. In order to ignore the Commonwealth option, the proposed two-stage process adds all the possible votes against Commonwealth, to knock that option out in the first round.

In every plebiscite held in Puerto Rico, Commonwealth has won. Statehood has never won.

This report tries to change that by creating an artificial majority. The math is simple. If you add the second place—statehood—to the third place—independence—then you can fabricate an artificial majority against the real majority, the Commonwealth.

It is very simple, although perverse and antidemocratic. Puerto Ricans deserve better. It is time for a new and better approach. An approach that is fair to everyone. Supporters of autonomy, statehood or independence, all Puerto Ricans deserve a fair, inclusive and democratic process with all of the three options represented.

The Senate has an opportunity to make it right. Earlier this year Senator Kennedy, along with Senators Lott, Burr and Menendez, introduced legislation that recognizes the right of the Commonwealth of Puerto Rico to call a constitutional convention through which the people of Puerto Rico would exercise their right to self-determination, and to establish a mechanism for congressional consideration of such decision.

S. 2304, “the Puerto Rico Self-Determination Act of 2006” reaffirms the inherent authority of the people of the Commonwealth of Puerto Rico to call, and expressly authorize the calling of, a Constitutional Convention through the election of delegates in a referendum for the purpose of proposing to Congress—

- 1) a new or amended compact of association to replace or amend the compact established under the Act entitled ‘An Act to provide for the organization of a constitutional government by the people of Puerto Rico’, approved July 3, 1950, commonly referred to as ‘Public Law 600’ and the Commonwealth constitution;
 - 2) the admission of the Commonwealth as a State in the United States;
- or
- 3) the declaration of the Commonwealth as an independent country.

As you can see, S. 2304 proposes a path that is initiated in Puerto Rico, democratic, based on the will of the people of Puerto Rico, inclusive, fair and full of promise for Puerto Rico and the United States.

With this in mind—as Governor of all Puerto Ricans and President of the Popular Democratic Party—I support S. 2304 because it provides for a true self-determination process through a Puerto Rican Constitutional Convention.

S. 2304 is the right approach. The bill offers Congressional recognition of the right of Puerto Ricans to hold a constitutional convention as the democratic mechanism to solve this issue. And it commits the Congress to respond to the proposals of this convention. This new approach learns from the mistakes of the past and follows the example set by America’s founding fathers allowing us to fully exercise our democratic rights in an open and inclusive process.

The time to resolve Puerto Rico’s status is now. I urge you to affirm Puerto Rico’s dignity and political rights. I also invite you to reject any legislation that derives from the President’s task force Report. I invite you to endorse legislation that would establish the constitutional convention as the new and most democratic approach to solve this issue.

CONCLUSION

Mr. Chairman and distinguished Members of this Committee, I urge you to go beyond this report. Congress has yet another chance to make it right. Puerto Ricans deserve more than this Report. I urge you to support S. 2304 and let us really provide a process of self-determination in Puerto Rico that is fair and inclusive.

The issue is status and it needs to be addressed. In this process Puerto Ricans are entitled to be told the whole truth. And in this Task Force Report the truth has been twisted to make a trap for fools. Puerto Ricans will not be deceived again. We deserve much more.

The Puerto Rican people are ready. We are ready to write a new chapter based on dignity, democracy and mutual respect. We are not afraid. It is about time that we conclude what was started in 1952. Congress has a choice to make. Let us move forward towards a new beginning in the U.S.-Puerto Rico relations.

Thank you.

The CHAIRMAN. Thank you very much. Now, we’re going to let you all testify before we ask questions. So we will proceed now with

the two Congressmen and let you testify and then we will proceed to—we will move to the Honorable Mr. Berríos.

Proceed, Congressman.

STATEMENT OF HON. LUIS G. FORTUÑO, RESIDENT COMMISSIONER OF PUERTO RICO, U.S. HOUSE OF REPRESENTATIVES

Commissioner FORTUÑO. Thank you, Chairman Domenici and Ranking Member Bingaman and all the other Senators present, for ensuring that a hearing is held this year on the fundamental issue of Puerto Rico. I would also like to thank the many elected officials that are present at this hearing, attesting to the importance that they, and the citizens they serve, place in this process.

The report of the President's task force and the legislation to implement these recommendations—it is imperative for establishing 3.9 million U.S. citizens to finally obtain a democratic form of government at the national level. One hundred and 8 years after Puerto Rico was taken through war—

The CHAIRMAN. How many people?

Commissioner FORTUÑO. Three point nine million.

The CHAIRMAN. Three?

Commissioner FORTUÑO. Point nine million. And there are even about 4 million Puerto Rico-Americans on the mainland.

The CHAIRMAN. OK. Thank you.

Commissioner FORTUÑO. There are many reason for Congress to provide, for the first time ever, a federally-sponsored plebiscite in Puerto Rico to decide our political future. However, none speak louder than the valor and courage of the hundreds of thousands of Puerto Rican men and women who have defended our Nation with distinction in every war since 1917. Every time I visit our wounded at Walter Reed, I witness firsthand their dedication and love for our country and the principles for which it stands.

That is the case with Private First Class Manuel Melendez, who was wounded in Iraq and, after a 2-year recovery process, joins us here today. We are honored to have him with us. We have made a disproportionate contribution to our current effort on the war on terrorism. He is only one example as to why we have earned our keep and deserve congressional consideration of our requests for a legitimate process to exercise our right to self-determination.

However, the self-determination process in Puerto Rico is in a state of arrest due to confusion about the options that have been offered to the electorate in every state-sponsored plebiscite held to this day. The task force was charged by President Clinton with clarifying the options and recommending a process for determining the territory's ultimate status. The task force of senior appointees of President Bush agreed with the Clinton administration on the options that are constitutionally viable and recommended a process deferential to the Governor's opposition, to a choice among the options and his insistence that Puerto Ricans support commonwealth. It asks Congress to provide for a plebiscite on whether Puerto Rico should remain an unincorporated territory or seek a non-territorial status. Depending on the results of the first plebiscite, further measures would be taken.

Representatives of a vast majority of Puerto Ricans support this plebiscite. The three political parties unanimously approved a bill in the State legislature requesting action on the status of Puerto Rico. This bill was vetoed by this Governor, who only appears to back initiatives that are intended to further delay any progress in providing the people of Puerto Rico their legitimate right to self-determination by direct votes of my constituents.

Status action for Puerto Rico is consistent with the national Democratic and Republican platforms.

The Governor has stated a number of objections to the report. Some are simply misleading, such as that Congress can take away the U.S. citizenship of Puerto Ricans in the States. It actually says almost the opposite.

Other objections are more subtle. A primary one is that the report considers Puerto Rico to be subject to the powers of Congress's Territory Clause, as has the U.S. Supreme Court, the Departments of Justice and State, this committee, the House of Representatives, the GAO and CRS.

The Governor does want to recognize that commonwealth is really just a word in the formal name of Puerto Rico's government, as it is in the cases of four States and another territory. He complains that the report is unfair for two reasons. One is that it does not accept his new commonwealth as an option. He has asked members to support an alternative process that would authorize Puerto Ricans to determine unilaterally, through a constitutional convention, as opposed to a direct vote by the people, what is an acceptable status option and then bring it to Congress. That alternative process would be a mechanism to try to force a Trojan horse with his new commonwealth proposal.

Such a situation would create false expectations in Puerto Rico resulting in greater frustration among my constituents and unnecessary tension between the Federal Government and the island.

To understand why his complaint is baseless and his bill is a dangerous mistake, you have to understand his new commonwealth. Under his proposal, Puerto Rico would be empowered to exercise veto power over Federal laws and to limit Federal court jurisdiction. It would be able to enter into trade and other international agreements and organizations. The United States will be obligated to provide new incentives for investment and to continue to grant all current aid to Puerto Ricans without paying Federal income taxes.

In addition, as if that were not enough, it would have to continue to provide free entry of goods shipped from Puerto Rico or through Puerto Rico, as well as permanent U.S. citizenship to residents born in Puerto Rico.

Congress ultimately will not accept an alternative that is not feasible under the U.S. Constitution, as stated by the Justice Department under the last three presidents. Under the Governor's plan, after much aggravation and effort, we would end up exactly where we started.

The Governor's other fairness complaint is that a vote between territorial status and seeking a non-territorial status will result in a majority for a non-territorial status. Setting aside the contradiction with his contention that Puerto Rico is not a territory,

why shouldn't the majority of the people be able to seek a form of government that is democratic at the national level if they want one of those options? And if they do, neither the rejected territorial status nor the impossible new commonwealth should be options.

Mr. Chairman and distinguished Senators, this issue will persist and fester and 3.9 million people for whom the United States is responsible will lack full democratic democracy at the national level. Congress must formally recognize its moral responsibility and join the executive branch in clarifying that Puerto Rico remains in a territorial status and that the new commonwealth proposal is unconstitutional, and thus, impossible to consider. It must then provide a process for Puerto Ricans to determine their preference among real and viable options.

Thank you again. I will be pleased to answer any questions.
[The prepared statement of Commissioner Fortuño follows:]

PREPARED STATEMENT OF HON. LUIS G. FORTUÑO, RESIDENT COMMISSIONER OF
PUERTO RICO, U.S. HOUSE OF REPRESENTATIVES

The report of the President's Task Force on Puerto Rico and legislation to implement its recommendations in a manner approved by Congress is imperative to achieve a democratic form of government at the national level-for the 4 million U.S. citizens in Puerto Rico.

The self-determination and political status resolution process in Puerto Rico is in a state of arrest, due to the ill-defined and confusing state of federal law and policy concerning Puerto Rico's status options. As a result, Puerto Rico remains the last large and heavily populated U.S. territory living under the anachronisms of America's imperial experiments in the distant past.

There are many here in Washington who promise to respect whatever status choice Puerto Rico chooses, but in the next breath say the problem is we can not make up our minds. Yet, the reason we do not have majority rule in Puerto Rico on the status issue is that Congress has failed to act in accordance with U.S. historical practice and constitutional precedents for territorial status resolution.

Without becoming unduly legalistic, let me say that the political dilemma we face is rooted in fatally flawed federal jurisprudence that has deviated since 1922 from the preceding 135 years of American territorial law going back to the Northwest Ordinance of 1787.

The historical norms for territorial status resolution were:

- Withholding U.S. citizenship and adopting a policy of non-incorporation leading to independence, as in the case of the Philippines, or
- Conferral of U.S. citizenship, triggering application of the U.S. Constitution and incorporation, the result confirmed by the U.S. Supreme Court in the cases of Alaska and Hawaii. *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Rasmussen v. U.S.*, 197 U.S. 516 (1905).

In 1901, the Supreme Court had ruled that Congress could govern the non-citizen populations of the Philippines and Puerto Rico as non-incorporated territories under U.S. nationality without extending the U.S. Constitution. *Downes v. Bidwell*, 182 U.S. 244 (1901) In *Rasmussen*, however, the Supreme Court ruled that territories with U.S. citizen populations were incorporated into the nation, and that the U.S. Constitution applied by its own force consistent with territorial status.

Thus, the Alaska and Hawaii cases on extension of the U.S. Constitution should have been applied to Puerto Rico when Congress extended U.S. citizenship in 1917. Instead, in 1922 a deeply divided U.S. Supreme Court made a fateful error and decided, notwithstanding the conferral of U.S. citizenship, that extension of the U.S. Constitution to Puerto Rico should be left to the discretion of Congress. *Balzac v. Puerto Rico*, 258 U.S. 298.

The *Balzac* decision was a 5-4 ruling that gave Congress license to govern the U.S. citizens of Puerto Rico in the same manner as non-citizens in non-incorporated territories, without the restraints or protection of the U.S. Constitution. Although statements of justices indicate that the Supreme Court clearly expected this to be temporary until Congress adopted a status resolution policy, Congress has ruled Puerto Rico as a vestige of empire past, without a democratic form of government at the national level for 108 years.

For territories under the Northwest Ordinance, incorporation and eventual statehood were the only options. Modern principles of self-determination, under the U.N. Charter and human rights treaties to which the U.S. is a party, mean that Puerto Rico also has the option of becoming a separate sovereign nation through independence or free association.

However, the existence of additional options does not eliminate the problem created by extending U.S. citizenship but not the U.S. Constitution to Puerto Rico while it is a U.S. territory. Having denied protections of the U.S. Constitution to the U.S. citizens of Puerto Rico wrongfully for more than eight decades as a matter of domestic law, Congress needs to act immediately to correct the judicial error of the *Balzac* ruling in 1922 and sponsor a self-determination process satisfying both domestic and international standards.

LOCAL STATUS IDEOLOGY

It was not until 1950, that Congress authorized a local constitution allowing self-government only in local affairs not otherwise governed by federal laws, which are applied by Congress without consent of the citizens.

The controlling faction of the territory's "commonwealth" party asserts Puerto Rico is no longer a territory, and that adoption of the local constitution in 1952 established Puerto Rico as a "commonwealth" with national sovereignty. (Another faction of the party, which favors free association does not subscribe to this fiction.) The current Governor is President of the party and he asserts that it is only a matter of time before the U.S. accepts that—

- Puerto Rico is not a U.S. territory, but a sovereign nation
- Federal laws, including federal wiretap and death penalty statutes, can apply in Puerto Rico only upon consent of the local government
- Federal law is no longer supreme, but co-equal to Puerto Rican law
- Puerto Rico has sovereign power to enter into international agreements in its own name and right as a nation, and conduct its own international relations
- U.S. citizenship and political union is guaranteed forever, as in the case of a state of the union
- Federal services, programs and benefits will increase and be guaranteed, but Puerto Ricans will always be exempt from federal income tax
- Puerto Rico will remain within the customs territory of the U.S., but enter into its own trade agreements with other nations
- Puerto Rico will have the power to limit the jurisdiction and operation of the federal court.
- The U.S. can permanently and irrevocably cede its sovereign power over Puerto Rico to the "commonwealth", and retain only such sovereign powers in Puerto Rico as may be delegated to the U.S. by Puerto Rico.
- Under the innocuous label "Development of Commonwealth"; this virtual confederacy is unalterable by Congress in perpetuity without local consent
- Disputes between governments would be settled by sovereign-to-sovereign negotiations since federal law is no longer supreme.

Based on this status doctrine, the Governor asserts that Puerto Rico can have the benefits of both statehood and independence, and not be required to make the difficult choice between the two. Accordingly, the Governor argues that a choice between options recognized under federal law will create an "artificial majority", because statehood and independence supporters will "gang up" against the territory status that he insists Puerto Rico does not have.

The Governor proposes that the solution to the status question is for Congress to authorize a local convention to choose among statehood, independence, and a development of the current status—which he intends would be his "Development of Commonwealth" proposal.

He asserts that residents of Puerto Rico support "commonwealth" based upon a slight plurality in a 1993 local referendum, when less than a majority voted for a "Commonwealth" proposal that was not accepted by the Clinton Administration or in the Congress.

In 1998, another local status vote did not produce a majority vote for any status option. The current status as recognized under federal law was rejected by 99.9% of the voters.

These local votes demonstrate Puerto Rico does not have majority rule on status, and the U.S. citizens of the territory have effectively withdrawn consent to the current territory status.

The local constitutional convention proposal of the Governor is, simply a diversionary tactic. It is not needed because Article VII, Section 2 of our local constitution already provides the exclusive procedure for calling a constitutional convention,

with a more democratic procedure based on approval of a convention by a majority of voters.

To confuse, confound and befuddle his own party, the people of Puerto Rico, and Congress, the Governor's party has commissioned respected lawyers to cobble together the best possible legal arguments supporting the commonwealth party platform making Puerto Rico a nation permanently linked to the U.S. in a confederation.

I am attaching a series of scholarly commentaries which reject the legal briefs the Governor has presented to Congress and the White House, in a failed attempt to derail federal policy on Puerto Rico's status that is compatible with the Constitution and laws of the United States.

CONCLUSION

There are many reasons for Congress to authorize a federally sponsored plebiscite in Puerto Rico, but nothing is truly more important than the patriotism of the Puerto Rican men and women who have served with honor and distinction in every war since we became citizens of the United States in 1917, 89 years ago. Puerto Ricans have fought in defense of our Nation, and the democratic principles of freedom for which it stands, since World War I. They have fought, and many have made the ultimate sacrifice, on the—battlefields of Europe and Africa, the Pacific and Korea, Vietnam and the Middle East, and recently in Afghanistan and Iraq. I regularly visit our wounded at Walter Reed, and am honored to witness first-hand their dedication and love for our Nation.

We have made a disproportionate contribution to our current effort on the War on Terrorism. We have earned our keep, and we deserve congressional consideration of our request for a fair and legitimate process to exercise our right to self-determination.

After 108 years of territorial status, Puerto Rico remains the longest standing territory in the history of the United States. Congress retains jurisdiction over the Puerto Rican status issue, so we have a constitutional responsibility to address the issue. Although Congress has consistently expressed its commitment to respect the right of self-determination of the people of Puerto Rico, Congress has never sponsored a plebiscite to allow the people of Puerto Rico to express themselves on their preference based on options that are compatible with the U.S. Constitution and basic laws and policies of the United States.

The only way to restore majority rule locally and achieve democracy and government by consent at the national level is to begin an orderly process of self-determination. I support the recommendation of the Task Force established by President Clinton and comprised of senior appointees of President Bush: a congressionally-provided-for plebiscite on whether to seek a non-territory status. Only if a majority vote to seek a new status, would a second step be taken to choose among the options accepted by the federal government and specifically, by the Justice Department under Presidents George H.W. Bush and Bill Clinton, and the current President, as permanent in nature.

This is a moderate and measured approach to the issue. It is the minimum that Congress can—and should—do to fulfill its historical role under the U.S. Constitution to redeem the promise of America in Puerto Rico.

The CHAIRMAN. Thank you very much.

Now we will ask you, the distinguished Rubén Berríos, if you would testify, please.

STATEMENT OF RUBÉN BERRÍOS MARTÍNEZ, PRESIDENT, PUERTO RICAN INDEPENDENCE PARTY

Mr. BERRÍOS. Mr. Chairman and members of the Committee, there is more than enough testimony and evidence in the recent record of the U.S. Congress to promptly approve legislation regarding the status of Puerto Rico. Suffice to state certain facts and issues in Puerto Rico—the bankruptcy and failure of a colonial commonwealth experiment is self-evident.

In the United States, the White House report on the consideration recognizes what the Puerto Rican Independence Party has been saying for more than half a century; that juridically, Puerto

Rico is nothing but a United States territory under the U.S. Constitution.

Internationally, next Saturday, November 18 or 19, the most important Latin American and Caribbean political parties of the widest ideological spectrum will meet in Panama. They will meet to express Latin America's collective solidarity with Puerto Rico's inalienable right to self-determination and independence and to offer their good offices in the process to achieve Puerto Rico's political organization.

It is time for Congress to fulfill its constitutional mandate and to dispose of the territory. Puerto Ricans, of all political persuasions, for more than a century, have urged the U.S. Congress to act in order to de-colonize Puerto Rico. Congress has refused to act. They simply say, in order to avoid recommendations at a time when we are looking for solutions, that the historical and political circumstances were not appropriate. But they are now.

At the end of the cold war, the unavailability and costs of commonwealth, the consensus for change in Puerto Rico, and the need for new U.S. policy towards Latin America marked the end of an era and signaled the beginning of a new one.

We propose a very simple solution, a very simple roadmap, leading to your constitutional duty to dispose of a territory. First, a yes or no referendum should be held to discard the present commonwealth or any other territorial arrangement.

Second, a sovereign constitutional convention should then be held in Puerto Rico to decide among alternatives, recognized by international law. As long as legal decolonization principles are respected, the specific details for the roadmap can be worked out with all flexibility. We in Puerto Rico will do all that is in our power to advance such a plan. That is our duty. But the United States is also under an obligation, both juridical and ethical, to act.

Under the present circumstances of utter dependence in Puerto Rico, it is up to this Congress to jump-start such a process, otherwise the colonial forces of inertia could prevail once more. But if immobility prevails, the situation in Puerto Rico will deteriorate and the status problem will come back to haunt Congress in evermore menacing ways. Now we are in a position to formulate an orderly process that will balance all interests involved, both yours and ours.

When all is said and done, regarding the issue of Puerto Rico's status, the national self-interest, both that of Puerto Rico and the United States, will prevail.

Commonwealth under any guise is the problem, and thus, it cannot be the solution. Democracy and colonialism are radically and utterly incompatible. Democracy cannot exist where the basic laws of a country or territory are determined by another country. The democratic colony is a contradiction in terms. It is no more than a tinsel cage.

Furthermore, commonwealth is an open door to statehood. And statehood, even though Congress may not openly acknowledge it at this time, is undesirable, both for Puerto Rico and contrary to national interest of the United States.

Independence, on the other hand, is the natural and rational solution to our colonial problem. Independence is an inalienable right

and “independentistas” will never surrender that right under any circumstances. An orderly transition to independence with a date certain should, of course, be part of any future arrangement.

I remind you, majorities come and go, as you well know, but nationalities remain and Puerto Rico is a full-grown Latin American nationality. I have no doubt that the Puerto Rican people will proudly claim their independence once the blackmail and intimidation to which we have been subjected for more than a century, ceases to exist.

I urge the Senate to fulfill its constitutional duty and its responsibility. Responsibility, needless to say, is a function of power and only political will is necessary. Thank you very much.

Senator MARTINEZ [presiding]. I have now taken the Chair and I will look to the Ranking Member for your questions. Do you have any?

Senator BINGAMAN. Thank you very much, Mr. Chairman.

Let me start by asking Governor Acevedo about your proposed alternative to the task force’s recommendation. The task force is recommending two plebiscites and your alternative, as I understand it, is to call a local constitutional convention to propose to Congress a new commonwealth relationship. Is that wrong?

Governor ACEVEDO-VILÁ. Not exactly. At that constitutional convention, the people of Puerto Rico will choose delegates, delegates that believe in commonwealth, delegates who believe in statehood, delegates that believe in independence—

Senator BINGAMAN. So you’re not—I don’t know what the—

Governor ACEVEDO-VILÁ. I don’t know what is going to come out of the convention. The whole idea is for them to ask for representatives of the people of Puerto Rico, try to solve our differences, and of course, we know how this process works. Once you have a constitutional convention, working on the issue, there is going to be communication with this committee and with the House. And at some point, they will make a recommendation that has to be approved by the people of Puerto Rico and then we’ll have a reaction from Congress. They might say we agree. They might say, we totally disagree. Congress might say we need some more changes. But it is an inclusive process that not only we have had experience—this nation was built through that process.

Senator BINGAMAN. Yes, but given the constitutional and legal concerns that have been raised about the proposal for a new commonwealth, as I understand it, why do you believe that a proposal like that, if it were to be the end result of the constitutional convention you’ve described, why do you believe that such a proposal would receive more favorable reaction in Washington if it were presented following a constitutional convention than it would be otherwise?

Governor ACEVEDO-VILÁ. No. 1, it will come after a fair process and it will come to Congress as the aspirations of the people of Puerto Rico. That’s the only thing I’m asking for: Give my people the right to dream of a different Puerto Rico and fight for it, using the democratic process.

I know how they picture statehood in Puerto Rico, during the campaigns. They say that we’re going to be the 51st state with our own national Olympic team, so we can defeat the United States in

the Olympic games, like we did once in basketball. They say that if we become a state, our judicial system is going to be in Spanish. They say that if we become a state, our public educational system will stay in Spanish and that we will teach U.S. history in Spanish. I know that's not going to happen, but I recognize the right they have of presenting those aspirations to the people of Puerto Rico and in my case—in my case, that's what we are asking for. What kind of future relationship under a commonwealth—under a new commonwealth we will have, if you allow me. Because there are a lot of legal discussions and the problem with the legal discussion is that, usually, for the people to say what political outcome they want and data come up—well, legal constructions. From 1953 until the late seventies, the Department of Justice position was completely different from the one you heard here today.

But if you allow me, I'm going to quote you a well-renowned jurist on this general issue, not on the specific issue of Puerto Rico: "The form of the relationship between the United States and unincorporated territory is solely a problem of statesmanship. The present day demand upon inventive statesmanship is to help evolve new kinds of relationships so as to combine the advantages of local self-government with those of a confederated union. Luckily, our Constitution has left this field of invention open." Justice Frankfurter, when he was working at the Bureau of Insular Affairs of the War Department.

This is a political issue and what we should be discussing in the future is what's best for the economy of Puerto Rico, what's best for the people of Puerto Rico, and let the people of Puerto Rico make the decision. And, of course, if that decision requires action from Congress, then we'll have a response from you.

Commissioner FORTUÑO. Senator, if I may? For the record?

Senator BINGAMAN. Yes, go ahead.

Commissioner FORTUÑO. There is only one type of statehood. There is only one type of independence. The problem is with the definition of commonwealth and that's where the crux of the matter is. Thank you.

Senator BINGAMAN. Let me ask one other question. My time is about up, but Governor Acevedo, you also, in your written testimony, say that the people of Puerto Rico have "the inherent authority to call a constitutional convention." If that's the case—and I don't dispute it—why don't you go ahead?

Governor ACEVEDO-VILÁ. Oh, we can do it. We can do it. I think that it is a stronger constitutional convention if, at the beginning of the process, there is an expression of Congress saying, we recognize you have that power and we will be listening. We'll be listening. If not, it could give us the results we want, but I think it is a weaker one. I have to—I recognize that, in that sense.

Senator BINGAMAN. Thank you, Mr. Chairman. Senator Landrieu, I understand you may want to—need to be elsewhere. Did you want to ask any questions before you have to go? I don't know who will take the floor after that.

**STATEMENT OF HON. MARY L. LANDRIEU, U.S. SENATOR
FROM LOUISIANA**

Senator LANDRIEU. I just want to make a brief statement, and I'm going to submit some questions for the record.

I thank you all, gentlemen, for your testimony because this is an important issue for, obviously, Puerto Rico and the Nation. I want to say that I hope, Governor, with all due respect to your testimony, that we not hold out false hopes, that we give the people of Puerto Rico a clear—clear choices. They deserve our utmost respect and confidence and to give them choices that are real and choices that are constitutional. I hope that as we proceed with these discussions, that that will be what we come out with: an opportunity for real choices based on what our Constitution says, and to be respectful of the people of Puerto Rico. I know that is what we all want to do.

So I'm going to just stop there and submit questions for the record and we'll see where we go. And I thank Senators Salazar and Martinez for their leadership.

[The prepared statement of Senator Landrieu follows:]

PREPARED STATEMENT OF HON. MARY L. LANDRIEU, U.S. SENATOR FROM LOUISIANA

Thank you, Mr. Chairman. I am sure you will agree that as the United States promotes democracy abroad, we should pursue it no less vigorously here at home. We need to start today with Puerto Rico.

I do not believe that we should spend more time today echoing the same debate between the local parties from Puerto Rico that we heard in 1998 and 1999, that we heard earlier in 1991 (before I came to Congress), and that Congress has heard going all the way back to 1952 (before I was born).

Puerto Rico has been part of the United States for more than 100 years. It is high time Congress empowered the proud people of Puerto Rico to decide their own future.

I believe that Puerto Rico should become a state. Puerto Ricans cannot, on the one hand, keep their U.S. citizenship, income-tax-free status and access to federal funding while on the other hand be able to enter into trade agreements with foreign countries or choose which laws passed by Congress to follow.

There is no such thing as a free lunch. Puerto Ricans should have full representation in Congress and all of the rights—and responsibilities—that such representation entails.

Otherwise, they should become an independent country with all of the rights—and responsibilities—that such a choice would entail.

As I have said, I believe that the citizens of Puerto Rico will be better off as part of the United States, but I am not afraid to let them decide in a straightforward manner.

Past plebiscites held on this issue have failed because the question has not been stated in a straightforward manner. When “none of the above” is the most popular answer, it is time to rethink what we are asking for.

Personally, I believe that we need to lay out a two pronged question for Puerto Rico: Would you prefer to join the United States as a full state? Or, would you prefer to become an independent country?

However, it does not appear that Congress or the White House is ready to ask that question.

But the President's Task Force did come close by laying out a relatively clear framework for resolving the issue:

Quite simply, it recommends putting a two step process before the people of Puerto Rico:

Step 1) Are you happy with your current, territorial status?

Step 2) If you are not happy, do you wish to be an independent country or a state?

That's pretty straightforward, and that is why I am an original cosponsor of S. 2661, a bill to provide for a plebiscite in Puerto Rico on the status of the territory.

Several of my colleagues on the Committee are cosponsors, and I hope we can move this issue quickly in the 110th Congress.

I believe that we need to restore majority rule and consent of the governed in Puerto Rico. Let's find out if a majority are happy with remaining a territory. If they are, then we can give this a rest for a while. If the majority really doesn't wish to be a territory any more, then we can move forward.

Thank you Mr. Chairman

Senator MARTINEZ. Thank you, Senator Landrieu.

Let me ask you a question and I'd like to get an answer from each of the panelists. Why were the results of the 1993 and 1998 plebiscites so muddled, so confusing, and why is there not a clear direction from the Puerto Rican people when presented with three clear-cut options? Let me begin, from right to left. I want to give Mr. Berríos an opportunity to speak.

Mr. BERRÍOS. It's from left to right.

Senator MARTINEZ. Well, I'm sorry. Depending on which way you—

[Laughter.]

Mr. BERRÍOS. Regarding the commonwealth issue, as usual, in one of the plebiscites, the formulation of a commonwealth was the best of both worlds. Who can vote against that? Well, more than 50 percent of the people did, but when you have things defined in such a manner and all issues stacked against you, after 100 years of intimidation and persecution, particularly with regards to independence, you can imagine the outcome.

Senator MARTINEZ. By the way, you have mentioned intimidation and blackmail now a couple of times; who do you accuse of that? I want to be clear.

Mr. BERRÍOS. Everybody involved in this issue. When it was up to—

Senator MARTINEZ. All right, that's fine.

[Laughter.]

Mr. BERRÍOS. I can give you some examples. I can give you—when it was up to the U.S. Congress in 1945, at the start of the cold war, the Smith Act was immediately appointed for Puerto Rico. And then the Puerto Rican government took it over and put more than 1,500 members of the Independence Party, which seeks independence peacefully, into prison. That's the intimidation I'm referring to.

Senator MARTINEZ. OK. Congressman.

Commissioner FORTUÑO. First of all, Senator, I commend you and Senator Salazar for the bill you have introduced and I thank you all for the interest that you have shown all of the members of the panel.

To address your question, I believe it goes to the crux of why should we be here? Why should we have this process and why should Congress get involved in this? I answer with a question. If one of the options was that you could keep, actually, U.S. citizenship, but you would not have to pay Federal taxes; however, all social programs will be applicable to Puerto Rico, and on top of that, that actually Puerto Rico will decide which laws applies, which Federal laws apply and which ones don't, that Puerto Rico will decide the jurisdiction of the Federal District Courts in Puerto Rico, that Puerto Rico will decide, actually, many of the—you know, even if we go to war or not, when the U.S. is at war; that Puerto Rico,

on top of that, will enter into international trade agreements separate from the United States, whichever country we want to enter into and that we can, indeed, live the best of both worlds as Mr. Berríos was saying. I beg you to—I ask the question to you all.

If you end up actually needing something like that, the new commonwealth, as an option, you'll end up with 50 requests like that here. And that's exactly why we need the intervention, actually, and Congress to fulfill its responsibility to a process that is fair and that allows the people to actually voice their opinions directly, not in a smoke-filled room of 50 delegates that may decide that, actually, they're going to come back as a tactic—with a Trojan horse and bring this to Congress and will present this new commonwealth alternative.

My concern here is that we may mislead the people of Puerto Rico, many of whom have served with valor and courage, on behalf of our country and democracy, abroad and they will believe actually that that is possible. The best of both worlds doesn't exist. We can't have the cake and eat it too. It's either statehood or independence. We can remain as a territory—and, actually, the reports state so—or we can explore free association. And actually there is a group within the Governor's party that actually have recognized that that's the only alternative that they have open and have actually submitted for the record their own proposals today here.

Senator MARTINEZ. Governor.

Governor ACEVEDO-VILÁ. Just to remind you, those two plebiscites were called by the Statehood Party when they were in power. Now, because they lost, the process was not fair. You see? The reason is that—

Senator MARTINEZ. I don't want to get—

Governor ACEVEDO-VILÁ. No, no. The reason is, yes, we're divided. Commonwealth—we won one of them with 48, 49 percent, and in the second one, we beat Statehood with none of the above. None of the above. So I think it is unfair to ask Commonwealth, why haven't you accomplished more when you get 40, 49 percent of the vote, but we win? And what about Statehood? They haven't won. So what they are trying to do is, because we are divided, it's like, well, since we don't know how to do it, you—Congress—tell us how to do it. And the way this report tries to do that is by eliminating Commonwealth, who has been the winner.

Senator MARTINEZ. Well, it seems to me that you want to move in a direction away from a direct vote on this issue.

Governor ACEVEDO-VILÁ. No, I want to try a different process, because we have failed with plebiscites and plebiscites and plebiscites and we have failed by trying to get Congress to establish the rules. And in this case, what I say is, why don't we use the same process that has been used by the United States, that was used in Puerto Rico and in many countries around the world, a constitutional convention?

Senator MARTINEZ. But isn't it more—I mean, wouldn't it be easy to argue that a more democratic process is a direct vote?

Governor ACEVEDO-VILÁ. And we have had many of them and commonwealth has won all of them.

Senator MARTINEZ. But then, if your particular point of view has won in the past—

Governor ACEVEDO-VILÁ. If, if, if. Senator, with all due respect, if Congress is willing to commit to a plebiscite in which, if Statehood wins, it would be granted and, if Commonwealth wins, it would be granted and independence, if it wins, would be granted, that's a completely different process. But with all due respect, not even your bill offers that.

Your bill even excludes statehood, because we all know today there is not the political will in this Congress to make a commitment to statehood. There is not the political will to make a commitment to statehood. That's the main reason and you know that. That's the reason. In your bill, the second election is not there. Because once you put there the option of the statehood, the message will be, oh, we in Congress are making a commitment toward statehood. And that's the problem here.

Senator MARTINEZ. I think the idea of not having a second election was to avoid the very problem that has been very obvious here by the panel, which is to not get into the second part of it, but only to determine whether, in fact, that is the route to take, for the future.

Governor ACEVEDO-VILÁ. In that case, Senator, I will say that is even more unfair to the people of Puerto Rico, because the option will be to destroy what you have. But I'm making no commitment, in terms of—

Senator MARTINEZ. It's an expression of the will of the people of Puerto Rico.

Governor ACEVEDO-VILÁ. But then there is no commitment—there is no commitment as to what Congress is willing to offer after.

Senator MARTINEZ. I believe this is a helpful process, because it educates the American people about the inherent unfairness of the current status and then it allows us to move forward toward a better status. So I don't think that this process—this hearing today and even the debate about which bill may be better—is anything but positive toward a future outcome. But it seems to me that the best way to persuade the Congress that the people of Puerto Rico are prepared to take a step toward a more defined status would be to have a plebiscite, which speaks with a clear voice. And I don't think that should be feared. I don't think the ballot box should ever be feared.

Governor ACEVEDO-VILÁ. But the one that is included in your bill, with all due respect, is not a fair process.

Mr. BERRÍOS. Senator, will you permit me?

Senator MARTINEZ. Yes, sir. And then I'm coming to you.

Mr. BERRÍOS. I wasn't sure what I was listening to, our fellow Puerto Ricans here, who were arguing against me or for me. It's fantastic what I have just heard. Let me—for the first time in the history of the U.S. Congress, the co-author of what happened in 1950, 1952—that is, a colonial status with another name to put up a good face before the world community—one of the co-authors has become state's witness for Puerto Rico's rights.

That's the problem with commonwealth. Because they insist, in an undemocratic, territorial or colonial status at a time when that is totally outdated in the world. That is why they don't want any clear definitions. They want to come up here with an impossible co-

lonial, undemocratic solution, which is no solution at all. That's why we hear all this stuttering today, here.

Things are clearing up and your first step proposed, which is yes or no, do you want to live in the servitude of political subordination as a territory in the 21st century, which is degrading to Puerto Ricans and demeaning to the United States; do you want to keep that, yes or no? They are afraid because they could win in the cold war, but now they are going to lose abysmally in Puerto Rico, because most of their party will come against colonialism and, of course, statehooders will come against it and the independent status is also dust.

Senator MARTINEZ. Senator Salazar?

Senator SALAZAR. Thank you very much, Senator Martinez. Let me just first make an observation that this is probably the first time in the history of the U.S. Senate where you have three Hispanic Senators in charge of a committee.

[Applause.]

Senator SALAZAR. So we might say the Hispanic Caucus is in charge of this hearing for now. Let me also just assure you that, notwithstanding the fact that there are two separate bills that are here, I think the one thing that we obviously share in common between Senator Martinez and Senator Menendez and myself has to do with the people of Puerto Rico, to make sure that we are helping in a process that, at the end of the day, is a process of self-determination by the people of Puerto Rico. And I think that the fact that you have the three of us being the last remnants of this hearing will tell you that we have a special interest and a special concern in Puerto Rico.

I'll make two observations and points and then I have a question that I would like each of you to answer. The first point is that I do think the White House report—it was, in fact, biased, because I do think that it would have prejudged an outcome. It would have essentially given to the people of Puerto Rico, ultimately, the decision to decide whether to accept statehood or to accept independence, so the third option would not have been at the table. And it was actually in the writing of the bill, with all due respect, Congressman Fortuño, that Senator Martinez and I sat down and tried to figure out what language would work for a bill that might accommodate all the different interests. We did not accept the language from the House because we wanted to make sure that there were—that all the options were, in fact, placed on the table. At least that was our intention as we were moving forward in the construction of the bill.

So I think, at least in my conversations with my colleagues, the notion has been here that there are viable options out there and, ultimately, it's up to the people of Puerto Rico to make the decision.

The third point I want to make here has to do with a little bit of history and the history of the State of New Mexico. I'm saddened that, as I make this statement, the two Senators from the State of New Mexico are not here, because that's the Land of Enchantment and a State that became a part of the United States in 1912. I remember in my own days in reading the history of my forefathers and foremothers in New Mexico; founding the city of Santa Fe,

New Mexico, in 1598; the whole debate that occurred in the late 1800's and in the early part of the last century, about whether or not New Mexico should be allowed to become a State; and it was very clear when you go back and you look at the Congressional Record, relative to the debate that occurred in those days, that New Mexico was not wanted as a part of the United States of America. New Mexico was not wanted as part of the United States of America for a very simple reason. Most of the people who lived in New Mexico in 1900 were Hispanic Americans, Mexicano Americanos. They were the ones who lived in New Mexico. So they were not wanted by the United States of America.

To the North, my State of Colorado, that I represent, became a State almost 30 years before New Mexico. But New Mexico did not become a State because of the fact that it was an Hispanic State.

So we need to recognize that the history was there. And one of the questions, I think, that is a real question and concern for me is that the people of Puerto Rico are not treated in a different way because of the fact that it happens to be an Hispanic population.

You know, Governor Acevedo, I very much respect you, and I hear your point when you say that this Congress would not willing to accept Puerto Rico if, in fact, it was to become the 51st state. You may be correct. I would hope that that is not—would not be the case, that, in fact, if the people of Puerto Rico, by themselves, were to decide that this was the option that they were going to exercise, that this Congress would say, yes, we are going to do it. Because it's not a Republican or a Democratic issue, it's a matter of 3.9 million people who have been a part of this country now for over a century and if it is their decision that they wanted to become part of the United States, it seems to me then that this Congress should recognize that and then all of us would come together hopefully and fight for that cause. So, I make that comment about New Mexico because it is, in fact, one of the historical factors, personally, that I care a lot about, with respect to what happened to the Southwestern part of the United States, and the analogy, if you will, that you can draw to Puerto Rico.

My question to the three of you simply is this: If, in fact, there was legislation that would say that the people of Puerto Rico would have a vote where the three options would be placed on the table once again—independence, commonwealth, statehood; one, two, three—and the people of Puerto Rico would then vote on that plebiscite, is that something that the three of you could support? Starting with you, Governor, and then Congressman Fortuño and Mr. Berríos.

Governor ACEVEDO-VILÁ. As they say, the devil is in the details. But in general terms, that's what my party tried to push in Congress back in 1989, and we were very close to creating that kind of plebiscite back then. With all due respect—I can just pull it out here and check the record—there was no willingness from this Senate to make any kind of commitment to statehood and that's the extent of my comment. I agree with you that it's a matter for the will of the people of Puerto Rico, but what my point is, so far, what we know is that Congress is not willing to commit to any process if statehood is part of the process. But then, on the other hand, even though that's what I believe, I recognize his right and the

right of the people of Puerto Rico, of the statehood supporters in Puerto Rico to keep pushing. That's the only thing I'm asking, that they recognize, too, commonwealth, and that's in general terms—a plebiscite that will recognize the three political ideologies, tendencies in Puerto Rico. That, if fairly defined, is an alternative, definitely.

Senator MARTINEZ. Thank you, Governor.

Congressman Fortuño.

Commissioner FORTUÑO. Yes. Certainly I'm not afraid of the ballot box and I would like the people of Puerto Rico to decide freely and directly what is it that they want. I have stated publicly several times, regarding the bill that actually my good friend and colleague, José Serrano, and I and another 108 members of Congress filed in the House, that I was open to actually have, on the second round, some sort of vote, but actually if we decide we don't want to be a territory anymore, to have a true free-association option there so that the people of Puerto Rico actually, if they don't want to be a territory, have all the rules of the game, everything above the table and they would know exactly what they will be voting for.

Statehood and independence are pretty easy. The problem here is, again, on free association or whatever it is. But I would not be—on the contrary, I'm not afraid of the ballot box.

I would say something else, going back to your comments, Senator. The fact that there are three distinguished leaders of our Hispanic community here before us—and I'm so proud that you are here today—actually attests to how this country has changed dramatically. And I know for a fact that this Congress will be very different from a Congress 80 years back when New Mexico was trying to become a State.

Finally, I will say one thing. I do want the people of Puerto Rico, my constituents, to vote directly on whatever the options may be. I want them to know what they are voting for. And I must say that what I find unfair is to try to block a process. And I wanted Manuel Melendez to be here with us today, because I would visit him when he was in a coma at Walter Reed. And every time, I would get in my car to drive back to the Hill, I would think to myself, how could it be that in the 21st century there is an American hero lying in bed, fighting between life and death and this American hero did not have a right to decide whether we were going to war and to elect a commander in chief? That is unfair and unconscionable in the 21st century. Thank you.

Senator SALAZAR. Thank you, Congressman Fortuño.

And thank you, as well, Mr. Melendez, for your service to our country.

Mr. Martínez.

Mr. BERRÍOS. Berríos Martínez. Senator Salazar—

Senator SALAZAR. You spoke with such eloquence that you knocked the nametag off of your front, so I was trying to remember it.

Mr. BERRÍOS. It was Luis.

Senator SALAZAR. It was Luis? It was Luis who caused that?

Commissioner FORTUÑO. I'm sorry.

Mr. BERRÍOS. Well, I think your question and the points you bring up are very important. With them, we go back to basics. The

basics here are simple. First, commonwealth is demeaning and degrading, both to Puerto Rico and to the United States. Colonialism is anti-democratic, so that's really no option.

Now you go back to the other theoretical option and bring up the case of Colorado. I will start with a small quote from my grandfather. You will understand it, but maybe some other people won't. En el tiempo de los apóstoles, los hombres eran barbaros y se comieron los pájaros debajo de los árboles. That was possible at that time. New Mexico. Besides, knowing—or Arizona. Knowing that it was going to be filled up with an overpowering presence of American citizens of other extractions. Now we are in a different world. We are in the anti-colonial era. Latin America will never stand by when it sees that one of their Latin American nation brothers is being swallowed up by the United States. Puerto Rico would have more votes than 28 States in the U.S. House. You know what that means? If we had three or four more Puerto Ricans, we would have more votes than 35. We would be the nation that would pay less in Federal taxes and receive more in Federal money.

A Nation which is building a wall along its southern frontier with Mexico will accept a mulatto, a Latin-American nation as a State in the Union? You can say whatever you want publicly, and I don't put in doubt your honesty regarding how you would vote, but let me tell you, they will give you many excuses, and probably, you will have two or three votes more, but when the time comes up, statehood will be no answer to your Puerto Rican problem.

Statehood is a solution for Americans or for people who want to become Americans. For a nation full of people proud of their Latin-American nationality, who do not want to become Americans, including statehooders and commonwealthers, statehood is no answer. Statehood was made for Americans, not for Puerto Ricans.

It's a nation like Palestine is a nation. The solution cannot be colonialism or being part of Israel, with all due respect to the differences. That's the issue. You have to face it. Either you will face it now or you will face it in 3 years or 5 years. Face it now. Be honest with ourselves and with yourselves and come forward and discuss the issues. When we discuss the issues and the full plate is put before the Puerto Rican people, the full offer, have no doubt that the Puerto Rican people would vote for their independence once the intimidation and blackmail of the last century—

Senator SALAZAR. I appreciate that, Mr. Berríos.

Mr. BERRÍOS [continuing]. Goes out of the way.

Senator MARTINEZ. I appreciate your comments and I appreciate the three of you, from my point of view, appearing before us today and providing us your comments.

Mr. BERRÍOS. Thank you.

Senator SALAZAR. Thank you, Senator Martinez. Senator Menendez.

Senator MENENDEZ. Thank you, Mr. Chairman.

Let me say to all three of you, I admire your passion, I admire your intellect and I respect your different views. You do each of them service to the part of the Puerto Rican electorate that you represent or the community at large that you represent in terms of a point of view.

I want to salute the young man from Puerto Rico who has served with distinction in the U.S. Armed Forces. We appreciate your service.

[Applause.]

Senator MENENDEZ. And I happen to like your name, too. That has a long history of the people—was that Mendes or Menendez? Governor ACEVEDO-VILÁ. Melendez.

Senator MARTINEZ. It's not like yours.

Senator MENENDEZ. But anyway, that is part of a long history of the Puerto Rican people and a very honorable one.

I have a couple of quick questions that hopefully we can get relatively short answers to, starting with the Governor. Governor, what is undemocratic or unfair about asking the people to choose, as the report recommends, between commonwealth status and the other status options? Haven't there been such plebiscites in the past? What is wrong with that?

Governor ACEVEDO-VILÁ. You mentioned the task force recommendations, but the way it is crafted is not like the way that Mr. Salazar proposed, and I think that the answer, for the record, is that I was the only one that said yes to having the three options, on equal footing, on a plebiscite. The problem with the task force is that it defines the process in a way that you get rid of commonwealth, which happens to be the alternative the people have voted for. They might disagree, but that is the will of the people. So it's like, "since I don't get the votes down in Puerto Rico, let me go to Congress to see if I can get a process that will get commonwealth out of the ballot or describe commonwealth in a way that is impossible to vote for it." So that is what is really unfair about that process.

Senator MENENDEZ. Let me ask you, Congressman Fortuño, I heard you say there was only one type of statehood. So then, if Puerto Rico were to be—ultimately goes through a process and determines that it wants to be a State and become a State of the United States of America, it would not have—you would not expect it to have its own Olympic team, you would not expect it to have a judiciary that would operate in Spanish and you would not expect its schools to operate in its primary language, in Spanish, and on down the line?

Commissioner FORTUÑO. Well, Senator, I am a big defender of State's rights and I have a record already here. Actually, I would say, for example, I understand how important it is to speak English to get ahead in life. If you open a newspaper in Puerto Rico today, you will see, on a Sunday, any Sunday, through the ad pages, 90 percent of the jobs require that you be bilingual. Actually, I have a record in the Education Committee in the House, on the House side, of introducing amendments that have gone through with the help of my two colleagues, other Hispanics on the committee, to make sure that actually our children in New Mexico and Colorado and in Puerto Rico learn English. Having said that, however, no one in Washington is going to tell me what language I'm going to use at dinnertime or when I pray with my family. And actually, the fact that we can use both languages is a great advantage in today's world. I'm proud of my heritage.

Senator MENENDEZ. I have no doubt that, at dinnertime or in prayer, no one would ever say that. The question is—when we talk about that, we need a clear definition of commonwealth. We also need a clear definition of what statehood means. So you would not expect an Olympic team, you would not expect a judiciary to operate in Spanish, you would not operate the public schools of Puerto Rico in Spanish; you would expect them to operate in English and you would expect to have Puerto Ricans be part of a U.S. Olympic team?

Commissioner FORTUÑO. Actually, our judiciary today, at the state level, can accept documents in both languages. The Federal court actually is in English. And I don't have a problem with that. On the contrary, I believe it is the right way to go. So that's the way it operates today.

I understand that there are—in different campaigns, many people have said different things. I would love for this committee, actually—and I know you would love to do that, as well—to clarify what it entails to do about everything, all three options, what it entails, at the end of the day. And I ask you, are you willing to accept a commonwealth that will pay no taxes, but on the contrary, will be getting all of this aid. Are you willing to accept a commonwealth that actually will have veto power over the laws that are approved here and actually will be able to enter into its own international trade agreements outside the United States?

Senator MENENDEZ. I don't think—

Commissioner FORTUÑO. And I believe that to be fair here, we should define everything. And I'm willing to go through that process anytime you want.

Senator MENENDEZ. OK. And my final question is—

Governor ACEVEDO-VILÁ. May I clarify the record, just for—if I may educate the members? The school system in Puerto Rico is in Spanish. And that's by law. The law says that the main language in our schools is Spanish. I learned that the founder of this Nation was Jorge Washington, not George Washington, and Puerto Rico was discovered by Cristóbal Colón, not Christopher Columbus. I didn't hear a clear answer about whether that will change. In the judicial system, you have the right to an interpreter if you speak English, but the prosecutor, the defendant and the judge—everything is conducted in Spanish, by law, just for the record.

Senator MENENDEZ. Mr. Chairman, I have one last question and I want to give it to Mr. Berríos Martínez.

I think have I finally figured out why you support Senator Martinez and the legislation. And I was going to ask you the question, but I just want to make sure that I heard you right in response to a previous question. Given that independence in the plebiscites that have taken place are only 5 percent, or have only gained 5 percent of the electoral vote, is it your thought that by having this structured two ways, where the people of Puerto Rico would vote first on the question of commonwealth, and presuming that you would join together with those who want statehood, you would eliminate the commonwealth status and then have a head-to-head on independence and statehood where, based upon previous plebiscites, statehood would win and then you would expect a rejection of the U.S. Congress, and therefore, having been rejected, the peo-

ple of Puerto Rico having been rejected, you would turn then to the expectation that your independence aspirations would be achieved? Is that your master plan here?

Mr. BERRÍOS. No, it's very simple.

[Laughter.]

Mr. BERRÍOS. It's very simple, but it's not yours. I will explain it to you. First of all, let me tell you that majorities come and go. We've been majorities in Puerto Rico before the United States converted us into a minority. In 1945, we were the majority. In 1914, we were the majority. Now, it was up to the pleasure and self-interests of the United States—and that's the usual thing—to convert Puerto Ricans, independentistas, into a minority. You gave flight to statehooders and commonwealthers and here's the consequence you have.

As soon as the playing field is leveled, I have no doubt as to the way the people of Puerto Rico will vote. But you must get interested in the problem. Because we have demanded many times—we have demanded statehood, independence, a commonwealth, and this Congress has never acted. If you put your heads and minds to it and come forth with a program, that can only lead to independence. It's the natural flow of the processes. When a full-grown nation becomes full-grown enough, it puts on its long pants.

You asked me before whether I would accept statehood or commonwealth. Well, of course not. Independence is an inalienable right. And that means we will fight for independence, struggle for independence always, under any circumstances. That's one of the important reasons why you will never accept us as a State: because we might be the minority now, but we will be the majority someday.

So act soon and avoid problems in the future. Thank you very much.

Senator MENENDEZ. I have just one last—what I hope might be a unifying question.

You have all made very clear your views and—your strongly held views. Can I just ask, is there—I think this is a difficult issue. Obviously it has a lot of different views. Is there a support—I think there is support in the Congress, particularly the Congress that is coming up, to help Puerto Rico in a variety of ways on what I would consider kitchen table issues: education, health care, economic development. Is there an opportunity for, at least on those issues, a consensus agenda among these three parties?

Governor ACEVEDO-VILÁ. I have no doubt about it that we can. And we have done so in the past, on issues regarding education, economic development, health, and we can work together. Actually, I had a meeting with the new Chairman of the House Ways and Means Committee, Charlie Rangel, today, and we agreed to try to work on an agenda that we can present to the Resident Commissioner to see if we can have common grounds, like before, on issues related to economic development, health and other issues.

Commissioner FORTUÑO. Senator, I have a record in the last 3 years of working in a bipartisan fashion here and back in Puerto Rico as well. I've worked with mayors from both parties. I've worked with the administration. When there was a need for a ferryboat between Vieques and Culebra, I was there. When there was

a need for additional buses for the transportation system, I was there. When there was a need for additional highway money, I was there. And I will continue to be there for those bread and butter issues.

Mr. BERRÍOS. You will see a big difference in our approaches between me and my tow friends here. You will see a big difference in the approach between our two friends here and myself. Of course, we worked together in Vieques. Of course. I was there for 1 year on the beaches, so I know. And they continued in their own ways for these issues. And if, tomorrow, we're going to raise the minimum wage, they can count on our party. But let that not be used as an excuse to avoid the real issue. That is what happened in the last 50 years. Let's deal with the issues, like education and health care. And things are worse now than 50 years back, to all practical effects, in many areas. So then we work with that, but then we forget about the real issues, which backs them up and which props them up. So if that is the question, then of course you can count on the Independence Party for the betterment of the Puerto Rican conditions, but not as an excuse to avoid your obligation to dispose of the territory. That's the main issue and that's why we're here. That's the excuse of Populares in Puerto Rico.

Senator MARTINEZ. Thank you, Mr. Chairman.

Senator MENENDEZ. Thank you very much. Let me, at this time, suggest that if there are any other questions any members of the committee may have, they may be submitted in writing and they will be submitted within the next 30 days and answered in the following 10 days by any of the witnesses.

I want to thank the distinguished panel. I also want to again thank all of the very distinguished guests that we had here today. This has been a very important hearing. Buenas tardes y gracias a todos.

[Whereupon, at 4:25 p.m., the hearing was adjourned.]

APPENDIXES

APPENDIX I

Responses to Additional Questions

RESPONSES OF GOVERNOR ANÍBAL ACEVEDO-VILÁ TO QUESTIONS FROM SENATOR CRAIG

“DEVELOPMENT OF THE COMMONWEALTH”

Question 1. One of your primary complaints about the Task Force Report is that it says your proposal for the “Development of the Commonwealth” is not an option. Your proposal calls for Puerto Rico to be recognized as a nation in a relationship that permanently binds the United States to its terms. The U.S. would have to cede to the Commonwealth the powers to nullify most federal laws and court jurisdiction and to enter into trade and other agreements and international organizations that States cannot. The U.S. would also have to grant an additional subsidy to the insular government and new incentives for U.S. investment and continue to grant all current program benefits to Puerto Ricans, citizenship, and totally free entry to products shipped from Puerto Rico. The Clinton Administration and the Justice and State Departments have also said that the proposal is impossible for constitutional, structure of government, and basic policy reasons.

Can you identify any Member of Congress or other federal official who has said that the “Development of the Commonwealth” proposal is viable?

Answer. The problem with the Task Force Report is that we do not even get a chance to discuss the specifics of an enhanced Commonwealth because it concludes without adequate legal support that the Commonwealth cannot exist under the Constitution.

Question 2. In lieu of the status resolution process recommended in the Report, you have asked Members to sponsor a bill that would support a convention in Puerto Rico to choose the territory’s status preference among three options—the recognized options of statehood and independence and a new form of what the bill calls the current “association.” You led your party in adopting a proposal for that association, the proposal for the “Development of the Commonwealth,” in 1998. It was incorporated into the Platforms on which you ran in 2000 and 2004, and you have continued to support it as Governor, including in testimony to a committee of the Puerto Rico House last year and after the presidential task force’s report was released.

Since the convention would propose your plan for the “Development of the Commonwealth” as Puerto Rico’s status choice, have you fully explained the contents and federal positions on the proposal to the Members you are asking to sponsor your bill?

Answer. Since my first day in office I have proposed that the first step should be for Puerto Ricans to elect a Constitutional Convention and such convention would have the option of drafting a proposal to the Congress for a new or amended compact. If Members of Congress support self determination for Puerto Rico they should support the Constitutional Convention option, regardless of the proposals that might emerge from that Convention. If the proposal is not to the liking of a particular member, be it an enhanced Commonwealth proposal, a statehood proposal or an independence proposal, such Member of Congress will have an opportunity to judge the proposal once it is presented. It makes no sense to judge it before it is even proposed.

Question 3. Article XIII (b) of your proposal for the “Development of the Commonwealth” would establish a mechanism whereby U.S. laws, other than those pro-

viding benefits to Puerto Ricans specified elsewhere in the proposal, would only apply to Puerto Rico if approved by the Commonwealth.

As there is no chance that the federal government would cede the power to determine the application of federal laws to the Commonwealth, are you more willing to accept the status options recognized in the report and otherwise by the federal government: a continuation of the current status, statehood, independence, and free association?

Answer. I disagree with both your characterization of the proposal and your “no chance” premise.

Question 4. Article VIII of your proposal for the “Development of the Commonwealth” would enable the Commonwealth to limit the jurisdiction of the federal courts in Puerto Rico.

How could the federal court tenably operate fits enforcement of federal law could be limited at the Commonwealth’s will?

Answer. Your premise is incorrect since what the proposal says is that the jurisdiction of the Federal Courts will be agreed up by both Puerto Rico and the United States in the Covenant.

Question 5a. Article IV (B) of your proposal for the “Development of the Commonwealth” would obligate the U.S. to continue to provide all current assistance to Puerto Ricans. Article V (A) would require the U.S. to provide the Commonwealth with a new, annual block grant, adjusted for inflation, for social assistance and infrastructure, and new socioeconomic development incentives. Congress repealed the \$3 billion-a-year Internal Revenue Code Section 936 tax exemption for manufacturing income from Puerto Rico and other possessions. It also rejected the essentially similar Sec. 956 amendment.

Very roughly, how much do you think the block grant should be?

Answer. The amount of the referenced block grant is one of the many issues that would be up for negotiation when there is an actual negotiation. To decrease the levels of economic dependency is one of the goals that the PDP has established for the future. Whatever the final cost of such a block grant, it would certainly be significantly less than the added cost to the Federal treasury of making Puerto Rico a state.

Question 5b. Would the socioeconomic incentives be tax exemptions for companies based in the States?

Answer. No.

Question 5c. Don’t you think that all of this financial assistance is inconsistent with the proposal that Puerto Rico be recognized as a nation and the proposed power for the Commonwealth to be able to nullify the application of federal laws and enter into international agreements that States cannot?

Answer. No. If read carefully, the proposal is designed to make Puerto Rico less financially dependent on the Federal Government, which contrasts with the case of statehood, where Puerto Rico would become much more financially dependent on the Federal treasury.

Question 6. Your representative at the House hearing told that committee that the Commonwealth “Covenant” ought to exempt Puerto Rico from the laws requiring the use of U.S. crewed, built, and owned vessels in shipping between U.S. ports. The Departments of Transportation and Defense have previously opposed this proposal. U.S. ship builders and owners and the AFL-CIO have opposed similar proposals.

Why do you think it is viable?

Answer. That could be part of the overall negotiations. It is pointless to assess viability without understanding the whole.

Question 7a. The director of your offices in the States told an assistant to a Member of the Committee that there should be different trade rules set by Puerto Rico for trade with Costa Rica.

What differences should there be?

Answer. That comment simply refers to the fact that there are certain products, particularly agricultural products, that are grown in Puerto Rico, but nowhere else in the United States. In those cases it is important to take into consideration the different reality of agriculture in Puerto Rico. And that, in fact, is already done to some extent, in the negotiations conducted by the USTR because the Commonwealth Government has alerted the USTR as to its specific situations.

Question 7b. And, if Puerto Rico could negotiate trade agreements with other countries and all trade between Puerto Rico and the States continued to be totally unrestricted as proposed in your plan for the “Development of the Commonwealth,” couldn’t products that the U.S. restricted entry of from other countries enter the U.S. if shipped through Puerto Rico?

Answer. If that were to be the route taken, I am sure that it is possible to prevent such outcome.

Question 8. In the past some of your colleagues have proposed that Puerto Rico be exempted from environmental laws.

What laws do you believe should not apply to Puerto Rico?

Answer. I do not believe that this written question and answer process is the right forum to discuss the full panoply of laws that should not apply to Puerto Rico.

Question 9. Your proposal for the “Development of the Commonwealth” calls for the federal government to cede to the Commonwealth the power to enter into trade, tax, and other agreements with foreign countries and into international organizations that States cannot—which are agreements that require national sovereignty—subject only to U.S. security requirements. The Department of State testified against the proposal in 2000, primarily because of the hybrid nature of the governing arrangement you propose: Puerto Rico would be a nation but U.S. citizenship would still be granted and U.S. domestic programs would still apply but Puerto Rico would be able to nullify U.S. laws. If Puerto Rico were to become a true nation, it would, of course, be able to establish its own foreign relations. But if it retained the benefits of a U.S. status inconsistent with true nationhood, Puerto Rican foreign relations could create conflicts with U.S. foreign relations, resulting in confusion abroad and imposing obligations on the U.S. which the U.S. could be unwilling to meet. Earlier this year, the State Department witness at the 2000 hearing reiterated that the views he expressed remain those of the State Department. During the term of your predecessor, State officials up to Secretary Powell had to intervene several times when the Commonwealth sought to enter into international agreements and organizations to which the U.S. had not agreed or to which it objected.

In light of this, why should we consider this aspect of your proposal viable?

Answer. Again, it is pointless to enter into such a discussion unless we have an actual good faith negotiation, which is not happening at this point.

Question 10. Your proposal for the “Development of the Commonwealth” would recognize Puerto Rico as a nation but in a permanent union with the U.S. that neither nation would be able to change or end. One of the basic elements of national sovereignty is that a nation can determine its relationships with other nations.

Wouldn't acceptance of your proposal mean that neither the U.S. nor Puerto Rico would be sovereign nations?

Answer. No. The question is premised on an outdated vision of sovereignty as a zero sum game, where one entity's gain must be another entity's loss. In the 21st Century nations are not absolute sovereigns. Every nation agrees to cede some element of what could have been an absolute sovereignty, simply as a matter of coexisting on the same planet. The Federal Union of States itself recognizes a dual sovereignty that cannot be unilaterally broken. There is absolutely nothing in the U.S. Constitution that prohibits an analogous dual sovereignty relationship with a non-State jurisdiction.

Question 11. You argued that the Task Force reiterated the federal position that one Congress cannot bind a future Congress regarding Puerto Rico policy as long as Puerto Rico remains a territory and does not become a nation or a State.

If one Congress could bind a future Congress regarding Puerto Rico policy while Puerto Rico remained a territory, wouldn't it compromise the future Congress' power under the Territory Clause of the Constitution? Wouldn't it compromise the sovereignty of the federal government? Wouldn't it in essence make Puerto Rico a different kind of State of the U.S.—in a nation where the States are intended to be equal—and, since it would not have equal voting representation in the federal government, make Puerto Rico a second-class State?

Answer. In the same fashion that one Congress may accept one territory as a state, and thus “compromise the future Congress' power under the Territory Clause”, Congress can enter into a different relationship. As explained by the late Chief Justice Rehnquist when he served at the Justice Department:

“One Congress could bind subsequent ones where it creates interests in the nature of vested rights, e.g., where it makes a grant or brings about a change in status. Thus we concluded in the early 1960's that a statute agreeing that the United States would not unilaterally change the status of Puerto Rico would bind subsequent Congresses.”

The Justice Department held this position for over 30 years, and it has failed to provide a reasonable legal explanation of why 15 years ago it changed this position. The Task Force Report had the opportunity to offer this explanation, but it offered no new analysis.

Question 12. Proposals for the federal government to cede national government powers to the Commonwealth without making it a nation have been rejected by the federal government for half a century, beginning with legislation by Resident Commissioner Fernos in the 1950s and Governor Munoz's negotiations with a task force

under President Kennedy. At the same time, federal officials have always said that the Commonwealth can continue to be a territory. The Task Force and the Clinton Administration have also said that free association is the status option most similar to “developed Commonwealth” proposals.

Is there a point at which you recognize that the federal government is not going to cede national government powers to the Commonwealth and you choose among the constitutional options: for the Commonwealth to remain a territory or to become a sovereign nation in a free association with the U.S., or choose one of the other recognized status options—*independence or statehood*?

Answer. The reasons why Congress has failed to act on proposals for greater autonomy for Puerto Rico have been varied and cannot be simplified into a statement that they “have been rejected by the Federal Government for over 50 years.” For 20 of those 50 years, Puerto Rico had pro-statehood Governors who were not interested in pursuing greater autonomy. It can also be said that several former territories failed to convince Congress to accept them as a state for long periods of time, yet this hardly seems like a convincing argument for them to have stopped those requests if that is what their citizens wanted.

Question 13. Your proposed “Development of Commonwealth” primarily consists of proposed changes in federal laws and policies.

Shouldn’t the people of Puerto Rico have the benefit of federal views on these proposed changes in federal laws and policies so they can make an informed decision if they are to elect a convention of delegates favoring different status proposals?

Answer. Yes. As I stated during the Committee hearing, I envision that during the Constitutional Convention there would be extensive consultation with the Federal Government.

RESPONSES OF GOVERNOR ANÍBAL ACEVEDO-VILÁ TO QUESTIONS FROM SENATOR MARTINEZ

Question 1. The Task Force calls on Congress to primarily provide for a plebiscite between: A) continuing the current status and B) seeking a non-territorial status. The Congress is not asked to take another step until after that vote. The Puerto Rico Democracy Act that I sponsored along with Senators Salazar, Craig, Landriau and nine others would provide for the plebiscite.

Would you agree that this bill will not preclude consideration of any status proposal or process after that vote?

Answer. No. There is a significant dispute as to the scope of the Territory Clause. It could be argued that any option where the United States retains certain powers under the territory clause (be it limited powers as we believe is possible) or unlimited powers (as the Task Force report contends) would be precluded from consideration after that vote.

Question 2. It is my understanding that you have referred to a “democratic deficit” in Puerto Rico and have further suggested allowing Puerto Rico to nullify federal laws and to enter into international agreements as a response to this perceived problem.

If your proposals for the “Development of the Commonwealth” are feasible, why not allow the Task Force’s plebiscite process to move forward and perhaps include a ‘Developed Commonwealth’ option in the second-round of this process?

Answer. That does not appear to be possible, as explained in the previous question.

Question 3. The Task Force recommended that Puerto Rico’s status preference be chosen by the citizens of Puerto Rico. Others have proposed that it be chosen by a convention. Under this alternative proposal, Puerto Ricans would only be able to accept or reject the convention’s choice after the federal government agreed to the proposal.

Wouldn’t it be more democratic to allow Puerto Ricans to directly choose the status of the territory?

Answer. This notion that the two step vote outlined in the Task Force Report is “more democratic” than the Constitutional Convention is false. If you arbitrarily limit the options available to the people in a direct vote as recommended in the Task Force Report, the process becomes totally anti-democratic. The Constitutional Convention is well recognized around the world as a valid democratic mechanism, but it has its deepest roots in U.S. history since it was the mechanism used for the adoption of the U.S. Constitution. The Constitutional Convention will have before it a full range of options and the voters will have the last word on approval, so I do believe voters will be directly choosing their political future. Accordingly, I disagree that a status choice among artificially limited options as suggested by the Task Force Report is “more democratic.”

Question 4. Governor, it is my understanding that you have objected to periodic plebiscites and have chosen instead to preserve the status quo. However, you have also recognized that the governing arrangement for Puerto Rico is not democratic in that Puerto Ricans do not have voting representation in the making of their national laws.

How can the current status be considered a permanent option if it does not provide for a democratic form of government at the national level?

Answer. I believe we need to use less the word “permanent” since death is the only permanent status known to mankind. The Commonwealth has served Puerto Rico and the United States well for over 50 years. In that same span of time several regions of the world have been under the sovereignty of different nations and at some point their status was also called “permanent”. The Commonwealth will be as permanent as the people of Puerto Rico and the United States desire for it to be. Clearly there are limitations, but the question is one of options. So long as the other options are less desirable, the Commonwealth will continue to be the preferred option.

RESPONSES OF GOVERNOR ANÍBAL ACEVEDO-VILÁ TO QUESTIONS
FROM SENATOR LANDRIEU

STATUS PROCESS

Question 1. You have complained that the initial plebiscite proposed by the Task Force would be unfair to what you call “commonwealth”, which the federal government considers to be a territory status, asserting that the vote for the non-territory statuses would be combined against it. But you have also said that Puerto Ricans want “commonwealth.”

So, isn't the threshold question the one that the Task Force's first recommendation poses: whether Puerto Ricans want the status quo or want to seek another status?

Answer. The problem with this formulation is that those who want to seek another status have completely divergent views. Imagine that you had to run against both a more liberal and a more conservative candidate in a race for the Senate. Would it be fair to you that if you get the most votes, but fail to get more votes than the combined votes of the more liberal and the more conservative candidate you would then be eliminated from the second round of voting and voters would no longer have Senator Landrieu as an option. That is essentially what the Task Force is recommending.

Question 2. There are astute members of your party and others who think that a vote between continuing the current status and merely seeking a democratic status would favor the status quo because people would vote for it rather than for seeking a new status that could wind up being one that they do not want.

Don't people often opt for the status quo over uncertain change? If a majority of the people want a non-territory status, however, what is wrong with them voting for that and then choosing among all of the options for a non-territory status?

Answer. Our job is not to try to game the vote by astutely anticipating how voters might react. We should be trying to provide the fairest voting process possible.

Question 3. The Task Force recommended that Congress provide for a plebiscite between continuing the current status and seeking a non-territory status. The Puerto Rico Democracy Act sponsored by Senators Martinez, Salazar, Craig, Landrieu and nine others would provide for the plebiscite.

Isn't it true that the bill, S. 2661, would not preclude consideration of any status proposal or process after that vote?

Answer. No. There is a significant dispute as to the scope of the Territory Clause. It could be argued that any option where the United States retains certain powers under the territory clause (be it limited powers as we believe is possible) or unlimited powers (as the Task Force report contends) would be precluded from consideration after that vote.

Question 4. You have said that Puerto Rico has a “democratic deficit” and have proposed making the governing arrangement democratic by allowing Puerto Rico to nullify federal laws and to enter into international agreements.

If you believe that your proposals for the “Development of the Commonwealth” are feasible, why, then, don't you embrace the Task Force's plebiscite process and propose that there also be a ‘developed Commonwealth’ option in the second-round plebiscite among non-territory options?

Answer. That does not appear to be possible, as explained in the previous question.

Question 5. You have asserted that Puerto Rico has tried the referendum route to choose its status preference and it has not worked. But all three referenda Puerto Rico has held have included proposals that are not status options. And only in 1967 was there a clear majority for a status proposal. The legislation that resulted from that “Commonwealth” proposal for Puerto Rico to be ceded some national government powers was rejected in the Congress. A different “Commonwealth” proposal, for tax, trade, and funding benefits and asserting autonomy from federal powers, did not win a majority but obtained a slight plurality over statehood in 1993. However, it too was rejected at the federal level. Statehood won most of the votes for a status option in 1998 but a slight majority was for no status option. You said that a “None of the Above” vote would be for your “Development of the Commonwealth” proposal but “None of the Above” was also apparently supported by half of the independence vote and by supporters of the current status and free association. In any case, “None of the Above” is not a status choice and is not a status that can be implemented. And your ‘developed Commonwealth’ proposal has been rejected as impossible by the Clinton Administration as well as by the Bush Task Force. The Task Force, the Clinton Administration, a 2000 law, the House in 1998, and many senators have recommended referenda with options recognized as valid by the federal government.

Isn’t the real reason that Puerto Rico’s local referenda have not resolved the issue that the referenda have always included proposals that are not status options according to the federal government, “Commonwealth” proposals in 1967 and 1993 and “None of the Above” in 1998?

Since the “Commonwealth” proposals in the 1967 and 1993 referenda were not proposals that the U.S. Government accepted and the 1998 referendum included the non-option of “None of the Above” weren’t the results of those referenda artificial?

Answer. I have to disagree with this characterization of the previous plebiscite events. The 1967 referendum did not resolve the issue because the 1968 elections in Puerto Rico were won by a pro-statehood governor who proceeded to disregard the vote outcome. Likewise, in 1993 when the Commonwealth option won again, Puerto Rico had a pro-statehood Governor which made it impossible to pursue a Congressional agenda to make good on the wishes of the voters. The Governor at the time argued, among other things, that because the Commonwealth option had failed to garner an absolute majority, that there was no mandate in favor of it. In 1998 the None of the Above option won so there was no mandate for a change in status, so the wishes of the voters, at that time, were respected. Trying to force to voters to chose among only the options that have less support is hardly a democratic solution to this problem.

RESPONSES OF GOVERNOR ANÍBAL ACEVEDO-VILÁ TO QUESTIONS
FROM SENATOR DOMENICI

Question 1. The Task Force Report recommends a first plebiscite for the people of Puerto Rico “to state whether they wish to remain a U.S. territory subject to the will of Congress or to pursue a constitutionally viable path toward a permanent non-territorial status with the U.S.” It seems appropriate that Congress should gauge the views of the people of Puerto Rico from time-to-time, but phrasing is important. Would you support a plebiscite that asked: Do you wish to continue the current relationship with the United States, Yes or No?

Answer. No. As stated in my testimony, I support a Constitutional Convention as the best process through which to address the issue of Puerto Rico’s political status in a fair, democratic and inclusive manner. That is why I support the “Puerto Rico Self-Determination Act”, (S. 2304/H.R. 4963) bipartisan legislation in both the House and Senate that represents a commitment by Congress to respond to the proposal advanced by the Constitutional Convention.

One of the many criticisms of, and objections to, the task force report, is its narrow, biased and demeaning definition of “Commonwealth” status. This has been explained in full in my testimony, as well as in testimony and commentary by several others. Therefore, any bill based on the task force report’s definition of “Commonwealth”—such as the “Puerto Rico Democracy Act” (S. 2661/H.R. 4867)—is flawed and slanted from the start. The clear intention of the sponsors of that bill is to artificially move Puerto Rico closer to becoming the 51st State of the Union by eliminating the only status option Puerto Ricans have favored since its establishment in 1952: Commonwealth.

If the Committee is interested in having Congress “gauge the views of the people of Puerto Rico from time-to-time” my sense is that a “gauge” can be accomplished without the formality and expense of a third plebiscite in twelve years. If the Committee believes that in order for Congress to take any action regarding the Commonwealth’s future, a plebiscite must be held to certify to Congress the wishes of the

people of Puerto Rico, then it is essential that the plebiscite be structured in a manner that is unbiased and gives no side any particular advantage.

A biased plebiscite will provide skewed results that will mislead Congress to making decisions based on faulty and prejudiced information. I do not believe that such a plebiscite is in the interests of Puerto Rico, the United States Congress or either the Democratic or Republican parties. I believe a plebiscite that asked: "Do you wish to continue the current relationship with the United States, Yes or No?" suffers from the same flaws of the task force report recommendations. It stacks the deck on one side of the ballot by having supporters of Statehood, Independence, and any other variations of possible status options, against "continuing the current relationship with the United States." That process would inevitably tip the scales against Commonwealth in order to knock that option out in that first vote. If there is only one vote authorized in the legislation, as in the Martinez bill (S. 2661), and the adversaries of the "current relationship" win a majority, Puerto Rico would be thrown into an uncertain state without any direction. If there is a second vote, as in the Fortuño bill in the House (H.R. 4867), Puerto Rico would then be on a fast track to statehood with a statehood v. independence runoff, where almost half the voters would not feel that they have an acceptable option. This approach is part of the agenda of statehood proponents who want to create an artificial majority for statehood. That makes no sense in the democratic tradition of the United States.

In short, such a plebiscite would constitute an antidemocratic exercise with a predetermined outcome. I cannot, of course, support it.

Question 2. The Task Force Report has identified the "free association" relationship that the U.S. has with three Pacific Island Nations as a model for a possible third, permanent, non-territorial status option available to Puerto Rico. How much consideration has been given in Puerto Rico to the "free association" relationship the U.S. has entered into with these Pacific nations, and do you believe it is a model worth further exploration between the U.S. and Puerto Rico?

Answer. The Popular Democratic Party, which I preside, supports the Commonwealth status which has served so well both Puerto Rico and the United States. The U.S. Supreme Court and the U.N. General Assembly have upheld the validity and legitimacy of this relationship and have recognized its unique and dynamic nature. And the people of Puerto Rico continue to favor this association.

At the same time, we support enhancing or developing our relationship with the United States and we have an open mind and are flexible in considering different paths through which to enhance our status.

With regard to "free association", I refer you to the legal study prepared by W. Michael Reisman, Professor of International Law at Yale Law School, which I submitted along with my testimony. Professor Reisman is one of the most respected scholars on international law and international relations.

Professor Reisman explains in his memo that, "Free association, as an international legal concept, subsumes a range of possible relationships between the associate and the principal—from the commonwealth arrangements that characterize Puerto Rico and the CNMI to the explicit compacts of free association establishing the RMI, the FSM, and Palau (collectively the FAS)." (page 68) He concludes that, "as a matter of international law, since 1952, Puerto Rico has ostensibly existed as a state freely associated with the United States of America." (page 101)

Professor Reisman accurately identifies and discusses the wide spectrum of existing "free association" arrangements.

By contrast, the task force report's treatment and discussion of "free association" as a status option is not only legally dubious and unnecessarily inflexible, but effectively shuts the door for the people of Puerto Rico to seriously consider that status model as defined by the task force. This conclusory remark in page 9 of the task force report should suffice: "[I]t would need to be made clear to the people of Puerto Rico that freely associated status is a form of independence from the United States and cannot (absent an amendment of the U.S. Constitution) be made immune from the possibility of unilateral termination by the United States."

The task force report goes on to say that if Puerto Ricans chose independence—or its model of "free association"—they would "cease to be citizens of the United States". Such a statement is not only constitutionally and legally dubious, but in essence precludes the great majority of Puerto Ricans, who cherish their U.S. citizenship, from giving serious consideration to a "free association" model as defined in the task force report, entailing independence, with possible unilateral termination by the U.S., and with no U.S. citizenship.

RESPONSES OF HON. LUIS G. FORTUÑO TO QUESTIONS FROM SENATOR DOMENICI

Question 1. The Task Force Report recommends a first plebiscite for the people of Puerto Rico “to State whether they wish to remain a U.S. territory subject to the will of Congress or to pursue a constitutionally viable path toward a permanent non-territorial status with the U.S.” It seems appropriate that Congress should gauge the views of the people of Puerto Rico from time-to-time, but phrasing is important. Would you support a plebiscite that asked: Do you wish to continue the current relationship with the United States, Yes or No?

Answer. The reason that the people represent to the federal government have not chosen a democratic form of government at the national government level—even though the vast majority want such a status—is confusion about the current status propagated by the faction of the “commonwealth” party that controls the governorship. As Gov. Acevedo told you his verbal testimony and written submissions, it claims that federal laws concerning Puerto Rico cannot be changed without the Commonwealth’s consent, Puerto Rico is not subject to Congress’ Territory Clause authority, and Puerto Rico is a freely associated state. Indeed, the literal translation of the name of the territorial government is the “Free Associated State of Puerto Rico.” As Gov. Acevedo’s submissions to you make clear, he also misrepresented the positions of the Congress, the courts, and the Executive branch regarding Puerto Rico’s status.

The central point of the executive order establishing the President’s Task Force on Puerto Rico’s Status issued by President Clinton and continued by President Bush is that the true status options need to be clarified. That has also been the point of Puerto Rican petitions for congressional action to enable the issue to be resolved and the Task Force report. Asking whether Puerto Ricans want to “continue the current relationship” would not clarify the options and would not result in an adequately informed vote.

The question proposed by the Task Force can be stated a little less starkly and perfected, however. The bill that I introduced with Representative Jose Serrano and 108 other Members of the House would, for example, ask whether Puerto Rico should “continue the existing form of territorial status as defined by the Constitution, basic laws, and policies of the United States” or “pursue a path toward a constitutionally-viable, permanent, non-territorial status.”

While the Task Force report language recommending a vote on continuation of the current status is not necessarily actual ballot language, the report language does correctly conclude that any ballot language should make it clear that the current status is that of a territory as defined by federal statutes approved by

Congress in the exercise of its territorial powers, as interpreted by the federal courts. Since even some lower federal court opinions have been taken out of context to confuse status definitions, Congress needs to take cognizance of U.S. Supreme Court ruling, applicable provisions of the U.S. Constitution and federal statutory law or policy, and on that basis sponsor a vote based on the most accurate and fair definition of the current status.

A vote on “the current relationship” invites subjective interpretation that is already well-known in Puerto Rico and Congress to be unrealistic.

It is imperative that Congress invite voters to express their wishes regarding continuation of the current status based on what it is under federal law, as opposed to what some in Puerto Rico may wish that is was in real life. Telling the truth about territory status and the sovereignty of Congress is not prejudicial to any legitimate interest, and is not unfair to anyone who wants informed self-determination to take place.

Question 2. The Task Force Report has identified the “free association” relationship that the U.S. has with three Pacific Island Nations as a model for a possible third, non-territorial status option available to Puerto Rico. How much consideration has been given in Puerto Rico to the “free association” relationship the U.S. has entered into with these Pacific nations, and do you believe it is a model worth further exploration between the U.S. and Puerto Rico?

Answer. There has been a lot of consideration of true free association by some people—a growing faction within the “commonwealth” party—but not by a lot of people. There has certainly been less consideration than there should be for a status that is recognized as:

- One of three decolonizing options for a non-self-governing territory by the United Nations, with the support of the United States, as well as by international law generally;
- A valid option by President Clinton and the House and 15 senators in 1998; and

- In the case of President Bush's Task Force and Clinton Administration, as the option closest to Gov. Acevedo's proposal for the "Development of the Commonwealth."

The reasons for the lack of adequate consideration are that:

- The faction of the "commonwealth" party that controls the governorship will insist on the "Development of the Commonwealth" proposal instead of free association as long as Congress does not join the Executive branch in clarifying that Gov. Acevedo's proposal is impossible;
- Gov. Acevedo claims that Puerto Rico is already in free association with the United States, as he told you; and
- The literal translation of the name of the territorial government is the "Free Associated State".

Real free association is based on separate sovereignty, nationality and citizenship, and under that status model by international agreement the U.S. and Puerto Rico could enter into a compact that would preserve close and beneficial economic, political and social relationships. For example, many current federal programs and services could be continued as agreed by Congress.

Unfortunately, the true nature of real free association compared to other options has never been fully explored because the Governor's party continues to espouse an unrealistic doctrine that "commonwealth" in effect is free association by federal statute. Additionally, the Governor's party proposes a constitutionally-impossible compact of association in which a "mutual consent" power for both the U.S. and Puerto Rico would mean that "commonwealth" is a non-territorial and non-colonial status.

The truth is that under international law and U.S. recognized criteria for free association, each party must be free to end the association in favor of the right to full independence. Thus, a compact of association that can only be ended with mutual consent gives each party a power to deny independence to the other, and this is essentially a territorial and colonial status that is free association in name only.

RESPONSE OF HON. LUIS G. FORTUÑO TO QUESTION FROM SENATOR CRAIG

Question 1. The Task Force recommended that Congress at this time provide for a plebiscite in which Puerto Ricans would decide whether they want to continue the current status or seek a non-territory status. Senators Martinez, Salazar, and 13 others have sponsored a bill for the plebiscite. The Task Force outlined steps it recommended be taken depending upon the results of the plebiscite. You, Representative Serrano, and 108 other House Members introduced a bill that would implement all of the Task Force's recommendations, including the alternative actions recommended depending upon the results of the plebiscite.

Why not just implement the Task Force's recommendation for the congressional action to take now?

Answer. The bill that introduced with Representative Serrano and 108 other Members of the House includes the steps recommended by the President's Task Force report. We believe the process recommended in the report is sound and should be provided for by Congress.

To understand the need for the steps recommended by the Task Force, it is important to understand that, during 108 years of American governance, the residents of Puerto Rico have never chosen among the options for the territory's status. The 1952 vote to ratify the local constitution was not a vote on the status question and did not involve status options. It also did not change the fundamental status of the territory.

In a 1967 locally-sponsored status vote, a majority favored a "commonwealth" proposal that would have given Puerto Rico some national government powers, but the proposal was rejected in Congress. In local votes on status in 1993 and 1998, no status option received a majority vote. In the 1993 vote, a plurality voted for a "commonwealth" proposal that consisted of economic benefits and other provisions that also was not accepted by the Congress or the President. In 1998, statehood received more votes than any other status option, but a line on the ballot to vote for none of the actual status options received half the vote. This half was cast: in favor of another "commonwealth" proposal for national government powers and greater economic benefits that successive federal administrations have rejected; by supporters of independence and free association; and by individuals unhappy with the governor at the time. Less than .1% voted for the current status, which was defined in language consistent with federal law, including the U.S. Constitution and federal law as interpreted by the U.S. Supreme Court.

Despite this record, Governor Acevedo claims that "Puerto Ricans have always supported 'commonwealth.'" By this, however, he does not mean the current terri-

tory status. Instead, he means a non-territory status that the federal government does not recognize as possible.

In this historical context, it is not clear to most voters in Puerto Rico what a vote for “commonwealth” really means. Does it mean a vote for the current territory status? Does it mean a vote for the status quo but not as a territory? Does it mean a vote for Gov. Acevedo’s “commonwealth” proposal for national government powers and greater federal economic benefits?

Statehood, independence, and free association are non-territory status options recognized under U.S. and international law. The federal government has rejected as legally and politically unrealistic over 15 formal proposals by Gov. Acevedo and his political predecessors for a non-territory “commonwealth.”

The three steps recommended by the Task Force are intended to clarify the wishes of the people through self-determination based on real options rather than Gov. Acevedo’s misinterpretation of the current status and impossible “commonwealth” proposal.

The first step is to conduct a federally-sanctioned vote on whether the voters want the current status to continue or to seek one of the non-territory status options.

It would be provided for both by the rouse bill sponsored with Rep. Serrano and 108 other House Members and by that the bill sponsored by Senators Martinez and Salazar and 13 other senators.

Under both bills, the process would not continue further unless a majority vote to seek a new status. Under the Martinez-Salazar bill, the next steps and the status options would be determined at that time. Under the Fortuño-Serrano bill, the next steps and options would be as proposed by the President’s Task Force except that it would be clear that free association between Puerto Rico and the United States would be a nationhood option for the territory in addition to independence.

RESPONSE OF HON. LUIS G. FORTUÑO TO QUESTION FROM SENATOR MARTINEZ

Question 1. The Task Force identified Puerto Rico becoming a nation in a free association with the U.S. as a possible status option, saying that the decision of whether it should be an actual options be made by the Congress and the President. The last Administration and bills passed by the House and sponsored by a number of senators from both parties included free association as an option. A faction of the “commonwealth” party advocates free association.

Do you, favor the inclusion of free association as an option?

Answer. Yes. Free Association is one of the three non-colonial options for a territory in U.S. and international law. It is supported by a growing thoughtful faction of Puerto Rico’s “commonwealth” party. It is the real status option closest in nature to Gov. Acevedo’s impossible status proposal.

Full consideration of the option has been squelched by Gov. Acevedo’s control of his party’s organization and because of the confusion, that has emanated from his claim that Puerto Rico is already freely associated with the United States—as he asserted in his initial statement in the hearing.

Free association is non-colonial because it preserves the right of each party to independence. The U.S. precedents for it also involve separate nationality and citizenship as well as separate national sovereignty, although in the case of Puerto Rico this would presumably require a choice between U.S. and Puerto Rican nationality and citizenship for individuals born before free association and Puerto Rican nationality and citizenship for persons born after free association.

As explained to the Committee by the Clinton Administration, free association between Puerto Rico and the U.S. would also presumably include close economic, political and social relations in a non-territory context, including continuation of many federal programs and services normally provided only in domestic areas of the United States.

RESPONSE OF HON. LUIS G. FORTUÑO TO QUESTION FROM SENATOR LANDRIEU

Question 1. The Governor has proposed that we support Puerto Rico holding a convention to choose among options of statehood, independence, and a development of what he calls the current “association”—which is unincorporated territory status—that he hopes would be his “Development of the Commonwealth” proposal. Senator Berrios has supported the Task Force recommendation for a plebiscite between the current territory status and seeking a non-territory status but says that the choice among non-territory options should be made in a convention.

Why are you opposed to the Governor’s proposal? What do you think of Mr. Berrios proposal?

Answer.

First with respect to Governor Acevedo's proposal for federal authorization for a local convention to choose among statehood, independence, and a new or amended form of what he misleadingly calls the current "association" between the U.S. and Puerto Rico

In 1989, the then governor, as president of the "commonwealth" party, was joined by the presidents of the other two major political parties, the parties favoring statehood and independence, in seeking federal action to enable the people of Puerto Rico to choose the territory's "ultimate status." In 1994 and again in 1997, the legislative Assembly of Puerto Rico formally petitioned Congress to either implement the proposal of the current Governor's party for a "commonwealth" that is not a territory, that is immune from federal law, and with greater economic concessions from the U.S., or to define the status options it was willing to consider, and, then, sponsor a status vote on the options.

As U.S. Senate Res. 279 of September 17, 1998 reminds us, status resolution for Puerto Rico will require changes to federal law and policy, and only Congress has the power to define the options for an ultimate future status.

The fundamental problem with the Governor's proposal is that it would invite Puerto Rico to choose a status proposal that is incompatible with the Constitution and basic laws and policies of the United States and, thus, is not a status option.

This proposal calls for the U.S. to be permanently bound to the terms of a Covenant with a nation of Puerto Rico that could nullify federal laws and court jurisdiction and enter into international agreements and organizations that States cannot while the U.S. grants an additional subsidy to Puerto Rico and new incentives for investment from the States and continues to grant all current assistance to Puerto Ricans, totally free access to any goods shipped from Puerto Rico, and citizenship.

The convention process is a tactic for delay of progress and for avoidance of accountability for the merits of Gov. Acevedo's status proposal. At best it would be an unproductive and wasteful bureaucratic duplication of the functions of the Legislative Assembly, which is duly-constituted to represent the residents of Puerto Rico with respect to federal affairs. More likely, it would raise expectations on the part of the people of Puerto Rico that cannot be fulfilled for the federal government to authorize the convention to choose a new or amended form of what Gov. Acevedo calls the current "association" when it is aware of what he proposes that new arrangement be.

Gov. Acevedo's convention proposal would also permit the convention to choose a status that did not represent the will of a majority of Puerto Rico's electorate—through a coalition or 'back-room' deal between delegates representing minority factions—and it would not give the voters a chance to consider that choice until after it is approved by the federal government. In fact, the formation of a coalition between supporters of Gov. Acevedo's "Development of the Commonwealth" proposal, advocates of free association, and advocates of independence in the convention is a goal of the proposal already stated by some of Gov. Acevedo's associates. Advocates of independence and free association would probably support Gov. Acevedo's "commonwealth" proposal in the convention to defeat the more popular option of statehood and recognizing that the "commonwealth" proposal would later be rejected by the federal government.

Gov. Acevedo's convention proposal is also flawed in other ways. First, the legislation purports to convey congressional recognition of an inherent right of the people of Puerto Rico to convene a constitutional convention on their political status. What does this really mean? The answer is that the bill was drafted to seek federal approval of a convention that is convened and operates in a manner less democratic than the constitutional convention procedure in the Constitution of the Commonwealth of Puerto Rico. Article VII, Section 2 of the constitution provides the procedure, and it requires a majority vote in a general election.

Additionally, Article VII, Section 3 of the constitution requires that any amendment be consistent with federal law. Another purpose of Gov. Acevedo's legislation is to circumvent this provision, which followed the federal law authorizing the constitution. The law provided the extent of the authority delegated to the territory with the constitution.

Since the 1989 petition of the three local party presidents, Congress has invested significant time and effort into devising a process and a mechanism for status resolution based on self-determination between options Congress can accept if approved locally. To adopt Gov. Acevedo's proposal would be to move backward, not go forward.

It is ironic that Gov. Acevedo claims the local constitution is part of a compact that cannot be unilaterally amended by Congress, and, at the same time, asks in the proposal for a unilateral amendment for a status convention.

Congress should keep its eye on the ball and continue to focus on what federal measures are required to ensure the U.S. citizens of Puerto Rico are able to exercise informed self-determination. This means self-determination that is informed by Congress as to legally-valid options,

That is what the Task Force report recommends, and Congress should carry out the recommendations of the report or in some other way act to ensure that disenfranchisement of U.S. citizens in Puerto Rico does not continue because Congress neglected its responsibilities under the Territory Clause of the U.S. Constitution.

Second, regarding Senator Berríos' convention proposal

The Independence Party's proposal is different from—and superior to—Gov. Acevedo's. Unlike Gov. Acevedo's proposal, it also is not incompatible with the Puerto Rico Democracy Act sponsored by Senators Martinez and Salazar and 13 other senators of the 111th Congress.

The critical difference between the proposals is that the Independence Party's proposal would limit its convention to choosing among the three statuses recognized by the Government of the United States and international law as legitimate—statehood and nationhood in free association with the U.S. as well as independence—and Gov. Acevedo's is intended to choose the 'developed Commonwealth' arrangement that I explained earlier, which has been rejected as impossible by the Bush Task Force as well as the Clinton Administration and every Member of Congress who has commented on it.

The Independence Party's proposal is, however, flawed in terms of democracy. A convention could choose a status not favored by a majority of the people through a coalition of convenience between advocates of statuses that have minority support. Puerto Rico's status choice—the territory's proposal to the United States—should be chosen by the people of Puerto Rico, not a limited group of representatives of the people, so that it is clear that the choice reflects the will of the majority of the people who would live under the status.

RESPONSES OF RUBÉN BERRÍOS MARTÍNEZ TO QUESTIONS FROM SENATOR DOMENICI

Question 1. The Task Force recommends a first plebiscite for the people of Puerto Rico "to state whether they wish to remain a U.S. territory subject to the will of Congress or to pursue a constitutionally viable path toward a permanent non-territorial status with the U.S." It seems appropriate that Congress should gauge the views of the people of Puerto Rico from time-to-time, but phrasing is important. Would you support a plebiscite that asked: Do you wish to continue the present relationship with the United State, Yes or No?

Answer. No. Since the nature of the present relationship is what is precisely at issue, the question should be as unambiguous as possible. The Popular Democratic Party in Puerto Rico favors the existing arrangement, but argues that it is non-colonial and non-territorial. We in the Puerto Rican Independence Party have argued for decades that the present relationship is both colonial and territorial. The statehood party does, too. In fact, the present relationship has been presented to the voters in recent times as "the best of both worlds" by those who favor its continuation, while at the same time denying its territorial nature under the U.S. constitution.

The phrasing referring to "a constitutionally viable path toward a permanent non-territorial status" is ambiguous as well, and can be misleading. There are those who would argue that an "incorporated territory"—one that has been promised statehood—is "constitutionally viable" toward such a permanent status, or that the current "unincorporated territory" could be a "constitutionally viable path" toward something else.

I agree with you, therefore, that phrasing is important. The question should leave no room for doubt. A clearer phrasing would be: "Do you wish to remain as a U.S. territory subject to the plenary powers of the U.S. Congress, Yes or No?" An unlikely "Yes" would, as you correctly point out, cause periodic referenda to gauge the views of the people of Puerto Rico. The most likely "No" vote would, on the other hand, leave no room for doubt as to the majority's desire for change in Puerto Rico.

Question 2. The Task Force Report identified the "free association" relationship that the U.S. has with three Pacific Island nations as a model for a third, permanent, non-territorial status option available to Puerto Rico. How much consideration has been given in Puerto Rico to the "free association" relationship the U.S. has entered into with these Pacific nations, and do you believe it is a model worth further exploration between the U.S. and Puerto Rico.

Answer. First off, let me point out that a non-colonial free association arrangement recognized by international law is, by definition, not a permanent status.

Under free association, either party may opt out at will. Since no political party in Puerto Rico proposes free association, its exposure in political debate has had limited impact. The option of full sovereignty or independence and the treaty-making power of the United States under its constitution, can provide for Puerto Rico and the U.S. to enter into flexible arrangements under Treaties of Friendship, Commerce, and Co-operation—common in international relations under international law. In other words, there is nothing that could be achieved, politically and economically, under a free association arrangement that independence could not achieve more easily and more flexibly.

Finally, the free association arrangements with the Micronesian nations have a very different context. These are sparsely populated, culturally and linguistically diverse islands spread over a vast area in the northern Pacific Ocean. Puerto Rico is a distinct, culturally cohesive, Spanish-speaking, Latin American nation of the Caribbean region, with four million inhabitants and an economically productive capacity which its lack of sovereignty has severely curtailed.*

Question 3. Your proposal to resolve the status question is first to have a plebiscite on whether to continue territorial status. Second, assuming that vote is for non-territorial status, you recommend a constitutional convention to decide among internationally accepted alternatives. Would you please elaborate? What do you believe those alternatives to be (Independence, Statehood, Free Association)? How would the people of Puerto Rico decide among these options in such a convention process?

Answer. The people of Puerto Rico proportionally would elect delegates representing non-colonial, non-territorial options to a Constituent Assembly. These delegates would formulate a majority proposal for a non-territorial, non-colonial option, subject to negotiation with the U.S. The negotiated proposal would then be brought for ratification by the Constituent Assembly and, subsequently, by the people of Puerto Rico. Under International Law, the three non-colonial options you mention are possible, so long as the inalienable right of the Puerto Rican people to independence is clearly recognized under any status, including annexation.

RESPONSE OF RUBÉN BERRÍOS MARTÍNEZ TO QUESTION FROM SENATOR MARTINEZ

Question 1. Mr. Berríos, I read your comments in *El Nuevo Dia* that refer to the recommendations you would be making before this committee today. It has been suggested that your recommendations are consistent with the Task Force recommendations. In your view, would you agree that the process presented in S. 2661 is impartial?

Answer. Although each of us is likely to have written it differently, S. 2661 certainly appears impartial in seeking to establish a fair process in harmony with the White House Task Force recommendations. Moreover, far from creating an “artificial” majority for anything, as has been argued by those who support inaction and the current commonwealth arrangement created under federal Public Law 600 (1950), the bill would make it possible for the initial and crucial decision in favor or against continued territorial status to be made by a clear majority. To characterize this as “artificial” would be to affirm that Congress remains indifferent as between colonial and non-colonial alternatives.

I take this opportunity to suggest that the question posed by S. 2661 be rephrased, as I have responded to Senator Domenici’s additional question for the record. The response to a clearer question along the lines of, “Do you want to continue as a territory under the plenary powers of the U.S. Congress, Yes or No?” would leave no room for ambiguous speculation. The duty of Congress is to decolonize—in U.S. constitutional terms, to dispose of the territory. S. 2661, in keeping with the White House Task Force recommendations, aims at fairness to the extreme that it even allows for the current territorial arrangement to remain—albeit subject to periodic assessments—in the unthinkable alternative of a majority wishing to remain as a colony.

The second phase recommended by the White House Task Force therefore depends on the outcome of the vote that S. 2661 would provide. As I responded to Sen-

*In today’s global economy, several other Latin American nations—Antigua, Argentina, Barbados, Bahamas, Chile, Costa Rica, Saint Kitts-Nevis, and Trinidad—and several nations elsewhere—Ireland, Malta, Singapore, among others—have higher per capita GNPs than Puerto Rico. Furthermore, between 1996 and 2003, ten Latin American nations—including Barbados, Bahamas, Costa Rica, and the Dominican Republic in the Caribbean region—have had a higher per capita GNP growth rate than Puerto Rico. Puerto Rico remains stagnant. *See*, 2005 WORLD DEVELOPMENT INDICATORS (World Bank) ALMANAC 2005; ECONOMIC REPORT TO TIDE GOVERNOR (Puerto Rico, 2003). More details would be provided upon request. (*Data compiled by MP Secretariat for Economic Affairs.*)

ator Craig's additional question for the record, the time will come for fine-tuning acceptable status options for both Puerto Rico, a Spanish-speaking, Latin American nation of the Caribbean, and the United States. Since last November's hearing by this Committee, from an international policy perspective, the United States faces a call by Latin America and the Caribbean for Puerto Rico's decolonization and independence. As stated by the unanimously approved Proclamation of the ideologically diverse Latin American and Caribbean Congress in Solidarity with Puerto Rico's Independence held in Panama last November 18-19, "solidarity and support for the cause of Puerto Rico's independence [is] an historic and principled claim of our America. Latin America and the Caribbean will not be truly independent until all its nations are." The Proclamation further states:

[I]t is a matter of launching a hemispheric dialogue on the subject, in order to agree as soon as possible on a transition schedule that will—once and for all—solve the problem in a dignified and efficient manner for all involved. Latin America can offer its good offices, promote that agreement, and guarantee compliance and the durability of that schedule.

(See: PROCLAMATION OF THE LATIN AMERICAN AND CARIBBEAN CONGRESS IN SOLIDARITY WITH PUERTO RICO'S INDEPENDENCE, Panama City, November 19, 2006; and accompanying annex, which I hereby request be made part of the record).

LATIN AMERICAN AND CARIBBEAN CONGRESS IN SOLIDARITY
WITH PUERTO RICO'S INDEPENDENCE

PROCLAMATION¹

Commemorating 180 years of the Peoples' Associative Congress of Panama called by the Liberator, Simon Bolivar, to finalize and secure our America's Independence, the Latin American and Caribbean political parties gathered in Panama City in support of Puerto Rico's Independence, and in harmony with the convocation for this event hereby

Resolve:

To reiterate to the World our solidarity and support for the cause of Puerto Rico's independence, an historic and principled claim of our America. Latin America and the Caribbean will not be truly independent until all its nations are.

To create a Permanent Working Committee for Puerto Rico's Independence² to coordinate and implement this Congress' resolutions.

To establish Solidarity and Support Committees in each of our nations to educate and create awareness regarding the need to integrate Puerto Rico, through its full sovereignty and independence, to the concert of free nations and thereby promote the best relations among the nations of this Hemisphere.

To offer to both the Puerto Rican nation as well as the Government of the United States, our cooperation and good offices, including the role of interlocutors and the tasks to lay the groundwork that may be necessary at the several levels of the Government of the United States, leading to a Hemispheric dialogue to resolve Puerto Rico's colonial problem.

To urge our respective governments that the Latin American and Caribbean community of nations promotes, as a region, the General Assembly of the United Nations Organization's urgent re-examination of the case of Puerto Rico in light of new international and regional conditions.

To espouse by all possible means the cause of Puerto Rico's independence.

To support the liberation of Puerto Rican political prisoners, a claim already made by the most diverse ideological sectors of the people of Puerto Rico.

¹ Unanimously approved by 33 political parties from 22 nations attending the Congress.

² The Committee was constituted by senator Ricardo Nunez, of Chile's Socialist Party; the Hon. Raul Alfonsin, former President of Argentina; the Hon. Ricardo Alarcon, President of the National Assembly of Cuba; Horacio Serpa, of Colombia's Liberal Party; Rolando Araya, President of the Socialist International for Latin America; Gustavo Carvajal, Founding President of the Permanent Conference of Latin American Political Parties (COPPPAL); senator Hugo Rodriguez Filippi, of Uruguay's Socialist Party; Rubén Giustiniani, President of the Socialist Party of Argentina; Tomas Borges, of the Sandinista Front of National Liberation of Nicaragua; Nils Castro, Secretary for International Affairs of Panama's Revolutionary Democratic Party (PRD); Cuauhtemoc Cardenas, of Mexico's Foundation for Democracy, Alternatives and Debates; senator Antonio Cafiero, of Argentina's Justicialista Party and President of COPPPAL; and Rubén Berríos Martínez and Fernando Martín, President and Executive President, respectively, of the Puerto Rican Independence Party. Subsequently, an additional and final member from Brazil's Workers Party (PT) will be selected by that party and join the Committee.

*To express to the Puerto Rican Independence Party our support, solidarity, and recognition, upon its 60th anniversary, for its constant and selfless struggle for Puerto Rico's freedom.**

Original in Spanish follows:

PROCLAMA DE PANAMA³

Resolvemos:

Aprobada por unanimidad por 33 partidos políticos de 22 países reunidos en el Congreso.

Reiterar ante el mundo nuestra solidaridad y apoyo a la causa de la independencia de Puerto Rico, reclamo histórico y de principios de nuestra América. América Latina y el Caribe no serán verdaderamente independientes hasta que todas sus naciones lo sean.

Crear un Comité Permanente de Trabajo por la Independencia de Puerto Rico⁴ para coordinar y hacer valer las determinaciones de este Congreso.

Establecer Comités de Apoyo y Solidaridad en cada uno de nuestros países para educar y crear conciencia sobre la necesidad de integrar a Puerto Rico, mediante su plena soberanía e independencia, al concierto de naciones libres y así promover las mejores relaciones entre las naciones de este hemisferio.

Ofrecer, tanto a la nación puertorriqueña como al gobierno de los Estados Unidos, las cooperaciones y buenos oficios, incluyendo las interlocuciones y gestiones necesarias ante las diversas instancias del gobierno de los Estados Unidos, que conduzcan al diálogo hemisférico para la solución del problema colonial de Puerto Rico.

Instar a nuestros respectivos gobiernos para que la comunidad de naciones latinoamericana y caribeña promueva, como grupo, que la Asamblea General de la ONU reexamine con premura el caso de Puerto Rico a la luz de las nuevas condiciones internacionales y regionales.

Difundir por todos los medios posibles la causa de la independencia de Puerto Rico.

Apoyar la liberación de los presos políticos puertorriqueños, reclamo que ya han hecho suyo los más diversos sectores ideológicos del pueblo puertorriqueño.

Expresar nuestro apoyo, solidaridad y reconocimiento al Partido Independentista Puertorriqueño al cumplir 60 años de su fundación, por su lucha sacrificada y consecuente por la libertad de Puerto Rico.

RESPONSE OF RUBÉN BERRÍOS MARTÍNEZ TO QUESTION FROM SENATOR CRAIG

Question 1. You testified that "Congress has refused to act" to "decolonize Puerto Rico." In 2000, a law was enacted providing funding for a Puerto Rican status choice among options proposed by Puerto Rico's tri-partisan Elections Commission as agreed to by the President of the United States, a responsibility delegated to the Task Force. In addition, serious legislative efforts were made between 1989 and '91 and 1996 and '98 that resulted in House-passed bills and bipartisan Senate support but were dropped due to lobbying by Puerto Ricans.

Isn't there really substantial Puerto Rican responsibility as well for the issue not being resolved?

Answer. Senator Craig, you are correct in pointing out that serious legislative efforts have been made since the end of the Cold War. I recall your involvement back in the late 80s and early 90s in this Committee. And it is true that paid lobbyists

* Translated by the Secretariat for North American Relations of the Puerto Rican Independence Party.

³ Al conmemorarse 180 años del Congreso Anfictionico de Panamá convocado por el Libertador Simón Bolívar para completar y garantizar la independencia de Nuestra América, los partidos políticos de América Latina y el Caribe reunidos en Ciudad de Panamá en el Congreso Latinoamericano y Caribeño por la Independencia de Puerto Rico, y en consonancia con la Convocatoria para el mismo.

⁴ El Comité de Trabajo se constituyó con Ricardo Núñez, Senador por el Partido Socialista de Chile; Raúl Alfonsín, Ex Presidente de Argentina; Ricardo Alarcón, Presidente de la Asamblea Nacional del Poder Popular en Cuba; Horacio Serpa, del Partido Liberal Colombiano; Rolando Araya, Presidente para América Latina de la IS; Gustavo Carvajal, Presidente Fundador de la COPPPAL; Hugo Rodríguez Filippi, Senador y delegado por el Partido Socialista de Uruguay; Rubén Giustiniani, Presidente del Partido Socialista de Argentina; Tomás Borges, Frente Sandinista de Liberación Nacional de Nicaragua; Nils Castro, Secretario de Asuntos Internacionales del PRD de Panamá; Cuauhtémoc Cárdenas, Fundación para la Democracia, Alternativa y Debate, México; Antonio Cafiero, Presidente de la COPPPAL; Rubén Berríos Martínez y Fernando Martín por el PIP de Puerto Rico. Posteriormente un último miembro adicional se integrara al Comité por parte de Brasil cuando la delegación de ese país lo seleccionara.

of those who oppose decolonization and change to a non-territorial status—particularly the commonwealth party leadership—worked to have Congress drop all efforts. It is also true that in those instances Congress as a whole—where the power over territories resides—has been “effectively lobbied” into inaction. The responsibility for colonialism, however, like any other form of subordination, can never be attributed to its victims.

Responsibility is a function of power. The United States, like any metro-political power, has the legal responsibility to dispose of its colonies. This translates in U.S. constitutional terms to the congressional power to rule and ultimately dispose of territories. Congress has acted several times with regard to Puerto Rico—prominently in the Foraker Act of 1900, the Jones Act of 1917, and the Law of Federal Relations (1950-1952) establishing the commonwealth arrangement. More than 50 years since the last time, Puerto Rico is still an unincorporated territory under the plenary powers of the United States Congress.

Before your Committee is a bill proposed by senators Martinez and Salazar—a good working document that could break the stalemate and allow a natural majority to respond to a simple question: Do the people of Puerto Rico wish to remain a colonial territory, Yes or No?

The time will come for fine-tuning acceptable status options for both Puerto Rico, a Spanish-speaking, Latin American nation of the Caribbean, and the United States, faced from an international policy perspective, with a call for decolonization by Latin America and the Caribbean. As Panama’s President Martin Torrijos phrased it last November in Panama:

[T]he basic problem is that Puerto Rico is the only Hispanic American nation that remains under a colonial regime. For Latin Americans, forever correcting this anomaly must be a matter of principle and a priority of continental proportions. What remains is to agree on whatever is necessary to concrete the Puerto Rican right to constitute an independent republic.

(See: President Torrijos, *Keynote Address from THE LATIN AMERICAN AND CARIBBEAN CONGRESS IN SOLIDARITY WITH PUERTO RICO’S INDEPENDENCE*, Panama City 2006; and *accompanying annex, which I hereby request be added to the record*).

But right now, as those who held the plenary powers over Puerto Rico’s decisions, it is the U.S. Government and the Congress that have the primary responsibility to initiate the process to dispose of the territory.

LATIN AMERICAN AND CARIBBEAN CONGRESS IN SOLIDARITY
WITH PUERTO RICO’S INDEPENDENCE

KEYNOTE ADDRESS BY THE HONORABLE MARTIN TORRIJOS ESPINO¹

Dear Latin American and Caribbean friends, cherished Puerto Rican brothers and sisters:

A warm welcome to you on behalf of the Panamanian people; and, particularly on behalf of the members of the Revolutionary Democratic Party, a warm and fraternal welcome.

You arrive at a special moment for Panama: barely three weeks ago, by an overwhelming majority, our citizens approved the enlargement of the Canal through a third set of floodgates. And last week, also by a very wide margin of the General Assembly of the United Nations, Panama was elected to represent Latin America and the Caribbean, as a member of the Security Council for the 2007-2008 term.

These are two manifestations of one single destiny: the confluence of wills to carry great causes forward. Our region becomes more competitive with a widened canal; and Latin America and the Caribbean win when they put forward a consensus position before an international forum.

Indeed. Panama has been constantly mentioned in international informative media and I trust that again they will look in our direction, now that the independence of Puerto Rico has been brought to the table at an extraordinarily representative international conclave.

The full incorporation of Puerto Rico into the family of Latin American and Caribbean republics has been present in the discourse of almost all ideological and political tendencies of our America for over a century.

For 23 years, this has been a recurring issue in the Resolutions of the Special Committee of the United Nations Organization to eliminate colonialism. This year,

¹ President of the Republic of Panama and Secretary General of the Revolutionary Democratic Party (PRD).

as in the preceding years, the UN resolution on Puerto Rico was again passed by consensus; that is, without opposition or reservations of any of the member States—which also means, without opposition or objections on the part of the United States.

The point is that for a century, our aspirations regarding Puerto Rico's independence have been part of a moral and cultural indebtedness dating back to Simon Bolívar and José Martí, but which we had not honored until now. Among other reasons, because this issue, like many others, became cloaked in Cold War rhetoric.

That rhetoric entangled the Puerto Rican question, over and over, throughout the past century, and has left it unresolved before us in the 21st century when no form of colonialism can be justified.

But now the situation is different. The Cold War is behind us and it need no longer contaminate our evaluation of the present and of the future. Foreign military bases, one aspect affecting Puerto Rico's situation much as they affected that of Panama, have disappeared. With changing times, the Isle of Enchantment lost the geopolitical or strategic value that was once attributed to it.

In that context, the last Resolution of the UN Special Committee on Decolonization has again pointed out (and I quote) that, "the Puerto Rican people constitute a Latin American and Caribbean nation that possesses its own unmistakable national identity". On the basis of this reality, the said Resolution once more calls on the Government of the United States to initiate a process directed towards the Puerto Rican people's recovery of the full enjoyment of its sovereignty.

The U.S. government has been sensitive to this call. Six years ago, thanks to an initiative by Rubén Berrios² at the White House, President Clinton created a Task Force, subsequently ratified by President Bush, on Puerto Rico's Status and its options.

Last December, the Presidential task force finally reported that the present Puerto Rican commonwealth status [Estado Libre Asociado] is of a colonial and transitory nature. Consequently, it established that as long as that status lingers, the Island remains subject to the powers of the US Congress that must legislate, in a definitive manner, to end the current situation.

But this also has other implications. While several forums in the United States are already discussing the relevance and replacement of the Puerto Rican regime, Latin America and the Caribbean are still absent from that debate. As the UN Resolutions clearly underscore, Puerto Rico is a Latin American and Caribbean nation and therefore we, the great family of Latin American and Caribbean nations, cannot remain indifferent to that discussion, nor be absent from it. On the contrary, it is our obligation to be an active part towards its adequate solution.

The gathering inaugurated here today is a step in that direction.

Why have the Socialist International, COPPPAL,³ and the Puerto Rican Independence Party preferred to hold this Congress here in Panama? Precisely because this country is important as an example of how a controversy of a colonial origin can indeed be resolved through a negotiated agreement and a schedule or timetable for decolonization.

That is the example which the Torrijos-Carter Treaties demonstrated to the world: how a conflict between a small nation and a world-power could be resolved through mutual agreement, with the solidarity and support of the peoples of our sister nations from Latin America and the Caribbean.

Even if in the present situation definite historical responsibilities could be assigned, it is no longer a matter of using the issue of Puerto Rico to strengthen anti-imperialist charges and allow the basic problem to go unresolved.

And the basic problem is that Puerto Rico is the only Hispanic American nation that remains under a colonial regime. For Latin Americans, forever correcting this anomaly must be a matter of principle and a priority of continental proportions. What remains is to agree on whatever is necessary to concrete the Puerto Rican right to constitute an independent republic.

In the 21st century, the Island has become a problem for Puerto Ricans and North Americans, as much as for Latin America and the Caribbean. The decline of Puerto Rico's productive economy is a consequence of that distortion and the elimination of military bases.

But the solution now is not the sudden proclamation of an independent republic without duly assured sustenance or guarantees for the welfare of its people.

Rather it is a matter of launching a hemispheric dialogue on the subject, in order to agree as soon as possible on a transition schedule that will—once and for all—

²President of the Puerto Rican Independence Party, Founding Vice-President of the Permanent Conference of Latin American Political Parties (COPPPAL) and Honorary President of the social democratic parties of the Socialist International (SI).

³Spanish acronym for the Permanent Conference of Political Parties of Latin America.

solve the problem in a dignified and efficient manner for all involved. Latin America can offer its good offices, promote that agreement, and guarantee compliance and the durability of that schedule.

Dear friends:

These are barely sketched ideas and it is up to you to complete the picture and delve more deeply into the subject, and make concrete proposals for the matter at hand. We must leave the Wailing Wall behind. Our motto must be to contribute realistic proposals to solve the root problem and to commit our permanent solidarity to that effort.

Thank you for coming to Panama to make that hope real. I hope you enjoy happy and fruitful days in Panama.

Thank you.*

Original in Spanish follows:

CONGRESO LATINO-AMERICANO Y CABEO EN SOLIDARIDAD POR LA INDEPENDENCIA DE
PUERTO RICO

DISCURSO DE APERTURA DEL HONORABLE MARTIN TORRIJOS ESPINO¹

Queridas amigas y amigos latinoamericanos y caribeflos, Apreciadas hermanas y hermanos puertorriqueños:

Reciban, en nombre del pueblo panameño una cálida bienvenida, y en particular de los militantes del Partido Revolucionario Democrático, una cálida y fraternal bienvenida.

Llegan en un momento especial para Panamá: hace apenas tres semanas se aprobo, por abrumadora mayoría ciudadana, la ampliación del Canal mediante un tercer juego de esclusas. Y la semana pasada, también por una amplísima mayoría de la Asamblea General de las Naciones Unidas, Panamá fue elegida en representación de América Latina y el Caribe, como miembro del Consejo de Seguridad para el periodo 2007-2008.

Son dos expresiones de un mismo destino: el concurso de voluntarios para llevar adelante grandes causas. La región se vuelve más competitiva con un canal ampliado, y América Latina y el Caribe ganan cuando pueden presentar ante un foro mundial una posición consensuada.

Si Panamá ha tenido una mención constante en los medios informativos internacionales y confío en que otra vez volverán la mirada hacia aquí, ahora que se trae al tapete, en un conclave internacional de extraordinaria representatividad, la independencia de Puerto Rico.

La plena incorporación de Puerto Rico a la familia de las repúblicas latinoamericanas y caribenas, tiene más de un siglo de estar presente en el discurso de casi todas las tendencias ideológicas y políticas de nuestra América.

Hace ya 23 años que este asunto se reitera en las resoluciones del Comité Especial de la Organización de las Naciones Unidas para eliminar el colonialismo. En el presente año, tal como en los anteriores, la resolución de la ONU sobre el caso de Puerto Rico volvió a adoptarse por consenso, es decir, sin oposición ni reservas de ninguno de los Estados miembros, lo que también significa que sin oposición ni objeciones norteamericanas.

El punto es que por un siglo nuestras aspiraciones sobre la independencia de Puerto Rico han sido parte de una deuda moral y cultural que se remonta a Simón Bolívar y José Martí, pero que hasta ahora no hemos sabido honrar. Entre otras cosas, porque este tema, como muchos otros, quedó envuelto en la retórica de la Guerra Fría.

Esa retórica enmarcó, una y otra vez, durante el siglo pasado la cuestión puertorriqueña, y nos la envió sin resolver al siglo XXI, cuando ninguna forma de colonialismo puede justificarse.

Pero ahora la situación es otra. La Guerra Fría quedó atrás y ya no tiene por qué contaminar nuestra evaluación del presente y el futuro. Desaparecieron las bases militares extranjeras, uno de los aspectos que afectaban la situación de Puerto Rico así como en su tiempo afectaron la de Panamá. Con el cambio de los tiempos, la Isla del Encanto perdió el interés geopolítico o estratégico que antes se le atribuyó.

En ese contexto, la última resolución del Comité Especial de descolonización de la ONU ha vuelto a sefralar que (cito), "el pueblo puertorriqueño constituye una nación latinoamericana y caribena que tiene su propia e inconfundible identidad

*Translated by the Secretariat for North American Relations of the Puerto Rican Independence Party

¹Presidente de la República de Panamá y Secretario General del Partido Revolucionario Democrático (PRD).

nacional". Con base en esta verdad, una vez mas dicha resolucion llama al gobierno de los Estados Unidos a emprender un proceso dirigido a que el pueblo puertorriqueno recuperar el pleno disfrute de su soberania.

El gobierno norteamericano ha sido sensible a ese llamado. Hace seis años, gracias a una gestión personal de Rubén Berríos² ante la Casa Blanca, el Presidente Clinton creó un Grupo de Trabajo sobre el estatus de Puerto Rico y sus opciones, que posteriormente fue ratificada por el Presidente Bush.

En diciembre pasado, dicho Grupo presidencial dictaminó, finalmente, que el actual estatus puertorriqueno de Estado Libre Asociado es de naturaleza colonial y transitoria. Por consiguiente, estableció que mientras ese estatus persista la Isla debe quedar sujeta a los poderes del Congreso norteamericano, el cual deberá legislar para poner fin, de manera definitiva, a esta situación.

Pero eso tiene otras implicaciones. Mientras que varias instancias norteamericanas ya discuten la pertinencia y el reemplazo del régimen puertorriqueño, América Latina y el Caribe todavía están ausentes del debate. Como bien se recalcan las resoluciones de la ONU, Puerto Rico es una nación latinoamericana y caribena y, en consecuencia, nosotros, la gran familia de las naciones latinoamericanas y caribenas, no podemos ser indiferentes a esa discusión ni estar ausentes de ella. Por lo contrario, nos corresponde ser parte activa de su adecuada solución.

El encuentro que hoy se inaugura es un paso en esa dirección.

Por que la Internacional Socialista, la COPPPAL y el Partido Independentista Puertorriqueno han preferido celebrar este Congreso aquí en Panamá? Precisamente porque este país es un importante ejemplo de como una controversia de origen colonial se puede resolver a través de una concertación pactada y de un programa o calendario de descolonización.

Ese ejemplo se lo dieron al mundo los Tratados Torrijos-Carter, a través de los cuales un conflicto entre una nación pequeña y una gran potencia se pudo resolver de común acuerdo, con el respaldo solidario de los hermanos pueblos de América Latina y el Caribe.

Aunque la actual situación haya tenido determinados responsables históricos, ya no se trata de usar el tema de Puerto Rico para redoblar denuncias antiimperialistas sin resolver el problema de fondo.

Y el problema de fondo es que Puerto Rico es la única nación hispanoamericana que permanece bajo régimen colonial. Para los latinoamericanos, corregir para siempre esta anomalía debe ser una cuestión de principios y una prioridad continental. Lo que toca es acordar lo necesario para materializar el derecho puertorriqueno de constituir una república independiente.

En el siglo XXI, el estatus de la Isla se ha vuelto un problema, tanto para los borinqueños y los norteamericanos, como para América Latina y el Caribe. El declive de la economía productiva de Puerto Rico es consecuencia de esa distorsión y de la eliminación de las bases militares.

Pero la solución no es plantear ahora la repentina proclamación de una república independiente que no tenga debidamente asegurada su sustentabilidad, ni garantice el bienestar de su pueblo.

Antes bien, de lo que se trata es impulsar un diálogo hemisférico sobre este tema, a fin de concertar cuanto antes un programa de transición que ??de una vez por todas?? solucione ese problema de manera igualmente digna y eficiente para todos los involucrados. América Latina puede ofrecer sus buenos oficios, alentar ese acuerdo y ser garante del cumplimiento y la sostenibilidad de ese programa.

Queridas amigas y amigos:

Estas son apenas unas ideas en borrador y es a ustedes a quien les toca completar y profundizar en el tema, y construir las propuestas del caso. Hay que dejar atrás el muro de las lamentaciones. La consigna debe ser aportar propuestas realistas para resolver el problema de fondo, y comprometer nuestra solidaridad permanente en ese esfuerzo.

Gracias por venir a Panamá para materializar esa esperanza. Que tengan ustedes unos días felices y provechosos en Panamá.

Muchas gracias.

RESPONSE OF RUBÉN BERRÍOS MARTÍNEZ TO QUESTION FROM SENATOR LANDRIEU

Question 1. You support the Task Force recommendation for a plebiscite between continuing the current territory status and seeking a non-territory status but then

²Presidente del Partido Independentista Puertorriqueno, Vicepresidente Fundador de la Conferencia de Partidos Políticos de América Latina (COPPPAL) y Presidente Honorario de los partidos socialdemócratas de la Internacional Socialista (IS).

propose that there be a convention to choose among the options for a governing arrangement that would be democratic at the national government level instead of a plebiscite as recommended by the Task Force.

Wouldn't a plebiscite be more democratic as the people would directly choose the status they prefer vs. having the choice made by a small group of people on their behalf? Also, wouldn't a plebiscite give assurance of reflecting the popular will because people would vote for the option they prefer and delegates in a convention could potentially form a majority that went beyond the popular will through a coalition of minorities?

Answer. The short answer to both questions is, No.

What we propose is NOT a bogus constituent assembly or convention such as that proposed by the Governor of Puerto Rico, which would propose changes to the existing commonwealth arrangement within the parameters of federal Public Law 600 (1950) that created it. That is not a change in the colonial nature of our present condition, but—at best—a change in form.

A constituent assembly or convention such as we propose would be made up of delegates directly chosen by the people, proportionally representing the non-colonial, non-territorial status of their choice, since colonialism would have been rejected in the first vote, as contemplated by S. 2661. Therefore the assembly delegates elected by the people would directly represent the people's status preference.

Whoever has a majority will draft a proposal to be negotiated with the United States government. The proposal negotiated and agreed upon by both the assembly and the U.S. government would have to be ratified, first by the assembly and, subsequently, by the people directly. A "coalition of minorities" elected by the people could add up to a majority coalition that then represents the majority of the people. However, its negotiated proposal would also be subject to a vote by the people, just as in the case of a single majority's negotiated proposal.

The problem with a direct vote on non-colonial, non-territorial status options is that, if the legislation is enacted by Puerto Rico's Legislative Assembly, people would end up voting for "wish-lists," like that of territorial commonwealth appearing on the ballot in a 1993 referendum touted as "the best of both worlds." Similarly, statehood with a guaranteed separate Olympic Team from that of the United States, or a separate Miss Universe contestant, or a guarantee that Spanish would continue to be the language of the courts, the legislature, the executive branch, and the language of instruction in our public schools is as much pie-in-the-sky as the commonwealth proposals.

As we know, of course, such proposals are either unconstitutional or unacceptable to the United States. Similarly, proposals acceptable to the United States could be unacceptable to the people of Puerto Rico.

If the proposed alternatives are left to Congress to define, there is a risk that no legislation may be approved. Congress has traditionally balked at any legislation that could be interpreted as a prior commitment to grant statehood. The inclusion of statehood in such prior legislation is the poison pill that would leave the status process in deadlock and continued inaction. It is therefore preferable for Congress to react to a non-colonial, non-territorial option proposed by a majority of representatives of the Puerto Rican people through the deliberative process of a constituent assembly.

As the American Patriot, Patrick Henry, said, "I know of no way of judging the future but by the past." And to avoid enormously false promises and even greater disappointments that the past has produced, the constituent assembly that should be convoked once the people of Puerto Rico have rejected continuing as a colonial territory should present a feasible option, consistent with international law, to be mutually agreed upon by the people of Puerto Rico and the Government of the United States.

As far as statehood and free association are concerned, the US, after all, also has a right to self-determination. Clearly, the U.S. recognizes that the Cold War is over, and that its colonial creature is one that must be left behind. And it has the obligation to say if the United States, a unitary federation, wishes to become a multi-national country by incorporating as a state of the Union a culturally distinct, Spanish-speaking, Latin American nation of the Caribbean whose primary allegiance is to itself, and not to the United States.

[Responses to the following questions were not received at the time this hearing went to press:]

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC, December 15, 2006.

Mr. JIM CLINGER,
Acting Assistant Attorney General, Office of Legislative Affairs, Department of Justice

DEAR MR. CLINGER: As I stated during the hearing on Puerto Rico's Status on November 15, I have allowed members 30 days to submit additional questions for the record.

Enclosed herewith please find a list of additional questions which have been submitted. If possible, I would like to have your response to these questions by Monday, January 15, 2007.

Thank you in advance for your prompt consideration.

Sincerely,

PETE V. DOMENICI,
Chairman.

[Enclosure.]

QUESTIONS FOR C. KEVIN MARSHALL FROM SENATOR CRAIG

Question 1. In addition to claiming that there is an irrevocable compact between Puerto Rico and the U.S., Gov. Acevedo asserts that there can be such an arrangement without the territory becoming a State. Gov. Acevedo submitted an extensive legal brief to the Task Force in support of these contentions.

Did the Task Force seriously consider the Governor's legal contentions?

Question 2. Gov. Acevedo claims that Puerto Rico is not a territory.

Does the Department of Justice agree with the Supreme Court, the Department of State, this Committee, the House, the Government Accountability Office, the Congressional Research Service, and the legislative history of the laws authorizing and approving Puerto Rico's local constitution that Puerto Rico remains subject to congressional powers under the Constitution's Territory Clause?

Is "Commonwealth" a word in the formal name of four States and another territory?

Question 3. Some associates of Gov. Acevedo claim that Congress can partially dispose of its Territory Clause power over a territory, ceding some, but not all, of the power to the territory, without making the territory a State or a nation, and limiting the Territory Clause power of future Congresses regarding the territory.

Does the Department of Justice agree?

Question 4. Gov. Acevedo argues that the Task Force report ignores jurisprudence, in particular noting the Supreme Court statement in *Rodriguez v. PDP* to the effect that Puerto Rico has authority over matters not ruled by the federal government, saying this proves that Puerto Rico is not a territory.

Does the report conflict with that ruling? Does *Rodriguez v. PDP* conflict with the Supreme Court's rulings that the Territory Clause continues to apply to Puerto Rico?

Question 5. Before the Task Force report was completed, the Governor complained to State Department officials that the prospective report would contradict some statements by some U.S. representatives during a U.N. debate in 1953. The Governor has the same complaint about the final report.

Did the State Department's representative on the Task Force agree to the report?

QUESTIONS FROM SENATOR LANDRIEU FOR C. KEVIN MARSHALL

Question 1. S. 2304 was introduced at the request of the Gov. Acevedo. It would support a convention in Puerto Rico choosing statehood, independence, or a new form of what the bill calls the current "association" between the U.S. and Puerto Rico. Puerto Rico is, of course, unincorporated territory of the U.S. but the Governor disputes this, contending that it is a "commonwealth." Gov. Acevedo has proposed a "Development of the Commonwealth" which he hopes will be the new form of "association" that the convention will choose. This proposal would permanently bind the United States to terms that include the Commonwealth having the powers to nullify federal laws and federal court jurisdiction and to enter into international trade and other agreements and organizations that States cannot. It would also require the U.S. to grant an additional subsidy to the insular government, new incentives for U.S. investment, and to continue to grant all current assistance to Puerto Ricans, free entry to any goods shipped from Puerto Rico, and citizenship.

Knowing Gov. Acevedo's intent that his "Development of the Commonwealth" proposal be the convention's choice for Puerto Rico's status, should the federal govern-

ment support the territory choosing a new form of the current status as its status preference?

Question 2. The bill introduced at Gov. Acevedo's request would support a convention in Puerto Rico choosing statehood, independence, or a new form of what the bill calls the current "association" between the U.S. and Puerto Rico. This proposal is intended to be Gov. Acevedo's proposal that Puerto Rico be recognized as a nation in a permanently binding relationship with the U.S. under which the Commonwealth could determine the application of federal laws and federal court jurisdiction and enter into foreign trade, tax, and other agreements and the U.S. would continue to grant citizenship, all current aid to Puerto Ricans, and totally free entry to products shipped from Puerto Rico and grant an additional annual subsidy to the insular government and new incentives for U.S. investment. A majority of votes in the convention would determine Puerto Rico's status proposal to the U.S., even if the majority included some delegates who were elected favoring another status.

Would adoption of the Governors "Development of the Commonwealth" proposal by a majority in a convention make the proposal acceptable if the proposal were said to represent the self-determination will of Puerto Ricans?

APPENDIX II

Additional Material Submitted for the Record

[Due to the amount of materials received, only a representative sample of statements follows. Additional documents and statements have been retained in committee files.]

PUERTO RICO-USA FOUNDATION,
San Juan, PR, December 11, 2006.

Hon. PETE DOMENICI,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

DEAR SENATOR DOMENICI: We thank you for the holding of public hearings on November 15, 2006 to discuss the findings of the President's Task Force for Puerto Rico's Status. The hearings were well run and extremely interesting.

We also want to thank you for giving us the opportunity to present our point of view by submitting the attached testimony which I hope will be made a part to the testimonies delivered at the hearings.

Your efforts as well of that of all members of the committee will help provide Puerto Rico with the proper mechanism to reach a final and permanent status which will be of great help in improving the economic development and improving the quality of life for island residents.

I hope you have a great Holiday Season.

Very truly yours,

JOHN A. REGIS JR.,
President.

[Enclosure.]

STATEMENT OF JOHN A. REGIS, JR., PRESIDENT, PUERTO RICO-USA FOUNDATION

Mr. Chairman and Members of this Committee: I want to express my deepest gratitude for the opportunity to express our point of view related to the findings of the President's Task Force for Puerto Rico Status, and our gratitude for the time and effort by the Chairman and members of this committee to review this very important subject.

Having been present at the hearing on November 15, 2006, I find it necessary to address our testimony on three specific topics which were mentioned or discussed during the hearing. These are:

1. The suggested plebiscite as suggested by the White House task force, and as included in bill S. 2661, vs. a constituents assembly as proposed by the Governor of Puerto Rico and as included in S. 2304.
2. The consideration of Free Association as an alternative for Puerto Rico's future.
3. The suggestion by Senator Bob Melendez of designing the plebiscite based on three alternatives; statehood, independence and a third "commonwealth" formula.

S. 2304 VS. S. 2661

Governor Acevedo-Vilá rejects the President's Task Force for Puerto Rico Status Report, as well as bill S. 2661 as he claims they are in favor of statehood. Governor Acevedo Vila is in favor of S. 2304 which promotes a constituents assembly as a method of solving Puerto Rico's status dilemma.

To the contrary of Acevedo-Vilá's claim, S. 2661 protects the Commonwealth against a coalition of state and independence supporters. Quite the opposite has happened in recent electoral activities. As a way of avoiding statehood independence

voters have always supported the Commonwealth option, as evidenced during the 1998 plebiscite where only 0.2% out of the usual 5.0% of independence voters remained loyal to that status, and recent elections including Acevedo-Vilá's own election in 2004 where 2.43% of independence voters voted under Commonwealth giving Acevedo-Vilá a narrow 0.2% victory over the statehood candidate. If anything, S. 2661 and the President's Task Force might be favoring the status quo.

Most important, in the recommendation of creating a constituent assembly the process does not have any representation of our present American sovereignty. The participation of the Federal Government is essential and must be a part in the negotiations of what items are acceptable not only for statehood, but for commonwealth as well. The absence of the Federal Government leaves a big part out of the status formula. In due time, and after the process has been designed, ultimately the people of Puerto Rico will make the decision.

Commonwealth proponents have tried unilateral efforts to modify or improve commonwealth with unconstitutional and/or unacceptable recommendations on thirteen previous occasions since 1952. On every occasion the Federal Government has either rejected the new suggestions or ignored the requests.

A constituent assembly will again go through extensive actions and end with the same results. Nothing achieved, but the status quo or commonwealth again remains. Nothing is solved.

FREE ASSOCIATION IS NOT A STATUS ALTERNATIVE

AN OPTION UNDER INDEPENDENCE—NOT A PERMANENT STATUS. Some have suggested that a Free Association is a viable option to be considered in this process. Free Association cannot be an option as a final status for Puerto Rico. In 1962 the United Nations under Resolution 1514 created the Decolonizing Committee to eliminate over 80 colonial states worldwide. In an attempt to lure some colonial states to become independent, the Free Association model was developed. It offered a cushion of benefits to help in a transition to independence. Free Association can be terminated by either side. Thus Free Association is not a permanent status. Once established, there is no turning back. While it may last 20, 30, or 40 years, the end result can only be independence.

Under a Free Association state, American sovereignty would be irreversibly terminated and under these conditions American citizenship is not possible.

Some Free Association sympathizers state American citizenship is viable under that status. Under some conditions it may be, but only for those living and having citizenship at the time. American citizenship cannot not apply to people born after the change of sovereignty.

Puerto Rican residents overwhelmingly treasure and persist on maintaining their American citizenship. Surveys on the subject would place figures of these wanting to retain American citizenship well over 90%. The loosing of American citizenship is not acceptable to Puerto Rican residents.

A TWO OR THREE WAY PLEBISCITE?

During the hearings Senator Bob Melendez suggested the holding of a plebiscite including the three status formulas as a better process.

While we believe the process under the recommendations of the President's Task Force is the best and fairest method to solve Puerto Rico's 108 year problem, a three way plebiscite could work as an alternative, but only after all three options are fully defined, and under the commonwealth formula two considerations must be made.

The first consideration is if the plebiscite process should follow the recommendations of the President's Task Force for Puerto Rico Status that the options be non-territorial and meet all constitutional requirements. Under this consideration the question is if the existing commonwealth should be included or not.

The second consideration is the definition of commonwealth to be used if commonwealth was to be included as one of the options. The definition to be used should be the definition accepted by the federal government, including the Department of Justice, President's Task Force, bills approved by the U.S. House of Representatives H.R. 856 (1998), U.S. Supreme Court and all other agencies, except a portion of the pro-Commonwealth Party who now claim attributes like permanency of status and citizenship, bilateral packs, and some nation like attributes that do not and have never existed.

In the event that a three way plebiscite process is chosen, the U.S. Government must decide how much more time they are willing to continue with this territorial, colonial status and continue the recommended number of plebiscites under the Task Force Report. After the number of years the U.S. is willing to continue maintaining

a colony, then the plebiscite should automatically be changed to the ultimate decision of the Puerto Rican people between Statehood and Independence.

Thank you very much Mr. Chairman to allow us to deliver our point of view in this matter.

STATEMENT OF ZORAIDA FONALLEDAS, REPUBLICAN PARTY NATIONAL
COMMITTEEWOMAN FOR PUERTO RICO

SUMMARY

The Republican Party of Puerto Rico concurs fully with the findings and recommendations of the Report of the President's Task Force on Puerto Rico's Status. Legislation introduced in the 109th Congress to implement the recommendations of the White House report includes S. 2661 and H.R. 4867. These measures are consistent with the findings and recommendations of the White House report and should be enacted as the first step in the journey of 4 million U.S. citizens in Puerto Rico from territorial dependency and restricted citizenship rights to full democracy and prosperity.

THE PRESIDENT'S TASK FORCE REPORT

In accordance with Executive Order 13183, as amended on December 3, 2003, the members of the Task Force engaged in research and consultations involving a broad spectrum of expertise and opinion, in order to prepare and submit a report to the President in 2005 on the legally valid political status alternatives available to the U.S. and Puerto Rico to achieve status resolution. In addition to other on-going efforts to prepare this report, on May 24, 2004, the Co-Chairmen of the Task Force visited Puerto Rico to discuss the status resolution process with leaders of the local government, local political parties, non-governmental organizations and others. The final report was presented to the President on December 22, 2006.

The Task Force report's historical analysis and findings are consistent with the Republican Party's recognition that this nation was born when the aspirations of the people for consent of the governed to the law of the land made continued colonial status intolerable. Accordingly, under the federal constitution adopted in 1789 an anti-colonial and anti-imperial tradition began that has included incorporation of territories into the union to redeem the promise of equality and consent of the governed through admission to statehood.

With the emergence of the United States as a world power and extension of American sovereignty to noncontiguous territories classified as unincorporated, both separate sovereign nationhood outside the United States constitutional system and incorporation into the union leading to statehood have remained legally valid territorial status resolution options. The United States has recognized the principle of democratic self-determination as a part of the status resolution process for all territories.

The principle of government by consent of the citizens has been implemented in the Commonwealth of Puerto Rico under a locally adopted constitution as to local matters not otherwise governed by federal law. The Task Force report recognizes that United States citizens of the territory properly should have access to a democratic status resolution process through which consent of the governed can be achieved as to national law as well. Specifically, there should be a mechanism recognized under both federal and local law through which the United States citizens of Puerto Rico can express their wishes with respect to continuation of the current status, as well as status options through which equal enfranchisement and consent of the governed can be fully implemented.

With these anti-colonial and anti-imperialist American principles in mind, the Task Force undertook comprehensive consultations and on-going research required to prepare and submit its report to the President. All political parties, representatives of local government and non-government organizations and interested individuals were given full access to the Task Force.

BIPARTISAN STATUS RESOLUTION POLICY

The White House report represents a bipartisan series of policy initiatives that include the Bush Memo of November 30, 1992 (Appendix A), and Executive Order 13183, signed by President Clinton on December 23, 2000 (Appendix B). These bipartisan efforts have been consistent with recent Republican and Democratic party platforms.

For example, the Republican Party Platform adopted at the historic 2004 GOP Convention in New York sets forth clear and compelling principles for resolving the

political status of Puerto Rico. As the 4 million United States citizens of Puerto Rico act democratically to advance status resolution through the local constitutional process, the 2004 GOP Platform provides a road map for both territorial and federal policy measures to address Puerto Rico's status.

First, the GOP Platform recognizes that each of the five U.S. unincorporated territories must follow its own path in relations with the federal government. Each territory faces unique social, political and economic development challenges and opportunities, and historically Congress and the President have addressed the status of each territory as it became ready for transition to a permanent status. However, the 2004 GOP Platform recognizes the right of U.S. citizens in all the territories to seek extension of increased rights and responsibilities under U.S. Constitution to the fullest extent consistent with their current status and readiness for greater self government.

In the case of Puerto Rico, the meaning of this GOP policy on status resolution could not be more clear or decisive. In the platform section entitled "Americans in the Territories" the policy of the Republican Party regarding the status of Puerto Rico is unequivocal:

- "We support the right of the United States citizens of Puerto Rico to be admitted to the Union as a fully sovereign state after they freely so determine."
- "We recognize that Congress has the final authority to define the Constitutionally valid options for Puerto Rico to achieve a permanent non-territorial status with government by consent and full enfranchisement."
- "As long as Puerto Rico is not a state, however, the will of its people regarding their political status should be ascertained by means of a general right of referendum or specific referenda sponsored by the United States Government."

These three policy statements define the political and legal procedures to address Puerto Rico's unique political status problem in accordance with historical and constitutional norms.

Specifically, it is culturally as well as historically significant that the platform of the national party of the President and the majority in Congress at that time stated that Puerto Rico is sufficiently integrated with the rest of our nation, socially, politically and economically, that its U.S. citizen population has earned the right to statehood, if that is the ultimate status they freely determine and choose.

The platform also states truthfully, to the U.S. citizens in Puerto Rico and the world, that under the current status Puerto Rico remains in a territorial condition, in which according to the federal constitution Congress is the repository of supreme sovereignty in Puerto Rico, with final authority to determine the legally valid status options available to Puerto Rico. However, the same statement also commits the national party to an ultimate status that is "non-territorial".

The term "non-territorial" is then defined in the same sentence as one in which the people are "enfranchised" with full and equal voting rights in the national law-making process, so that the principle of government by the consent of the governed is fully implemented at the national as well as local level.

Finally, the GOP platform recognizes that the U.S. citizens of Puerto Rico have not yet been afforded the opportunity for an informed act of self-determination on political status based on legally valid options recognized by federal law. Thus, the policy adopted in the platform calls for federal sponsorship of a referendum in which those eligible to vote under the laws of Puerto Rico can freely determine and express their wishes as to political status options that the President and Congress accept as legally valid.

It is also historically significant that the 2004 GOP Platform reflects Republican leadership that seeks bipartisan convergence based on the principles of the U.S. Constitution and political realism.

This is demonstrated by the fact that the National Democratic Party 2004 Platform language on Puerto Rico status resolution is less specific but nearly identical to the GOP platform language reviewed above. Specifically, the Democratic Party Platform states that:

- "We believe that four million disenfranchised American citizens residing in Puerto Rico have the right to the permanent and fully democratic status of their choice."
- "The White House and Congress will clarify the realistic status options for Puerto Rico and enable Puerto Ricans to choose among them."

Where the GOP platform calls for full enfranchisement through equal voting rights, the Democratic Party platform calls for an end to denial of equal voting rights through "disenfranchisement". Where the GOP platform recognizes the need for Congress and the President to define the legally valid options and sponsor a ref-

erendum, the Democratic Party platform calls for the White House and the President to “clarify” the “realistic options” and “enable” a vote between them.

The true meaning of these two national party platforms is the same. This represents bipartisan support for the principle that status resolution requires an informed act of self determined recognized by the federal government, based on options that are non-territorial, defined to mean full enfranchisement at the national and not just the local level of government.

Any locally adopted legislation to advance the status resolution process should fully take into account the clearly expressed principles of the GOP 2004 Platform, confirmed in a nearly identical but less explicitly defined policy statement in the 2004 Democratic Party Platform.

Accordingly, the Republican Party of Puerto Rico supports federal and local legislation that satisfies the following criteria:

- Local law and policy on status must unite Puerto Rico in supporting the principle that status resolution must be based on a non-territorial status as recognized under federal as well as local law and policy.
- Local status resolution procedures and options must not divide the voters in Puerto Rico on party lines, based on options that are not recognized at the federal as well as local level to be legally valid or politically realistic, as called for in both national party platforms.
- Puerto Rico status law must recognize that the current status is defined by federal law, not the local constitution which was adopted in 1952 without a choice of permanent or non-territorial status options, so that any status solution must be the result of a process recognized and ultimately approved by changes to federal rather than operation of local law alone.
- We must recognize the need for joint local and federal measures that are coordinated to produce a non-territorial permanent status, and that a majority vote for a non-territorial solution is the most effective step to make the federal government politically, legally and morally accountable for its responsibility to sponsor informed self-determination
- We must not mislead the public to believe that a local status assembly created under local law can substitute for the duly-constituted Legislative Assembly for purposes of coordinating status resolution procedures with the federal government.
- We must not mislead the public to believe a convention called under Article VII of the local constitution can properly address issues of federal law governing the status of Puerto Rico that are outside the scope of amendments to the local constitution. Article VII does not authorize such a local convention on status, and the attempt to call one would be unconstitutional.

STATEMENT OF NESTOR R. DUPREY SALGADO, MOVIMIENTO AUTONOMISTA
SOCIALDEMOCRATA (PUERTO RICANS FOR FREE ASSOCIATION AND SOCIAL JUSTICE)

Chairman Domenici, Ranking Minority Member Bingaman, Senators Martinez and Salazar, and other Distinguished Members: Thank you for this hearing concerning the unfinished task of defining a non-colonial, non-territorial status for the people of Puerto Rico.

Movimiento Autonomista Socialdemocrata (M.A.S.) or Puerto Ricans for Free Association and Social Justice, is primarily comprised of members of what is commonly called Puerto Rico’s “commonwealth” party, the Popular Democratic Party, who advocate the governing arrangement desired by the founders of the party and by a growing faction of its current members: free association between sovereign nations of Puerto Rico and the United States.

We have two main complaints about the Task Force report:

- 1) It considers free association to be a form of independence.
- 2) It does not clearly recommend that free association be an option if Puerto Ricans vote to seek a non-territory status.

Our complaints stems from the fact that free association and independence are recognized as being different forms of national sovereignty.

There are not many territories that have become nations in free association with other nations but there are some. Since 1985, the United States is in free association with three: the Federated States of Micronesia and the Republics of the Marshall Islands and Palau.

The United Nations has identified three statuses as options for decolonizing a territory: free association, independence, and integration with another nation, i.e., statehood. (General Assembly Resolution 1541, which was passed after Puerto Rico

was taken off the list of non-self-governing territories for which countries have to report annually.)

Free association and independence have been recognized as different forms of national sovereignty in legislation sponsored by 15 senators, including three current Members of this Committee—Senators Craig, Akaka, and Landrieu—and seven other current senators—Reid, Stevens, Kerry, Warner, Lieberman, Hatch, and Alard (105th Congress S. 472). There was similar recognition in a bill passed by the House (105th Congress H.R. 856).

President Clinton recognized free association and independence as two separate and distinct options. His Administration's representative also testified to this Committee that the option of free association should be clarified and should be at least as similar in the case of Puerto Rico as in the case of the Pacific islands in free association with the U.S., given the deeper and longer relationship that Puerto Rico has had with the U.S. than the Pacific islands did.

The United States defines itself as history's champion of democracy. But it took Puerto Rico through an act of war 108 years ago and since then the territory's status has not fundamentally changed. Since the establishment of the present Commonwealth arrangement in 1952, the people of Puerto Rico have requested, in 1967, 1993 and 1998, the development of the present relationship into a non-colonial, non-territorial compact or treaty based on the sovereignty of the people of Puerto Rico. However, the status of Puerto Rico has remained unchanged and undemocratic.

Further, as former Governor Rafael Hernandez Colon of our party has written of Puerto Rican views on the issue, "All factions do agree on the need to end the present undemocratic arrangement, whereby Puerto Rico is subject to the laws of Congress but cannot vote in it."

Governor Hernandez Colon has also written that, "The status debate has raged in Puerto Rico for half a century, dividing the people and breeding unending conflict—at worst bloody, at best bitter and destructive."

Additionally, "It is morally unacceptable, unfair, and harmful to Puerto Rico and the United States for Congress to relegate the issue to business as usual—that is, do nothing, wait for a Puerto Rican initiative, play with it for a while but take no action, wait for the next initiative, and repeat the cycle. Such insensitivity undermines Puerto Rico's capacity for self-government, inflicts considerable hardship on its society, and drains the U.S. Treasury."

"Movimiento Autonomista Socialdemocrata" (M.A.S.), or Puerto Ricans for Free Association and Social Justice, urges the Committee to act next year to enable the issue to be resolved in accordance with the aspirations of the people of Puerto Rico (in addition to the desires of the United States). In doing so, we respectfully request that it clarify that free association is among Puerto Rico's true options.

Thank you.

BUFETE IGARTUA,
San Juan, PR, November 14, 2006.

Hon. SENATOR PETE DOMENICI,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

DEAR SENATOR DOEMNICI: I am an American citizen resident of Puerto Rico, and have been pursuing the right to vote in Presidential Elections for the American citizens of Puerto Rico since 1991. Tomorrow your Committee will be holding a public hearing regarding Puerto Rico's status issue, particularly, the procedures set forth in the white House Report. I find it pertinent to bring to your attention, and that of the other Members of the Committee, the following observations:

1. If you evaluate different reports concerning the political status of Puerto Rico from Congressional and Executive sources, including those by the White House, as well as the position espoused by national and local politicians, you will find them to be generally contradictory and confusing. This may be due to ignorance of the development of the legal relationship between Puerto Rico and the United States and our present legal status as an incorporated territory of the U.S.

2. The White House Report proposes a political solution for the status of Puerto Rico that is not legally viable, that is, a two tier referendum where the American citizens of Puerto Rico would first decide on whether to stay as a territory of the United States, and depending on the outcome of the first referendum, to participate in a subsequent referendum to vote for either statehood or independence. Any attorney should be able to explain to the Committee, as the U.S. Attorney General should, that you cannot in-

volve American citizens by birth to vote for an option that continues to subject them to government without consent. It is legally and morally incomprehensible to promote a system based upon the proposition that taxation without representation is a valid option for American citizens. In Puerto Rico's case to continue to be deprived of Congressional representation and the right to vote in Presidential Elections while being federally taxed for over 5 billion dollars annually.

I invite you and the other Members of the Committee to evaluate first all of the legal documents and judicial opinions in the cases of *Igartua v. U.S.*, I, II, and III, litigated in the Federal Courts and related to our right to vote in Presidential Elections. The U.S. Department of Justice can provide you with the whole record. In any case, I am at your disposition to provide these, or any documents you deem pertinent.

Even under international treaties, particularly those to which the United States is signatory, and under international customary law, the proposal is not only legally unviable, but rather disrespectful to the four million American citizens residents of Puerto Rico, which have contributed so much to the Nation, inclusively in armed conflicts to ironically defend the democratic rights (government by consent) of citizens of other countries (Iraq and Afghanistan—More than 60 American citizens from Puerto Rico have died already in these conflicts.) That is, defending our flag under the embarrassing condition of being denied those same democratic rights.

I wonder, why so many people seem to be confused with the political status of Puerto Rico? Everybody wants to propose solutions randomly. Some Senators have even proposed a constitutional assembly, showing total disregard for the one held in 1952, when we adopted a constitution to govern our internal affairs, with a republican form of government like in states, and where we expressed our loyalty to the U.S. Constitution. Most probably many of these proposals are made out of ignorance of Puerto Rico's legal relationship as an incorporated territory of the United States, from where four million other former residents have moved to the fifty states. To determine where we are legally under the U.S. Constitution, and where we should go, is not such a complicated endeavor. In this regard, I would respectfully propose to this Honorable Committee to match the requirements imposed to other territories in order to become a state. After such analysis, your Committee would find that Puerto Rico has complied with the requirements to become a state as originally established in the Northwestern Ordinance of 1789. Moreover, that Puerto Rico is already more than 66% a state, if one considers that the Judicial Branch operates fully in Puerto Rico as in the states, that all federal laws apply to Puerto Rico as in the states, and that most of the Executive Branch operates fully in Puerto Rico.

Furthermore, I would respectfully propose that the Committee should rather evaluate the following: Why the four million American citizens residents of Puerto Rico are still being denied their full rights as other American citizens in their states to have government by consent? Why the U.S. Department of Justice has opposed our claim for voting rights in Presidential elections by arguing that treaties to which the U.S. is signatory are merely aspirational and not legally binding? Why an attorney in the U.S. Department of Justice dares to tell a Federal Judge in Puerto Rico not to grant our request even if found to be viable constitutionally? What steps can be taken to grant us our eight Congressmen? Why still opening hopes to pro-independence backers who have shown only a three percent support in elections since 1956? Why maintaining hopes to the pro-commonwealth status supporters when the White House has already established that it is a non-existent, none legally viable alternative?

Senator Dominici, and other fellow Senators of the Committee: I urge you to analyze the relationship of Puerto Rico with the United States within its proper legal context. This Committee can contribute to our human rights and make history by promoting a process that fully recognizes our legally acquired rights as American citizens by birth and provides us with all the benefits conferred by statehood. (Enclosed are three articles published by me in the San Juan Star.) I respectfully request that this communication and its annexes be made part of the official record of the Committee Hearing on Puerto Rico.

Sincerely yours,

GREGORIO IGARTUA,
Attorney-at-Law.

[Enclosure.]

WHY PUERTO RICO IS NOT YET THE 51ST STATE?

Puerto Rico was acquired by the United States in 1898, at its own initiative, by the Treaty of Paris. Article IX of the Treaty provided that “. . . Congress would dispose of the political rights of the inhabitants . . .” This was correctly in agreement with Art. IV-3 of the U.S. Constitution, which provides for Congress to regulate territories. In view of this constitutional authority, and of other constitutional dispositions, can we identify what the Federal Government has done legally for Puerto Rico, in order to determine exactly where and how it fits within the Federal political framework? Several, federal policies that have been adopted for Puerto Rico, “like for states”, answer this question simply without confusion, and are the following:

- a. Puerto Rico was organized by Congress into a republican form of government at the outset in 1900 by the Foraker Act (like states are).
- b. In 1917 Congress granted us American citizenship by the Jones Act, and in 1950 by birth, retroactively to 1941. (Like to citizens born in states).
- c. In 1948 Congress gave us the right to vote for the governor of Puerto Rico (like citizens of states who vote for their governor),
- d. In 1952 we adopted by direct vote a Constitution for local autonomy, that is to rule our internal affairs, and we swore our loyalty to the U.S. Constitution. The Puerto Rico Constitution was ratified by Congress and signed into law by the President. (Each state has a Constitution for internal applicability—U.S. Const. Art. IV-4.)
- e. The Federal Judicial Branch operates in Puerto Rico like in each state.
- f. All laws adopted by Congress apply locally, except those locally inapplicable.
- g. The Federal Executive Branch operates in Puerto Rico like in states.
- h. We defend American liberty and democracy abroad by active service of our residents in the Armed Forces of the U.S. (like residents in the states).
- i. We pay more than \$5 billion annually in federal taxes. (IRS Reports)
- j. We participate in the National Republican and Democratic Parties, and raise thousands of dollars for these.

All of the above policies are clear evidence that Puerto Rico is a territory that has been gradually incorporated to be like a state. In short, today we are 4th, 5th, and 6th generation American citizens with a federalist personality, one associated with Puerto Rico, and one associated with the Nation (like citizens of states).

All the above policies constitute statehood requirements met by Puerto Rico (since 1952) in excess of the requirements to other territories to become state (13 colonies were a state in origin). Notwithstanding how clearly the above policies make us fit squarely into the American constitutional framework, or like a state, Puerto Rico has not been granted the charter of statehood. Why we still are not the 51st state of the Union we agreed by direct vote to join permanently in 1952? The reasons are:

- a. The confusion created by the U.S. Supreme Court opinions in the 1901 Insular Cases (5-4) whereby it created two classification of territories: “incorporated territory” to be in possession of the United States to become a state at some point in time; and, “non incorporated territory” to be in possession of the United States not to become a state referring to Puerto Rico in this classification. This classification finds no legal support in the Constitution. Congressional policies for Puerto Rico after 1901 (cited previously) ignored these cases and incorporated Puerto Rico in the road to statehood, just like even the majority opinion in the Insular Cases predicted eventually would happen. Some politicians are still confused and insist we are still a non incorporated territory without acquired rights. These include, ironically, some statehood supporters who propose that discriminating against ourselves, sells statehood better.
- b. The definitional confusion brought about by Governor Luis Mufloz Malin (Popular Party) proposing that we adopted a special status relation with the U.S. in 1952 (referred to as the ELA) which he defined as a “ball of energy” which doesn’t fit legally like a state, nor fit legally like a Republic, but could grow with imagination. He confused the Puertoricans by making them disregard the legal step taken with the adoption of our constitution with a definitional political act that never took place. The federal government has recently affirmed that such status is non existent. Some “Populaces” continue to insist in keeping alive the confusion with the same non-viable proposal, or by pretending legal privileges for the American citizens of Puerto Rico from the Federal government, like treaty making power, which cannot be authorized for American citizens residing in the states,

and or that are not constitutionally viable, This pretension was already decided by the American Civil War against the states of the South.

c. Inaction after 1952 by the three Branches of the Federal Government to continue moving Puerto Rico in the process of incorporation to grant us all our rights as American citizens under statehood, considering only three percent of local residents support independence.

d. Discriminatory conduct from some US Government officials, who may have to legally respond one day for their actions, who use or include wrong and misleading information about our acquired rights, thereby promoting local and national confusion about who we really are.

e. The practice of the leaders of the three political parties of Puerto Rico, pro statehood—pro EJSA—pro independence—of not promoting their political status preferences within their proper legal, political, historical, and economic perspective, leading to more confusion whereby local residents may not know the real basis of the status they are supporting.

f. The adverse political influence of 936 corporations operating in Puerto Rico since their existence from 1921, opposing statehood in Congress that their lucrative tax incentive of billions of dollars survive.

g. The legal inconsistency of some of the Federal Judges in the U.S. District Court, in the U.S. Appeals Court (1st Circuit), and in the U.S. Supreme Court, with judicial disposition of cases treating Puerto Rico sometimes as if it were a state, (applying U.S. Constitutional provisions locally), while treating in others as discriminatorily as in the Insular cases, by ignoring all Congress has done in the road of incorporating Puerto Rico as a state, and or disregarding we are American citizens by birth.

h. The practice of, some journalists (both locally, nationally) to write articles about Puerto Rico lacking any sense of impartiality, in order to promote their own political status preference.

LET US CELEBRATE FEDERALISM ON JULY 25TH

The American citizens of Puerto Rico are confused about the correct legal political status of Puerto Rico. This state of confusion is worsened by the ignorance of many politicians, the contradictory opinions of local and federal courts, and particularly by the insistence of the leaders of the Popular Democratic Party that Puerto Rico has a political relation with the United States that does not fit within the constitutional framework of the United States, one that the Federal Government has already stated does not exist. The answer to our political dilemma can be traced and found by evaluating, and comparing what Congress has done legally and politically for Puerto Rico with the requirements it imposed upon former territories to qualify as states.

In the year 1787 the United States Congress adopted the Northwest Ordinance which established the statehood requirements for the territories west of the Ohio River. These requirements included a specific geographical area, a minimum population, an organized government with a governor, a legislature, and the nomination of a territorial delegate or Resident Commissioner to Congress. If one compares what Congress has done legally and politically with Puerto Rico since 1898 with the aforementioned requirements, one can come to the conclusion that Puerto Rico has been gradually moved by Congress to a federalist relationship like that of the Northwest Territories.

Puerto Rico became a U.S. territory in 1898 by the Treaty of Pass, which provided in part that “the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress”. Since then, the United States has gradually incorporated Puerto Rico, with the consent of the American citizens of Puerto Rico, to be like a state. In 1900 Congress adopted the Foraker Act which organized a government in Puerto Rico with three branches, executive, judicial and legislative, as in the states. In 1917 the Jones Act granted American citizenship to the residents of Puerto Rico. Less than one thousand residents, out of more than one million, declined American citizenship, and many of those who declined were persons born in Europe. In 1948 Congress authorized the first popular election of a governor in Puerto Rico. An act of Congress in 1951 re-affirmed American citizenship by birth, retroactive to 1941.

In 1952 the American citizens of Puerto Rico constituted themselves into a republican form of government, that is, a government with an executive, a judicial, and a legislative branch, in compliance with Article IV, Section 4 of the Constitution of the U.S., just like the states. The Puerto Rico Constitution was adopted in 1952 to rule internal affairs. The Constitution was freely approved by the American citizens of Puerto Rico, and it was ratified by Congress in a law signed by the President

of the U.S. In the Preamble to the Puerto Rico Constitution the American citizens of Puerto Rico swear their loyalty to the Constitution of the U.S., affirm their permanent irreversible union with the U.S., and subject themselves freely and voluntarily to the Supremacy clause of the Constitution of the U.S., and to the applicability of federal laws.

The American citizens residing in Puerto Rico are subject to the jurisdiction of all three branches of the federal government. The U.S. Census operates in Puerto Rico as in the states. In the 2000 census Puerto Rico had four million inhabitants, which qualifies us for eight electors for presidential elections, two senators, and six Congresspersons. The American citizens of Puerto Rico have demonstrated their loyalty to the U.S. by serving with dedication, distinction and honor in the Armed Forces of the U.S. in all armed conflicts since 1917. All income from sources outside of Puerto Rico is subject to federal taxation. Puerto Rico contributes annually to the U.S. Treasury more than five billion dollars from various sources of revenue. As a result Puerto Rico contributes more to the U.S. Treasury more than some states.

All of the above constitutes evidence that the American citizens of Puerto Rico have exceeded the requirements of the Northwest Ordinance for the Congress of the United States to grant the Statehood Charter to Puerto Rico. We have plenty of reasons to celebrate federalism. In Puerto Rico on July the 25th, the date we completed all of the requirements to become a state, and to pursue our full rights as American citizens to vote in presidential elections and to elect two senators and six Congress persons as in law and justice is our democratic right.

STATEMENT OF CHARLES J. COOPER, BRIAN S. KOUKOUTCHOS, AND DAVID H. THOMPSON, COOPER & KIRK, PLLC

THE POWER OF CONGRESS TO VEST JURIDICAL STATUS IN PUERTO RICO THAT CAN BE ALTERED ONLY BY MUTUAL CONSENT

This memorandum examines the question whether the Constitution permits the United States and the people of a United States territory to enter into a bilateral and binding political relationship that can be altered only by mutual consent. As we demonstrate below, Congress has the legal authority to enter into a binding compact with a territorial polity that confers a vested political or juridical status upon that polity that can be altered or revoked only by the mutual consent of the parties. Having established that proposition, we then demonstrate that such a relationship was created by virtue of a 1952 compact between the United States and the people of the Commonwealth of Puerto Rico.

INTRODUCTION

For the first four decades after the 1952 compact between the United States and the people of Puerto Rico, the United States Department of Justice consistently recognized (1) the federal government's general authority to enter into binding political compacts with the people of United States territories and (2) the binding nature of the commitments contained in the specific compact conferring substantial sovereign autonomy on Puerto Rico. The Justice Department recognized the plenary power of Congress and the President to fashion a wide range of political arrangements that would be necessary to effectuate the United States' varying global interests. Independence was appropriate for the people of the Philippines, statehood was appropriate for the people of Hawaii, and a state-like, autonomous political union, called "commonwealth," was appropriate for the people of Puerto Rico. Each political status—statehood, independence, and commonwealth—was acknowledged to be permanent: it had been created by the mutual consent of the sovereign parties, and it could be altered or revoked only by the mutual consent of the sovereign parties.

In 1990, however, the Department of Justice abruptly reversed itself in testimony before Congress commenting on proposed legislation relating to Puerto Rico's future political status. The testimony cited no precedent for this reversal and offered no basis for distinguishing OLC's prior analysis. In 1994, the Clinton Administration attempted to provide a defense of this new position in a memorandum commenting on the proposed legislation containing a provision conditioning future amendments on the mutual consent of the governments of the United States and Guam. *Memorandum for the Special Representative for Guam Commonwealth* (Office of Legal Counsel, July 28, 1994) (hereafter "1994 OLC Memo"). Emphasizing that Congress' legislative power over the territories, "like every other legislative power of Congress," is "plenary," the 1994 OLC Memorandum concluded that any congressional delegation of sovereign governing authority to the people of a territory "is necessarily subject to the right of Congress to revise, alter, or revoke the authority

granted.” *Id.* at 4-5. According to the 1994 OLC Memorandum: “[T]he retention of the power to amend or repeal legislation delegating governmental powers to a non-state area is an integral element of the delegation power. Congress therefore has no authority to enact legislation under the Territory Clause that would limit the unfettered exercise of its power to amend or repeal.” *Id.* at 5-6.

But this narrow concept of the federal government’s latitude with respect to territories is inconsistent with the very “plenary” congressional power that the 1994 OLC Memorandum constantly invokes. Far from supporting the proposition that Congress may not relinquish some of its power over a territory, the cases on Congress’ plenary power over territories confirm that, when Congress *chooses* to exert its plenary power to shape the federal government’s political relationship with the people of a territory, that power is as broad as it needs to be to effectuate Congress’ purpose, including the creation of a political status that endures until altered or revoked by mutual consent of the parties. If congressional power with respect to the government of territories is truly *plenary*—“full, complete in all aspects or essentials”¹—then how can it be limited to the creation only of political relationships of a single, rigid form—that is, territories of subservient and dependent status, forever subject, in every aspect of their law and life, to unfettered, unilateral congressional revision? Congress’ power in this area is indeed plenary and therefore is not so narrowly confined.

The courts, and the Justice Department before 1990, have long recognized that the territorial power, like other federal powers, demands flexibility on the part of Congress and hesitation on the part of those who would confine the exercise of those powers to rigid or arbitrary categories. In 1963 the Justice Department saw this very clearly, and quoted a memorandum written by Mr. Felix Frankfurter in 1914 when he was a law officer in the executive branch:

“The form of relationship between the United States and unincorporated territory is solely a problem of statesmanship.

1. History suggests a great diversity of relationships between a central government and dependent territory. The present day shows a great variety in actual operation. One of the great demands upon inventive statesmanship is to help evolve new kinds of relationship so as to combine the advantages of local self-government with those of a confederated union. *Luckily, our Constitution has left this field of invention open.* The decisions in the Insular [c]ases mean this, if they mean anything; that there is nothing in the Constitution to hamper the responsibility of Congress in working out, step by step, forms of government for our Insular possessions responsive to the largest needs and capacities of their inhabitants, and ascertained by the best wisdom of Congress.”

Memorandum Re: Power of the United States to Conclude with the Commonwealth of Puerto Rico a Compact Which Could Be Modified Only by Mutual Consent (Office of Legal Counsel, July 23, 1963) at 5-6 (emphasis added) (hereafter “1963 OLC Memo”). In 1971 the Justice Department’s Office of Legal Counsel, under then-Assistant Attorney General William H. Rehnquist, revisited the issue and again repeatedly relied upon and quoted Frankfurter’s view. See *Memorandum Re: Micronesian Negotiations* (Office of Legal Counsel, Aug. 18, 1971), Attachments at 3-4, 8 (hereafter “1971 OLC Memo”).²

The President and Congress have engaged in such “inventive statesmanship” for more than two centuries by adapting forms of territorial government and fine-tuning the nature of political relationships with particular territories. Indeed, Congress has been making binding compacts with the inhabitants of territories—compacts that could be changed or revoked only by mutual consent—since the very days when the Constitution was written. There is no practice of territorial administration—indeed, there may be no federal government practice of *any* kind—that has a longer lineage or that is more closely tied to the framing of the very constitutional provisions now said to prohibit it. And nothing in the text of the Constitution or the deci-

¹ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1006 (1971).

² See also 3 *Political Status Referendum: 1989-1991* (General Accounting Office) (1992) at 25 (“The U.S. Constitution grants Congress broad authority over territories and permits it great flexibility in admitting States or granting independence.”); *id.* at 27 (“the Congress’ broad authority—combined with each state’s unique characteristics and the increased complexity of government responsibilities—has led to many variations in admission procedures, time elapsed before attaining statehood, prerequisite conditions, and assistance provided.”); *id.* at 28 (“In short, a federal relationship—whether it be commonwealth or statehood—is never completely clear. Rather, there is a necessary and desirable obscure fringe area which permits many legal, political, and practical adjustments to take place.”)(quoting the 1966 report by the Commission on the Status of Puerto Rico).

sions of the Supreme Court requires Congress to foreswear that practice. The conclusion reached by the Office of Legal Counsel in 1963, and reaffirmed in 1971 under then-Assistant Attorney General William H. Rehnquist, remains sound today:

[T]he Constitution does not inflexibly determine the incidents of territorial status, *i.e.*, that Congress must necessarily have the unlimited and plenary power to legislate over it. Rather, Congress can gradually relinquish those powers and give what was once a Territory an ever-increasing measure of self-government. Such legislation could create vested rights of a political nature, hence it would bind future Congresses and cannot be “taken backward” unless by mutual agreement.

1971 OLC Memo at 1; *id.*, Attachments at 4 (quoting 1963 OLC Memo).

The new position advanced by the Justice Department in 1990—that a compact such as that made with Puerto Rico in 1952 is unilaterally revocable by Congress at will—is wholly inconsistent with the contractual nature of a compact. Since the Northwest Ordinance of 1787, both Congress and the Supreme Court have treated congressional compacts with territories as binding and unalterable except by mutual consent. The contrary position sometimes taken by the Justice Department artificially limits the range of options available to the President and Congress in exercising the Federal Government’s power over U.S. territories and in resolving delicate political issues touching upon the fundamental right of self-determination.

The position on Puerto Rico’s status taken by the Justice Department in 1990 is also inconsistent with the consistent position of the Department of Justice from the time of the Puerto Rico compact in 1952 until the early 1990’s, and repeatedly reaffirmed in departmental memoranda. Indeed, the proposition that Congress could revoke Puerto Rico’s commonwealth status was specifically presented to Congress in the Meader amendment in 1952, but Congress did not adopt that amendment and Public Law 600 was therefore deliberately enacted without any reservation of congressional power to alter or repeal the grant of authority made in that compact.

The Justice Department in the Clinton Administration nevertheless argued—quite astonishingly—that Congress’ enactment of Public Law 600 as a solemn compact with the people of Puerto Rico was “illusory and deceptive.” (1994 OLC Memo at 12). The entire compacting process was apparently a charade, Public Law 600 was an illusory and meaningless legislative gesture, and Congress, we are told, simply perpetrated a fraud upon the people of Puerto Rico. Unsurprisingly, the Supreme Court has flatly refused to “sanction . . . such a conception of the obligations of our Government.” *Perry v. United States*, 294 U.S. 330, 351 (1935). As the First Circuit has stated, “[w]e find no reason to impute to the Congress the perpetration of such a monumental hoax.” *Figueroa v. Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956).

In short, there is no support for a reading of the Constitution that unnecessarily restricts the political arrangements available to the President and Congress in fashioning binding consensual solutions to the Nation’s relations with the people of its territories. And, with respect specifically to Puerto Rico, the historical record is clear that the United States exercised its broad power to create a permanent political union with the people of Puerto Rico that can be altered only by mutual consent.

ANALYSIS

I. Congress Can Confer Vested Political Status On A Territorial Polity Pursuant To A Compact That Can Be Revoked Only By The Mutual Consent Of The Parties

The United States has been making compacts containing mutual consent clauses with territories since before the Constitution was written. The first such compact can be found in the Northwest Ordinance of 1787, which applied to the territories that later became the States of Ohio, Indiana, Illinois and Michigan. *See* 1 Cong. Ch. 8, 1 Stat. 50 n.(a) (1789). The Supreme Court recognized as early as 1810 that Congress can vest irrevocable rights through its legislative acts. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). Consistent with this well established practice, the Justice Department has traditionally espoused the view that a mutual consent provision is constitutional because Congress can vest rights in political status. As noted earlier, the Justice Department took this position in 1963 and adhered to it in 1971. The same position was again taken in 1975 with specific reference to Puerto Rico. *See Letter to Rep. Marlow Cook, Co-Chairman, Ad Hoc Advisory Group On Puerto Rico, from Asst. Atty. General Mitchell McConnell* (Office of Legislative Affairs, May 12, 1975) (hereafter “1975 OLA Memo”).

In the early 1990’s, however, the Department of Justice abandoned the Rehnquist analysis and took the opposite position. In hearings on a bill proposing a referendum on the status of Puerto Rico, Attorney General Richard Thornburgh raised

the issue of mutual consent clauses and conceded that “there are statutory precedents for attempting to make such limitations in certain restricted circumstances—commitments which this Administration believes must be honored.”³ Yet General Thornburgh nevertheless opined, without reference to any authority, that mutual consent clauses “remain[] subject to serious legal question.”⁴ The Attorney General acknowledged that, “in the past the Department of Justice has taken the position that Congress can agree” to be bound by a mutual consent restriction on future congressional action, but he cautioned that those “earlier opinions . . . are subject to serious question.”⁵ No explanation was offered for the Justice Department’s change in position, nor was the analysis contained in the Department’s prior memoranda reviewed or disputed, nor was any new authority offered, either by the Attorney General or any of the other seven administration witnesses who followed him.⁶

The Department subsequently provided similar testimony to the House of Representatives on another Puerto Rico bill, and drew strong criticism from members of the committee for offering “very broad statements of a political nature” rather than “some kind of legal analysis.”⁷ Reference was made to the 1962 report of the bipartisan United States Commission on the Status of Puerto Rico, which studied the compact issue and concluded: “The entire history of the United States/territorial relationship and the Federal Government/citizens relationship sustains innovation and change in accordance with needs. We can see no constitutional bar to prevent Congress, under the existing Constitution of the United States, from entering into innovative forms of relationships within the Federal structure, including a binding relationship entered to meet the needs and desires of the Puerto Rican people.”⁸ Noting that no explanation or authority had been offered for the change in the Justice Department’s position, a Congressman inquired, “Are we to think that the consistent constitutional practice of the Congress for many years was unconstitutional, just because now it is so claimed by the Justice Department? Where is the analysis about what happened in the past?”⁹

The Justice Department again took this position on mutual consent clauses in a 1994 memorandum addressing the status of Guam¹⁰ and in congressional testimony in 2000.¹¹ The 1994 Guam memorandum merely mentions the Department’s prior opinions in passing, without citation, and the Justice Department’s congressional testimony in 2000 does not even acknowledge the Department’s prior, conflicting

³ *To Provide for a Referendum on the Political Status of Puerto Rico: Hearings Before the Senate Comm. on Energy and Natural Resources on S. 244*, 102nd Cong., 1st Sess., (Jan. 30 and Feb. 7, 1991) at 210 (Statement of Attorney General Richard Thornburgh) (hereafter, “1991 Senate Hearings”).

⁴ 1991 Senate Hearings at 210.

⁵ 1991 Senate Hearings at 211.

⁶ Indeed, Assistant Attorney General Stuart Gerson admitted during questioning that the Department had no objection whatever to the position that the “Commonwealth of Puerto Rico is a unique juridical status . . . created as a compact between the people of Puerto Rico and the United States.” 1991 Senate Hearings at 218 (quoting from the language of the proposed bill).

⁷ *Puerto Rico Self-Determination Act. Hearing Before the Subcomm. on Insular and International Affairs of the House Comm. on Interior and Insular Affairs on H.R. 4765*, 101st Cong., 2d Sess. (June 28, 1990) at 113 (remarks of Rep. Fuster) (hereafter, “1990 House Hearing”).

⁸ 1990 House Hearing at 114 (Remarks of Rep. Fuster)(quoting the 1962 Commission Report by Senator Henry Jackson and others).

⁹ 1990 House Hearing at 113-14 (Remarks of Rep. Fuster). See also *id.* at 114 (“In the face of this, the Justice Department comes and makes an affirmation about the alleged unconstitutionality of our proposal with not even a footnote to support its claim.”). The Justice Department explained that it had relatively little time to prepare its testimony, but nonetheless insisted that its testimony was “more than adequate . . . for these purposes.” *Id.* at 115 (Remarks of Assistant Attorney General Stuart Gerson).

¹⁰ See 1994 OLC Memo. See also *Puerto Rico-United States Bilateral Pact of Non-Territorial Permanent Union and Guaranteed Citizenship Act: Hearing on H.R. 4751 Before the House Comm. on Resources*, 106 Cong. (Oct. 4, 2000) (written statement of William M. Treanor, Dep. Asst. Atty. Gen., Office of Legal Counsel), available at <http://resourcescommittee.house.gov/archives/106cong/fullcomm/00oct04/treanor.htm> (hereafter “2000 OLC Testimony”); *Puerto Rico-United States Bilateral Pact of Non-Territorial Permanent Union and Guaranteed Citizenship Act: Hearing on H.R. 4751 Before the House Comm. on Resources*, 106th Cong. (Oct. 4, 2000) (written statement of Richard Thornburgh), available at <http://resourcescommittee.house.gov/archives/106cong/fullcomm/00oct04/thornburgh.htm> (hereafter “Thornburgh Testimony”).

¹¹ 2000 OLC Testimony. A recent report issued by the Congressional Research Service (“CRS”) likewise proceeds without mention of this consistent, well-reasoned opinion that the Justice Department adhered to for forty years. The CRS all but ignores the issue of binding congressional compacts with territories, noting only in passing (in a single footnote) the existence of questions about the constitutionality and enforceability of mutual consent provisions in compacts. *CRS Report For Congress—Political Status of Puerto Rico: Background, Options, and Issues in the 109th Congress (May 25, 2005) at 19 n.65* (hereafter “2005 CRS Report”). The CRS does not elaborate on this point, nor offer any authority.

opinion—an opinion that traces its origins to Felix Frankfurter and that was endorsed by William H. Rehnquist.

The Justice Department memoranda and testimony opining that mutual consent clauses are unconstitutional and unenforceable do not identify any intervening judicial authority, nor any change in long-standing congressional practice, that would justify the Department's change in position. Nor are we aware of any such intervening authority. No court has held that Congress cannot bind the United States to a bilateral compact with a territorial polity that can be repealed or amended only by mutual consent. Nor has any court held that a solemn congressional agreement with the people of a territory is at best illusory and at worst deceitful.

Instead, the argument advanced by those who believe that Congress has no power to make binding commitments on the political status of a territory proceeds from two premises: (1) as a general matter, one Congress cannot bind a subsequent Congress; and (2) the terms of the Constitution supposedly recognize only three options for governance of an area—namely statehood, territorial status, or independence—and Congress has no power to agree to different terms with the people of an area that, like Puerto Rico, remains within the sovereign power of the United States. The first premise simply recites a legal maxim, while the second partakes of an abstract categorical approach to constitutional analysis that has been consistently rejected by the Supreme Court and that is inconsistent with 200 years of history. We address these propositions in turn.

A. Congress Can By Compact Vest Political Status in a Territorial Polity That Can Be Revoked Only By Mutual Consent.

Those who invoke the maxim that one Congress cannot bind a subsequent Congress usually overlook the fact that the seminal opinion of Chief Justice Marshall that announced the maxim also noted the exception to it:

The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, *so far as respects general legislation*, can never be controverted. *But, fan act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power.* Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest (sic) those rights.

Fletcher, 10 U.S. at 135 (emphases added). Such legislative “acts” include the making of contracts or compacts, *see id.* at 137; *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 92 (1821), and such congressional compacts can bind a subsequent Congress if the compact confers vested rights, including political rights. “There are steps which can never be taken backward.” *Downes v. Bidwell*, 182 U.S. 244, 261 (1901).

It is well-established that “the right to make binding obligations is a competence attaching to sovereignty.” *Perry v. United States*, 294 U.S. 330, 353 (1935). “The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or municipality or a citizen.” *Sinking Fund Cases*, 99 U.S. 700, 719 (1879). As Alexander Hamilton explained:

When a Government enters into a contract . . . it deposes as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its *power to legislate*, unless in aid of them. It is, in theory, impossible to reconcile the two ideas of a promise which obliges with a power to make a law which can vary the effect of it.

Alexander Hamilton, *Report on the Public Credit* (1795), reprinted in 3 THE WORKS OF ALEXANDER HAMILTON 518-19 (John C. Hamilton ed. 1850).

The Supreme Court has consistently rejected the notion that, when Congress has made a pledge in a compact or contract, “it is free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient.” *Perry*, 294 U.S. at 350. The Court refused to “sanction . . . such a conception of the obligations of our government.” *Id.* at 351. The Court explained in *Murray v. City of Charleston*, 96 U.S. 432 (1878), that the notion of an inherent legislative power to renege on solemn contractual commitments could not be reconciled with

the legislative power to make that commitment in the first place: “[H]ow an express contract can contain an implication, or consist with a reservation directly contrary to the words of the instrument, has never yet been discovered.” *Id.* at 444. Squarely rejecting the notion that a sovereign government cannot make commitments binding on its successors, the Court quoted Alexander Hamilton’s observation that a revocable government contract would “involve two contradictory things: an obligation to do, and a right not to do It is against the rules, both of law and of reason, to admit by implication in the construction of a contract a principle which goes in destruction of it.” *Id.* at 445 (quoting Alexander Hamilton).

Therefore, Congress enjoys the power to bind the United States by the creation of a variety of vested rights, and subsequent legislative efforts to repeal the vesting of those rights are *ultra vires*. For example, Congress can create vested rights of a contractual nature. See, e.g., *United States v. Winstar*, 518 U.S. 839, 895-97 (1996); *Lynch v. United States*, 292 U.S. 571, 579 (1934); *Fletcher*, 10 U.S. at 135. As the Court held in *Perry v. United States*, Congress’ enactment of a statute purporting to invalidate clauses in bonds previously issued by the United States “went beyond the congressional power.” 294 U.S. at 354. Congress can also create vested rights in property that cannot be unilaterally rescinded by a subsequent Congress—for example, by enacting land grants. See *Fletcher*, 10 U.S. at 132, 134. And Congress is also empowered to create vested rights in a particular legal framework. If Congress authorizes particular acts—for example, by enacting a rule that a particular financial stream does not count as taxable income—a subsequent Congress can of course repeal that statute and make that category of income taxable. But Congress cannot *undo* the prior law and go back and reclassify that income as taxable *ex post facto* and prosecute taxpayers for failure to report and pay tax on that income. Doing so would violate both the Due Process Clause and the Ex Post Facto Clause. A future Congress is *bound* as to that prior tax law with respect to those taxpayers at that time.

Finally, Congress can create vested rights of a political or juridical nature. That is, one Congress can bind its successors by the act of conferring a particular political status on a territorial polity pursuant to an agreement with that polity, thus making the agreed-upon status irrevocable except by mutual consent. Thus, as the Justice Department consistently recognized for 30 years, “The maxim that a legislature cannot limit or preclude the power of amendment of a subsequent legislature must, like any other legal maxim, be taken with a grain of salt.” 1963 OLC Memo at 4 (internal citation omitted). See also 1971 OLC Memo, Attachments at 2. “[V]ested rights or accomplished facts can be created in the political field, and, indeed, in the specific area of the political evolution of the Territories of the United States.” 1963 OLC Memo at 5; 1971 OLC Memo, Attachments at 3.

For example, when a United States territory (e.g., the Wisconsin, Oklahoma or Arizona Territories) or an independent nation (e.g., the Republic of Texas) petitions to join the Union as a State, the typical path to statehood is that negotiations between the parties ensue, Congress imposes conditions, the people of the territory or nation accept the conditions and draft a constitution, and Congress eventually enacts an admission or annexation statute. Thus the power of the United States to “conclude[] compacts with its Territories . . . cannot be questioned at this late date.” 1963 OLC Memo at 3.¹² A compact on statehood between Congress and the people of a territory (or nation) cannot be entered unilaterally and cannot be undone unilaterally by either party. Once a State is in the Union, it cannot change its mind and leave: there is no right of secession. See *Texas v. White*, 74 U.S. (1 Wall.) 700, 725-26 (1869). A State’s acceptance of juridical status as a State is irrevocable except “through consent of the States.” *Id.* at 726. Similarly, Congress cannot undo the act of union and return a State to its prior status of territory or independent republic by repealing the original admission statute. The “tie” that binds a State to the Union cannot be severed “without at least the consent of the Federal and state governments to a formal separation.” *Downes*, 182 U.S. at 261.

Equally irrevocable is the legislative act of granting a territory independence. The Philippine Islands became United States territory by a treaty of cession from Spain at the same time as Puerto Rico, following the Spanish-American War in 1898. The Philippines became a Commonwealth pursuant to congressional enactment and then were granted independence by the United States after World War Two. Congress cannot annex the Philippines and reestablish U.S. sovereignty over them by the simple expedient of unilaterally repealing the statute recognizing Philippine independence. The people of the Philippines would have to consent. Thus, as the Justice

¹²The CRS recently acknowledged that Congress has the power to make compacts with territories, 2005 CRS Report at 16, and that many different models for territorial status have been employed by Congress through the years, *id.* at 13-14.

Department explained in 1963, the “grant of statehood or independence to a Territory by one Congress unquestionably has the effect of precluding all subsequent Congresses from exercising any further powers under Article IV of the Constitution with respect to that Territory. The repeal of an act granting statehood or independence cannot undo the past and restore territorial status.” 1963 OLC Memo at 5; 1971 OLC Memo, Attachments at 3.

The Justice Department in 1963 anticipated that “[t]he argument could be made that this example is not conclusive because a Territory loses that status by virtue of the grant of statehood or of independence, but that the unlimited and plenary power of Congress over a Territory may not be bargained away, as long as territorial status is retained.” 1963 OLC Memo at 5; 1971 OLC Memo, Attachments at 3. The memorandum then disposed of this objection: “In at least one field, however, such a contention would be clearly incorrect. . . . Congress can limit its plenary power over a Territory by extending the Constitution to it either by express statute, or by incorporating it into the Union. And this step which does not terminate territorial status as such cannot ‘be taken backward.’” 1963 OLC Memo at 5 (quoting *Downes*, 182 U.S. at 261); 1971 OLC Memo, Attachments at 3 (same).

Thus, in *Springville v. Thomas*, 166 U.S. 707, 708-09 (1897), the Supreme Court held that a congressional enactment would be unconstitutional if it were read to authorize the legislature of the Utah Territory to provide for jury trials as the territorial government wished. Such a congressional enactment was beyond Congress’ power insofar as Congress had already extended the full protection of the Constitution to that territory, including the Seventh Amendment’s requirement of civil juries. “[T]he organic act of that Territory had expressly extended to it the Constitution and laws of the United States. As we have already held, that provision once made could not be withdrawn.” *Downes*, 182 U.S. at 270. *See also id.* at 271 (“where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith”). Thus a federal law enacted by one Congress to incorporate a territory thereafter imposes “limitations upon the power of Congress in providing a government for [the] territory.” *Dorr v. United States*, 195 U.S. 138, 144 (1904).¹³

Given that “one Congress can restrict the plenary power of its successors over Territories by extending the Constitution to it,” it follows, as the OLC explained in 1963 and reaffirmed in 1971, “that such a limitation is not inconsistent with the view that Congress may take other irreversible steps on the road of a Territory toward statehood, independence, or some intermediate or novel status.” 1963 OLC Memo at 5; 1971 Rehnquist Memo, Attachments at 3. In 1971, this analysis led the future Chief Justice to conclude:

[O]ne Congress could bind subsequent ones where it creates interests in the nature of vested rights, *e.g.*, where it makes a grant or brings about a change in status. Thus we concluded in the early 1960’s that a statute agreeing that the United States would not unilaterally change the status of Puerto Rico would bind subsequent Congresses.

1971 OLC Memo at 1 (citing the 1963 OLC Memo at 3-6). *See also* 1963 OLC Memo at 1 (“Congress has the power to work out forms of government for Puerto Rico which involve grants of self-government which can be modified only by mutual consent.”).

Similarly, in 1975 then-Assistant Attorney General Mitchell McConnell advised Congress: “[I]t is possible for Congress to bind future Congresses with respect to Puerto Rico by means of a ‘compact.’ This may be viewed either as the vesting of certain rights, *see, e.g., Downes v. Bidwell*, 182 U.S. 244, 261-71 (1901), or as the granting of a certain measure of independence which once granted cannot be retrieved.” 1975 OLA Memo at 1. Indeed, the Justice Department cautioned Congress that the “binding effect of the proposed Compact, it should be emphasized, extends to all its provisions, . . . and therefore extreme care should be taken in analyzing

¹³ *See also Rassmussen v. United States*, 197 U.S. 516, 526 (1905) (“where territory was a part of the United States the inhabitants thereof were entitled to the guarantees of the Fifth, Sixth and Seventh Amendments,” and the “acts of Congress purporting to extend the Constitution were considered as declaratory merely of a result which existed independently”); *id.* at 529 (Harlan, J., concurring) (“Immediately upon the ratification in 1867 of the treaty by which Alaska was acquired from Russia, that Territory . . . came under the complete, sovereign jurisdiction and authority of the United States and, without any formal action on the part of Congress in recognition or enforcement of the treaty, and whether Congress wished such a result or not, the inhabitants of that Territory became at once entitled to the benefit of all the guarantees found in the Constitution.”); *id.* at 536 (Brown, J., concurring) (when Congress “has seen fit to extend the provisions of the Constitution to [the territories]” that step “is irrevocable”).

each provision and assessing its potential for unwanted effects resulting from unanticipated changes in other laws.” 1975 OLA Memo at 2.

The views of Messrs. Frankfurter and Rehnquist were grounded in more than two hundred years of historical practice. Congress has, in fact, *been making binding compacts with territories since before the Constitution was written*. The Northwest Ordinance of 1787, enacted by the Confederation Congress while the Constitution was still being drafted in Philadelphia, created “articles of compact” between the United States “and the people” in the Northwest Territory, “forever unalterable, unless by mutual consent.” Cong. Ch. 8, 1 Stat. 50, 52 n.(a) (1789). The Ordinance was reenacted by the First Congress when it convened in 1789. 1 Cong. Ch. 8, 1 Stat. 50, 50-51. The “unalterable” terms of the Ordinance included certain conditions of eligibility for the territories to become States, such as a guarantee that no fewer than three, nor more than five, States could be created from those lands and the pledge that any territory “shall be admitted” as a State whenever it had 60,000 inhabitants. 1 Cong. Ch. 8, 1 Stat. 50, 53 n.(a) (Art. V of the Northwest Ordinance of 1787). Even those who have interpreted Article IV, section 3 of the Constitution to confer sweeping powers upon Congress over territories have recognized that such power is limited when Congress thus voluntarily agrees to limits on its power. Joseph Story, for example, deemed the provisions of the Northwest Ordinance to be irrevocable except by mutual consent, just as that statute provided. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION section 1322 (1833) (“The power of congress over the public territory . . . is absolute, and unlimited, unless so far as it is affected by stipulations in the cessions, or by the ordinance of 1787, under which any part of it has been settled.”).

Thus, as the Department of Justice explained when it examined the Puerto Rico compact issue in 1975, it is precisely the *plenary* nature of congressional territorial power that makes such an irrevocable grant to Puerto Rico possible: “Such autonomy may be granted Puerto Rico because Congress under the Constitution (Article IV, section 3) has plenary power over the territories of the United States” 1975 OLA Memo at 1. *See also* 1963 OLC Memo at 3-4 (plenary power under Art. IV permits Congress to make binding compacts); 1971 OLC Memo, Attachments at 1-2 (same).

Throughout American history, Congress routinely made binding compacts with territorial polities, and the courts enforced them. *Beecher v. Wetherby*, 95 U.S. 517 (1877), involved competing federal and Wisconsin land grants. The Supreme Court held that the federal grant was invalid because it came after Congress’ Act of August 6, 1846, which authorized the people of the Wisconsin Territory to organize a State government and pledged that, among other things, certain lands would be reserved for the new State if the constitution to be proposed by the State contained particular provisions. *Id.* at 523. Because the people of Wisconsin agreed to those provisions—the *quid pro quo*—the Supreme Court held that the federal reservation of lands exclusively to Wisconsin became an “unalterable condition of the admission, obligatory upon the United States.” *Id.* at 523. *See also id.* (once accepted by the people of Wisconsin in exchange for including certain provisions in the new Wisconsin constitution, the terms of Congress’ admission statute became “obligatory upon the United States”).

Although the object of the dispute in *Beecher* was real estate, the Court did not approach the case as one involving enforcement of a land transaction that could not be repealed without implicating the Takings Clause of the Fifth Amendment—indeed, *Fletcher v. Peck* was not even cited by the Court. Instead, the Court treated the problem as one of binding commitments made by Congress in a statute, which could not be revoked by subsequent congressional legislation once the other party (the people of Wisconsin Territory) had fulfilled the condition precedent of the original admission statute. The Court thus explained that “[i]t matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in [the] future, or as operating to transfer the title to the State upon her acceptance of the propositions.” In either case, whether property rights in the land had vested or not, the lands were withdrawn from federal control and “no subsequent” federal law could embrace them. *Id.* at 523-24. *See also Cooper v. Roberts*, 59 U.S. (18 How.) 173, 179 (1856) (the Territory of Michigan was admitted to the Union under the “unalterable condition” that certain lands were reserved to the State for the use of schools, and until certain essential steps were taken under state law to vest those property rights, “the right of the State rests in compact—binding, it is true, the public faith”).

Congress can restrict its subsequent exercise of its territorial powers not only by making compacts with the people of territories themselves, but also by making compacts with other sovereigns about those territories. As Chief Justice Marshall explained, when territory is acquired by the United States pursuant to a treaty with

a foreign power, “the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose.” *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828). The treaty at issue in *Canter*—the 1819 treaty with Spain ceding the Florida territory—did not leave Congress free to choose the terms of Florida’s relationship with the United States. Article Six of the treaty of cession expressly provided that the “inhabitants of the territories, which his Catholic majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States.” *Id.* at 542 (quoting the treaty). The Court ruled that the Senate’s ratification of this treaty made it “the law of the land” which, without more, “admit[ted] the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities, of the citizens of the United States.” *Id.* As previously explained, such an extension of the Constitution to the inhabitants of a territory cannot be withdrawn, and therefore the treaty’s designation of Florida as an incorporated territory restricted the power of subsequent Congresses to legislate for that territory. *See Downes*, 182 U.S. at 270. It is noteworthy that neither Congress nor the Supreme Court perceived any forbidden diminution of United States sovereignty.

Similarly, in *Rasmussen v. United States*, 197 U.S. 516 (1905), the Court held that the source of Alaska’s status as an incorporated territory was the intent of the Senate and the Tsar of Russia as expressed in the words of the treaty of acquisition. The Court explained that “[t]he treaty concerning Alaska, instead of exhibiting, as did the treaty respecting the Philippine Islands, the determination to reserve the question of the status of the acquired territory for ulterior action by Congress, manifested a contrary intention” that the “inhabitants of the ceded territory shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States.” *Id.* at 522. *See also Dorr*, 195 U.S. at 143 (also contrasting the Alaska treaty of cession with that of the Philippines from Spain, which expressly provided that “the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress”); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 314 (1937) (explaining that congressional power over Philippines is limited “by the terms of the treaty of cession”). Thus, under this consistent and venerable line of authority it is clear that Congress may, by compact, restrict its future exercise of plenary authority over territories, and that Congress has been doing so for more than two centuries.

The very longevity of the congressional practice of making such compacts with territories is itself strong evidence that such compacts are binding, constitutional, and enforceable. “A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for [more than two centuries] of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice” *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327-28 (1936). *See also Cincinnati Soap*, 301 U.S. at 315 (upholding statute in part because “[l]egislation of this character has been so long continued and its validity so long unquestioned”).

Indeed, as noted above, the first such “unalterable” compact between Congress and the people of a territory was the Northwest Ordinance, originally enacted before the Constitution was written. The fact that the Ordinance was reenacted by the First Congress in 1789 cements the proposition that congressional compacts with territories are binding and constitutional. “An Act ‘passed by the first Congress assembled under the Constitution, many of whose members had taken part in the framing of that instrument, . . . is contemporaneous and weighty evidence of its true meaning,’” and powerful confirmation of its consistency with the Constitution. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)).

To be sure, “no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside.” *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970). The propriety of Congress making binding compacts with territories is established by “[t]he unbroken practice for two centuries in the National Congress.” *Marsh*, 463 U.S. at 795. Indeed, the Supreme Court ruled more than a century ago that the practices of the First Congress in dealing with the territories were a reliable confirmation of the constitutionality of those practices and served to remove any “doubt” about them. *See National Bank v. County of Yankton*, 101 U.S. 129, 132-33 (1880).

It is noteworthy that the ability of Congress to confer vested political rights by compact, and the venerable line of authority supporting it, are not even mentioned, let alone refuted, by any of the Justice Department analyses concluding that such bilateral compacts are illusory and unenforceable. These contrary 1990’s memo-

randa, however, offer three arguments that are in conflict with this well-established doctrine—all three are without merit.

First, the 1994 OLC Memorandum and the 2000 OLC Testimony assert that Congress is empowered to vest irrevocable rights only in *property* interests, and because “a specific political relationship does not constitute ‘property’ within the meaning of the Fifth Amendment,” Congress cannot restrict its own plenary legislative power to unilaterally alter or revoke its bilateral compacts conferring such political rights. 1994 OLC Memo at 10. But no case supports this “property rights only” restriction on congressional power to confer vested rights, and as previously demonstrated, many cases squarely refute it. Nor does the Justice Department offer any explanation as to why the Constitution would permit Congress to confer irrevocable property rights, but not irrevocable political rights, on the people of a territory.

Second, the 1994 OLC Memorandum contends that Supreme Court doctrine on congressional power to vest rights changed dramatically in 1986 with the decision in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986). See 1994 OLC Memo at 2 n.2, 11-12; 2000 OLC Testimony.¹⁴ *Bowen* was a sea change in the law, says the Justice Department, that required the Department to repudiate its long established position that Congress can make binding commitments to the people of a territory about political status. This position cannot withstand examination.

Bowen held that state governments had no vested contract right in a prior legislative scheme that allowed them to opt out of the Social Security system. 477 U.S. at 52-55. The 1994 OLC memorandum relies on *Bowen* for the proposition that the Due Process Clause of the Fifth Amendment protects only individuals, not states, territories, or other political entities. 1994 OLC Memo at 11-12; 2000 OLC Testimony. This is true, but irrelevant. The doctrine relied on here—and relied on by the Justice Department itself before it had a change of heart—is not that the Due Process Clause or some other particular provision of the Constitution prevents Congress from repealing vested rights, but that *Congress itself* relinquished that power when it acted to vest those rights in the first place. *Bowen* never mentions, let alone purports to overrule, *Fletcher*, *Downes*, *Dorr*, *Rassmussen* and their progeny.¹⁵

In fact, *Bowen* undermines the 1994 OLC Memorandum’s argument and buttresses Congress’ power to relinquish unilateral repeal power when it chooses to do so. The *Bowen* Court unanimously and expressly confirmed that “the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights.” 477 U.S. at 52 (citations omitted). The state lost the case only because Congress had *not* made any such compact with them when they entered the Social Security system.

The contract at issue in *Bowen* governed California’s participation in the social security system. The agreement was expressly made subject to the provisions of the Social Security Act, which at the time the agreement was entered permitted states to withdraw from participation in the program. A subsequent amendment to the Act prohibited states from withdrawing from the system. The Supreme Court held that neither the statute nor the State’s contract obliged the government to permit the State’s withdrawal because Congress had expressly reserved in the statute the “right to alter, amend, or repeal” any of its provisions. 477 U.S. at 52. See also *id.* at 44 & n.2, 52, 53, 54. Thus, the Act itself obviously “created no contractual rights,” and because the contract conformed to the Act, it too created no contractual right to withdraw. *Id.* at 52. It is hardly necessary to point out that the *Bowen* Court would not have so thoroughly analyzed *whether* Congress had made a binding contractual commitment, and have so frequently repeated Congress’ explicit disavowal of any such commitment, if it believed that Congress could *not* make such a commitment.¹⁶

¹⁴*Bowen* was the centerpiece of the Justice Department’s Guam analysis in 1994. By 2000, however, the citation to *Bowen* had been reduced to a mere “*cf.*,” even though *Bowen* was still the *only* authority offered by OLC. See 2000 OLC Testimony. Presumably the Department’s reduced emphasis on *Bowen* in 2000 is an implicit bow to the Supreme Court’s intervening decision in *United States v. Winstar*, 518 U.S. 839 (1996), see note 10, *infra*, which rejected the Department’s overreading of *Bowen*.

¹⁵Even accepting the government’s argument on its own terms, it is clear that the Due Process Clause would protect the vested political rights of the *people* of Puerto Rico, whose specific approval was a necessary requirement for entry into the 1952 compact.

¹⁶The reading of *Bowen* offered by the OLC memoranda is precisely the reading advanced by the Justice Department in *United States v. Winstar*, 518 U.S. 839 (1996), and rejected by seven members of the Supreme Court. The plurality and two concurring opinions recognized and upheld the power of Congress to bind itself under *Bowen* and other precedent. See *Winstar*, 518 U.S. at 895-97 (plurality); *id.* at 910 (Breyer, J., concurring); *id.* at 919 (Scalia, J., concurring).

The third argument advanced during the 1990's for why Congress cannot vest political rights likewise ignores *Downes* and the long line of cases dealing with the territorial power. The 1994 OLC Memorandum contends that Congress cannot relinquish its power to repeal legislation pertaining to the territories because that would somehow diminish Congress' sovereign powers and be inconsistent "with the supremacy and supervision of National authority." 1994 OLC Memo at 5 (quoting *Clinton v. Englebrecht*, 80 U.S. (13 Wall.) 434, 441 (1872)). "The requirement that the delegation of governmental authority to the non-state areas be subject to federal supremacy and federal supervision," says the Justice Department, "means that such delegation is necessarily subject to the right of Congress to revise, alter, or revoke the authority granted." 1994 OLC Memo at 5. See also 2000 OLC Testimony.

The Justice Department distilled this concept of sovereignty from broad statements in opinions that congressional power over the territories is "supreme" and, in particular, "plenary"—a maxim that the OLC memoranda repeat as a mantra. See 1994 OLC Memo at 2-4, 6; 2000 OLC Testimony. But the Supreme Court has specifically warned against this facile mode of analysis: "too much weight must not be given to general expressions found in several opinions that the power of Congress over territories is complete and supreme." *Downes*, 182 U.S. at 258. "[G]eneral expressions" do not control cases. *Id.* And limitations on Congress' territorial power "must be decided as questions arise." *Rasmussen v. United States*, 197 U.S. 516, 521 (1905). Not one of the cases relied upon by the OLC even presented a congressional compact with a territory, let alone held that Congress cannot make such a compact expressly alterable only by mutual consent.¹⁷

There are two compelling explanations for this glaring dearth of authority for the Justice Department's opposition to mutual consent clauses. First, as noted above, two hundred years of history contravenes this view. The second is that the proposition at the heart of the 1994 OLC Memorandum—that a sovereign is no longer sovereign if it makes a binding contractual commitment—simply makes no sense. As explained at length above, "the right to make binding obligations is a competence attaching to sovereignty." *Perry*, 294 U.S. at 353. For example, under Article I, section 10 of the Constitution, States surrender their unilateral power to legislate on an issue when they make compacts with one another on that subject. See, e.g., *State ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) ("It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified . . ."). It was argued in a challenge to a compact between Virginia and Kentucky that Kentucky could repeal its assent to a provision of that compact, because to rule otherwise would be to accept that a sovereign could "surrender[] . . . rights of sovereignty which are unalienable." *Green*, 21 U.S. at 85. The Supreme Court gave this objection the back of its hand, because it "rests upon a principle, the correctness of which remains to be proved":

¹⁷Therefore, none of the cases cited by the OLC memoranda is remotely apposite. See 1994 OLC Memo at 5 & n.5; 2000 OLC Testimony. *Clinton v. Englebrecht*, 80 U.S. (13 Wall.) 434, 441 (1872), states only that the power exercised there was "consistent with the supremacy and supervision of National authority." The issue of a compact repealable only by mutual consent was not presented, and there is no holding, nor even any dictum, on that question. *Puerto Rico v. Shell Co.*, 302 U.S. 253, 260-62 (1937), merely quoted *Clinton*, and is equally bereft of any holding on the "supremacy" point. There is no indication that Congress cannot bind itself in a compact creating vested political rights. *Hornbuckle v. Toombs*, 85 U.S. (18 Wall.) 648, 655 (1874), did not hold, nor even offer dictum, that Congress cannot relinquish power to unilaterally revoke compacts with the people of territories. It noted merely that Congress has usually retained power to repeal grants of authority to territories, which suggests that Congress has the option not to do so. *Christianson v. King County*, 239 U.S. 356 (1915), is to the same effect, holding that Congress has the right to retain revision power, which suggests that Congress likewise has the right not to do so. *District of Columbia v. Thompson Co.*, 346 U.S. 100, 106 (1953), upheld a broad delegation by Congress of local government authority, while noting that Congress has the right to retain the power to revise or repeal such delegations. Like the other cases cited, it did not hold (nor even suggest) that Congress has no choice but to retain repeal power, and most importantly it did not involve a compact that Congress had entered with the people of the District of Columbia. *Fireman's Ins. Co. v. Washington*, 483 F.2d 1323, 1327 (D.C. Cir. 1973), simply quoted *Thompson v. United States v. Sharpnack*, 355 U.S. 286, 296 (1958), affirmed congressional power to delegate authority, and did not hold that Congress must retain the power to revise and repeal. It simply cited *Thompson*, *King County*, and *Hornbuckle*. Finally, *Harris v. Boreham*, 233 F.2d 110,113 (3d Cir. 1956), held that Congress may delegate to a territorial government such powers as Congress sees fit. If anything, the case suggests that Congress may delegate and waive the right to unilaterally revise such delegation, although—as with all of OLC's other authorities the compact issue was not presented and therefore there is no holding, nor even any dictum, on the issue.

It is practically opposed by *the theory of all limited governments*, and especially those which constitute this Union. The powers of legislation granted to the government of the United States, as well as to the several State governments, by their respective constitutions, *are all limited*. The article of the Constitution of the United States, involved in this very case [the Compact Clause], is one, amongst many others, of the restrictions alluded to. If it be answered, that these limitations were imposed by the people in their sovereign character, it may be asked, was not the acceptance of the compact the act of the people of Kentucky in their sovereign character? If, then, the principle contended for be a sound one, we can only say, that it is one of a most alarming nature, but which, it is believed, *cannot be seriously entertained by any American statesman or jurist*.

21 U.S. at 87-88 (emphases added).

When a State makes a binding compact with another and gives up the right of unilateral revocation of its commitments, it does not thereby suffer some diminution of its sovereignty, it does not become something less than a State. Similarly, when Congress irrevocably gives up the local police power over a territory when it admits that territory as a State of the Union—something Congress has done 30-odd times—Congress is not thereby diminished, and the Federal Government is not somehow reduced in stature. The Court has rejected as “unsound” the contention that when a sovereign binds itself in a compact that it cannot unilaterally abrogate it has “renounced the plentitude of power inherent in her statehood.” *United States v. Bekins*, 304 U.S. 27, 53 (1938) (citation omitted). Rather, “[i]t is the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power.” *Id.* at 51-52.

B. Article IV, Section 3's Reference to "Territory" Does Not Bar Congress from Making Compacts with the People of a Territory that May Be Altered or Revoked Only by Mutual Consent

The second premise underlying opposition to congressional power to make binding compacts with territorial polities is that the terms of the Constitution supposedly recognize only two forms of association with the United States: statehood and territory. “There is no intermediary status as far as the Congressional power is concerned.”¹⁸ Assuming for the sake of argument that this is true, it proves nothing. One can posit that the Ohio Territory, the Wisconsin Territory, the Alaska Territory and the Commonwealth of Puerto Rico were all “territories,” without accepting the conclusion that Congress was forbidden to make binding compacts with the people of those territories. To reach *that* conclusion, one must posit an *additional* premise—that Congress may not restrict its plenary power over a “territory” by entering a compact with the people of the territory.¹⁹ Under this view, Congress cannot relinquish or restrict its absolute power to unilaterally repeal or amend legislation pertaining to the territories because that would somehow diminish Congress’ sovereignty. But as discussed above, the Supreme Court long ago rejected that proposition as one that “cannot be seriously entertained by any American statesman or jurist.” *Green*, 21 U.S. at 88.²⁰

Article IV, section 3 of the Constitution provides: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.” Notwithstanding the Eighteenth Century habit of capitalizing all nouns, “Territory” in Article IV is not a proper noun, nor even a term of art. Indeed, in *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840), the Supreme Court

¹⁸ 1994 OLC Memo at 6. See also 2000 Thornburgh Testimony at 1 (“There is statehood and there is territorial status.”). See also *id.* at 2-3, 5; 2000 OLC Testimony at 1-2, 5.

¹⁹ See 1994 OLC Memo at 2-4; 2000 OLC Testimony; 2000 Thornburgh Testimony.

²⁰ When they repeat their “inalienable supremacy” point, the Justice Department memoranda rely on different authorities than they invoked before, but the new cases are equally inapposite. See 1994 OLC Memo at 2-3; 2000 OLC Testimony. Once again, *none* of the cases even presented a territorial compact that could be revised only by mutual consent, and consequently none contains a holding, nor even dictum, that Congress cannot bind itself with such a compact. Thus *National Bank v. County of Yankton*, 101 U.S. 129, 133 (1880), held only that Congress could override the enactments of the Dakota Territorial Legislature, even though “[i]n the Organic Act of Dakota there was not an express reservation of power in Congress to amend the acts of the Territorial Legislature,” because such a reservation was not “necessary.” “Such a power” of congressional override, the Court explained, is “an incident of sovereignty, and continues *until granted away*.” *Id.* (emphasis added). *Yankton* thus indicates that Congress may “grant[] away” to the people of a territory its unilateral power to amend and repeal legislation enacted by that territory.

held that “[t]he term territory, as here used, is merely descriptive of one kind of property; and is equivalent to the word lands.”

The Framers drafted Article IV, section 3 to respond to the issues created by the enormous unsettled tracts of western lands originally held by the individual States, which were then ceded to the federal government. See 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES, App. 283-86 (1803).²¹ The references in section 3 to multiple forms of “property” that Congress may “dispose” of, and the caveat that nothing therein should be construed to prejudice any federal or state land “claims,” make clear that this section was broadly drafted to ensure federal “regulation of all other personal and real property rightfully belonging to the United States.” 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION section 1319 (1833). See also *Ashwander v. T.V.A.*, 297 U.S. 288, 331 (1936). The Framers saw congressional power to provide for governments in these vast tracts of land as incidental to the power over the property itself. See Story, *supra*, at section 1318; *Sere & Laralde v. Pitot*, 10 U.S. (6 Cranch) 332, 336 (1810); *Gratiot*, 39 U.S. at 537; *American Ins. Co.*, 542-43. Unsurprisingly, section 3 of Article IV is therefore most often referred to as “The Property Clause,” even when power to govern territories is being discussed. See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529, 539-40 (1976) (“It is the Property Clause, for instance, that provides the basis for governing the Territories of the United States.”) (citations omitted). All of this negates any inference that the Framers intended the term “territory” to rigidly define a particular political entity with a particular degree of (or lack of) autonomy from Congress.

Over the course of the last two centuries, the term “territory” has encompassed a remarkable array of local governments and a wide variety of relationships with the federal government. It is a catch-all term, covering everything from Johnston Atoll, a tiny Pacific island with neither a native population nor a local government, to the Indiana Territory, an organized area in the continental United States that was predetermined to achieve Statehood, to the Commonwealth of Puerto Rico, a self-governing, autonomous sovereign entity with its own congressionally approved constitution. As the GAO noted in a 1997 report, each of the United States territories “has a unique historical and legal relationship with the United States.”²²

This historical record explodes the assumption, which is the foundation of the Justice Department’s 1990’s pronouncements on the compact issue, that all “territories” are the same and all are equally subject to congressional authority. The Supreme Court has long recognized well-established gradations among territories. For example, the Court has repeatedly emphasized the differences between incorporated and unincorporated territories, with corresponding differences with respect to Congress’ ability to regulate them. See *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 5 (1955) (“A vital distinction was made between ‘incorporated’ and ‘unincorporated’ territories. The first category had the potentialities of statehood like unto continental territories. The United States Constitution, including the Bill of Rights, fully applied to an ‘incorporated’ territory. The second category described possessions of the United States not thought of as future states. To these only some essentials, withal undefined, of the Constitution extended.”) (internal citations omitted); *Balzac v. Porto Rico*, 258 U.S. 298, 304-05 (1922) (“It is well settled that these provisions for jury trial in criminal and civil cases apply to the Territories of the United States. . . . But it is just as clearly settled that they do not apply to territory belonging to the United States which has not been incorporated into the Union.”) (internal citations omitted); *Rasmussen*, 197 U.S. at 520 (“[The Philippines] had not been incorporated into the United States as a part thereof, and therefore Congress, in legislating concerning them, was subject only to the provisions of the Constitution applicable to territory occupying that relation.”).

Accordingly, the Court has explained that the “limitations [upon Congress] which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution.” *Dorr*, 195 U.S. at 142. Congress is free to treat with different territories on different terms, and to accord them different degrees of autonomy, because unlike States, which are guaranteed to join the Union on “an equal footing” with existing States, *Coyle v. Smith*, 221 U.S. 559, 563-69 (1911), the territories are not guaranteed equal status and Congress may adapt the status of individual territories as it sees fit.

²¹ Reprinted in 4 PHILIP KURLAND & RALPH IAEARNER, THE FOUNDERS’ CONSTITUTION 555 (1987).

²² GAO/OGC-98-5, U.S. General Accounting Office, Report to the Chairman, Committee on Resources, House of Representatives: U.S. Insular Areas—Application of the U.S. Constitution 1 n.1 (1997).

In its memoranda opposing compacts with territories, the Justice Department urged that Congress may not delegate government power to a territory and relinquish the power unilaterally to amend or revoke that delegation at will, because the resulting territory would be incompatible with a rigid, idealized notion of "Territory" supposedly derived from Article IV, section 3. The same response is again in order—there is no one, pure form of a "Territory" that Congress must adhere to when it agrees to confer the power of self-government on the people of a territory. The contours of the territorial power are not something that can be divined from an abstract theory—they must be worked out "as questions arise." *Rasmussen*, 197 U.S. at 521.

In light of the Justice Department's effort to fashion a constitutional straight-jacket for Congress from the single term "Territory," it is worth remembering that Congress' power over the territories is not merely another enumerated power such as those listed in Article I. The power of the United States to control relations with the people in its territories inheres in national sovereignty and would exist *even without* Article IV, section 3. In the words of Chief Justice Marshall, the "power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory." *Sere Laralde v. Pitot*, 10 U.S. at 336. This power "result[s] necessarily from the facts that [a territory] is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States." *American Ins. Co.*, 26 U.S. at 542-43 (Marshall, C.J.). See also *Dorr*, 195 U.S. at 140-41. Although congressional power over territories is *confirmed* by Art. IV, section 3, it actually *arises* "from the ownership of the country in which the [t]erritories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else." *United States v. Kagama*, 118 U.S. 375, 380 (1886) (citation omitted).

The Justice Department recognized the need for congressional flexibility in this area in its original 1963 memorandum when it embraced Felix Frankfurter's rule of "inventive statesmanship." 1963 OLC Memo at 5-6. William H. Rehnquist likewise relied on Frankfurter's analysis in 1971. See 1971 OLC Memo, Attachments at 3-4, 8, and also quoted the testimony of Harvard professor Abe Chayes, the former State Department Legal Adviser, on the status of Puerto Rico: "[T]he *Insular Cases* themselves were cases in which a new arrangement was developed" to "meet a new situation," and the Supreme Court flatly "rejected old and rigid dogmatic categor[ies]." 1971 OLC Memo, Attachments at 5 (*Status of Puerto Rico: Hearings Before United States—Puerto Rico Comm'n on Status of Puerto Rico*, S. Doc. No. 108, 89th Cong., 245-46). Professor Chayes explained that "the facts of international life in the world today are such that we all should be very hesitant, and I think the Supreme Court would be very hesitant, to confine the Congress to the categories of independence, statehood, and territories. . . . As a former State Department official, it is perfectly clear [to me] that the United States has . . . territories and possessions around the world: many of those territories and possessions are not suitable either for statehood or for independence. If we establish a constitutional category that says: All you can be is a territory in which case you are totally subservient and there is . . . a colonial relationship to the Federal Government, or else you must be either a State or independent, it would be impossible really for the United States to fulfill its obligations under the U.N. Charter with respect to many of its territories." 1971 OLC Memo, Attachments at 5-6.

II. *The United States And Puerto Rico Entered Into A Binding Compact In 1952 That Conferred Vested Political Rights On The People of Puerto Rico*

Puerto Rico was ceded to the United States by Spain in the aftermath of the Spanish-American War. Pursuant to Article IX of the Treaty of Paris, the United States and Congress agreed that "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress." See 30 Stat. 1754 (1898). Since then, Congress has gradually granted Puerto Rico an increasing degree of self-determination.

In 1900, Congress passed the Foraker Act, see 56 Cong. Ch. 191, 31 Stat. 77 (1900), which enabled the lower house of the Puerto Rico Legislature to be elected by a limited electorate. This Act was followed in 1917 by the Jones Act, which provided for the popular election of both houses of the Puerto Rico Legislature. See Pub. L. No. 64-368, 39 Stat. 951 (1917). The Jones Act also served as an organic government charter for Puerto Rico and gave Puerto Rico citizens American citizenship. See *id.* And under the Elective Governor Act, the governor of Puerto Rico was popularly elected. See Pub. L. No. 80-362, 61 Stat. 770 (1947).

In 1948, the successful candidates for Governor and Resident Commissioner ran on a platform calling for a constitution drafted by the people of Puerto Rico, and for a continued relationship with the United States to be consented to by the people of Puerto Rico. In recognition of the wishes of the people of Puerto Rico, on July

3, 1950, Congress enacted a bill, Public Law 600, to enable the people of Puerto Rico to establish a constitution. Pub. L. No. 81-600, 64 Stat. 319 (1950).

Public Law 600 specifically declared that, “recognizing the principle of government *by consent*, this Act is now adopted *in the nature of a compact* so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption.” *Id.* (emphases added). By its own terms, Public Law 600 was to be submitted to the voters of Puerto Rico for acceptance or rejection. *See id.* If a majority of the voters accepted the Act, the Puerto Rico Legislature would call a constitutional convention to draft a constitution. *See id.* The constitution would then be effective upon: (1) adoption by the people of Puerto Rico, (2) approval by Congress, and (3) determination by the President that the proposed constitution conformed with Public Law 600 and the Constitution of the United States. *See id.* In addition, those provisions of the Jones Act relating to local government of Puerto Rico would be repealed under Public Law 600, and the remaining Jones Act provisions relating to Puerto Rico’s economic relationship to the United States, to the application of Federal laws, and to representation in Washington, would be known as the Puerto Rican Federal Relations Act. *See id.* Congress’s sole requirement as to the constitution’s content was that it “shall provide a republican form of government and shall include a bill of rights.” *Id.*

On June 4, 1951, an overwhelming majority of the Puerto Rican electorate voted in favor of Public Law 600. The constitutional convention that followed produced a draft constitution in February 1952, and on March 3, 1952, it too was supported by an overwhelming majority of Puerto Rico’s voters. The Preamble of the Constitution of Puerto Rico declared: “We the People of Puerto Rico . . . do ordain and establish this Constitution for the Commonwealth which, in the exercise of our natural rights, we now create within our union with the United States of America.” And Article I, section 1 of the proposed constitution provided that “political power emanates from the people and shall be exercised in accordance with their will, *within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America.*” P.R. CONST. art. I, § 1 (emphasis added).

The Preamble and Article I thus made plain to all concerned—including the Congress—that the proposed new government of Puerto Rico would owe its existence to an act of popular sovereignty by the people of Puerto Rico, rather than to an exercise of congressional territorial power under Article IV of the Federal Constitution. Government power in this proposed Commonwealth would “emanate[] from the people” and would be bound only by “the terms of the compact” between the United States and the people of Puerto Rico. P. R. CONST., art I, § 1. Congress expressly and formally approved these terms under Public Law 82-447, 66 Stat. 327 (1952), which stated that Public Law 600 “was adopted by the Congress *as a compact with the people of Puerto Rico*, to become operative upon its approval by the people of Puerto Rico.” *See* Pub. L. No. 82-447, 66 Stat. 327 (emphasis added). *See also Americana of Puerto Rico, Inc. v. Kaplus*, 368 F.2d 431, 435 (3d Cir. 1966) (“The government of the Commonwealth derives its powers not alone from the consent of Congress, but also from the consent of the people of Puerto Rico.”).

Thus, one need not look beyond the express terms of the legislative and constitutional instruments to determine conclusively that this was a compact between the United States and the people of Puerto Rico. The contractual nature of the United States’ new relationship with Puerto Rico is reiterated in Public Law 600, in Public Law 447, and in the Constitution of Puerto Rico itself, which was specifically reviewed and expressly endorsed by Congress.

Indeed, Congress took pains to underscore the contractual nature of Puerto Rico’s new Commonwealth status, and to enumerate the *only* federal laws to which the new Puerto Rico Constitution would be subject. Congress conditioned its approval of the proposed constitution on the addition by Puerto Rico of the following language to Article VII—language drafted by Congress itself: “Any amendment or revision of this Constitution shall be consistent with the resolution enacted by the Congress of the United States approving this Constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act and with Public Law 600, Eighty-first Congress *adopted in the nature of a compact.*” P.R. CONST. art. VII, § 3 (as translated from the Spanish version) (emphasis added).²³

²³ Congress further conditioned approval of the Puerto Rican Constitution on the deletion of several provisions of the proposed constitution on policy grounds. Section 20 of Article II (providing the right to obtain work, an adequate standard of living, and medical care) was removed, and section 5 of Article II (dealing with public education) was amended to explicitly protect the rights of those attending private elementary schools. *See* Pub. L. No. 82-447, 66 Stat. 327 (1952). The Puerto Rican constitutional convention considered and accepted these conditions and made the necessary changes to the draft document. Even those who dispute the binding nature of the

The Puerto Rican Constitutional Convention accepted these terms, thereby confirming the status of Public Law 600 as a negotiated compact. The Convention approved the Constitution with Congress' proposed changes, and on July 25, 1952, the Governor of Puerto Rico announced the establishment of the Commonwealth of Puerto Rico. The bargained-for commitment under Public Law 600 was the passage of the Puerto Rican Constitution, a consideration which Congress accepted when it enacted the compact into law. Insofar as the people of Puerto Rico fully executed their part of the compact, Congress accordingly relinquished its power to strip them of their political rights, and to extinguish Puerto Rico's commonwealth status without mutual consent.

Puerto Rico's new juridical status was thus conferred by compact, and it has long been understood that a "compact" is a binding contractual commitment. *See, e.g., Fletcher*, 10 U.S. at 137. *See also Green*, 21 U.S. at 92 ("the terms compact and contract are synonymous"). As demonstrated above, the Supreme Court has scorned the notion that, when Congress has made a pledge in a compact, "it is free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient." *Perry*, 294 U.S. at 350. *See also Murray*, 96 U.S. at 444-45 (rejecting proposition that a contract should be assumed to contain an implicit reservation of a right to renege). And unlike the statute upheld in *Bowen v. POSSE*, which contained a provision expressly reserving congressional power "to alter, amend, or repeal any provision of the Act," 477 U.S. at 51-52, there is nothing remotely resembling such a reservation of rights in Public Law 600, in Public Law 447, or anywhere else in Congress' enactments pertaining to Puerto Rico's status as a commonwealth.²⁴

The new political status wrought by the 1952 compact and the new political rights it conferred have been confirmed by the Supreme Court. In *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), the Court accorded the same deference to the Puerto Rico Legislature that it accords to states: "Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'" 457 U.S. at 8 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 673 (1974)) (internal quotation marks omitted). In reaching this conclusion, the Court cited approvingly the following passage in *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*:

[In 1952] Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth. And the federal government's relations with Puerto Rico changed from being bounded merely by the territorial clause, and the rights of the people of Puerto Rico as United States citizens, to being bounded by the United States and Puerto Rican Constitutions, Public Law 600, the Puerto Rican Federal Relations Act and the rights of the people of Puerto Rico as United States citizens.

649 F.2d 36, 39-42 (1st Cir. 1981) (emphasis added). *See also United States v. Valentine*, 288 F. Supp. 957, 981 (D.P.R. 1968) ("It is clear, however, that the compact does exist as a binding agreement, irrevocable unilaterally between the people of Puerto Rico and the Congress of the United States, transforming Puerto Rico's status from territory to commonwealth, or *Estado Libre Asociado*.").

Where the statutory enactments are themselves so clear on their face that the United States' relationship with Puerto Rico derives from and is governed by a compact, the inquiry is at an end, and it is unnecessary to consult other sources. *See, e.g., Freytag v. Comm'r*, 501 U.S. 868, 873 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances."). But even if other sources as to the fact and nature of the compact are consulted, they confirm the congressional intent that inheres in the statutes themselves. Thus the formal submissions made by the United States to the United Nations publicly confirmed that the United States understood itself to be deliberately and irrevocably binding itself in a compact with the people of Puerto Rico.

Puerto Rico compact concede that, in Public Law 447 and Public Law 600, Congress and Puerto Rico deliberately and jointly negotiated the terms of the new relationship. 1991 Senate Hearings at 200 (Statement of Attorney General Richard Thornburgh) ("Public Law 447 did not unconditionally accept, ratify, and confirm the June 4, 1951 Constitution but mandated several amendments that became effective on January 29, 1953.").

²⁴The congressional decision *not* to include such a reservation of unilateral power over Puerto Rico was plainly a deliberate one, because Congress *did* make a different reservation of rights. As explained above, Congress demanded that Puerto Rico include in its new Constitution a provision (Article VII) expressly making the right of the people of Puerto Rico to amend their constitution subject to: (1) the Federal Constitution, (2) the resolution enacted by the Congress approving the Puerto Rican Constitution, (3) the Puerto Rican Federal Relations Act, and (4) Public Law 600.

Specifically, in 1953 the United States advised the United Nations that it would no longer report on Puerto Rico as a “non-self-governing territory” under Article 73(e) of the United Nations Charter.²⁵ See Memorandum by the Government of the United States of America concerning the Cessation of Transmission of Information under Article 73(e) of the Charter with Regard to the Commonwealth of Puerto Rico (“Cessation Memorandum”), *reprinted in* PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION, DOCUMENTS ON THE CONSTITUTIONAL RELATIONSHIP OF PUERTO RICO AND THE UNITED STATES, 616 (3d ed. 1988). In the Cessation Memorandum, the “Government of the United States of America” formally advised the United Nations that the incremental process of “vesting of powers of government in the Puerto Rican people and their elected representatives” had “reached its culmination with the establishment of the Commonwealth of Puerto Rico and the promulgation of the Constitution of this Commonwealth on July 25, 1952.” Cessation Memorandum at 616. The Cessation Memorandum declares unequivocally: “With the establishment of the Commonwealth of Puerto Rico, the people of Puerto Rico have attained a full measure of self-government.” *Id.*

In describing the gradual process that lead to the establishment of the Commonwealth, the Cessation Memorandum noted that Public Law 600 had “expressly recognized the principle of government by consent, and declaring that it was ‘adopted in the nature of a compact,’ required that it be submitted to the voters of Puerto Rico in an island-wide referendum for acceptance or rejection.” *Id.* at 618. The Cessation Memorandum also noted that Public Law 447, “in its preambular provisions, recalled that the [Public Law 600] ‘was adopted by the Congress as a compact with the people of Puerto Rico’” *Id.* at 619. “The operative part of Public Law 447” recorded Congress’s approval of the Commonwealth’s new Constitution on the condition, among others, that the following sentence be added thereto: “Any amendment or revision of this Constitution shall be consistent with . . . Public Law 600, 81st Cong. adopted in the nature of a compact.” *Id.* at 620.

In describing the “principle features of the Constitution of the Commonwealth,” the Cessation Memorandum noted that the new Constitution, as specifically approved by Congress, expressly provides that it “shall be exercised in accordance with [the people’s] will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America.” *Id.* at 620, quoting P.R. CONST. art. I, § 1. The Memorandum also advised the United Nations that the Puerto Rico Legislature had been given “full legislative authority with respect to local matters.” *Id.*

Under the heading “Present Status of Puerto Rico,” the Cessation Memorandum declared:

By the various actions taken by the Congress and the people of Puerto Rico, Congress has agreed that Puerto Rico shall have, under that Constitution, *freedom from control or interference by the Congress in respect of internal government and administration*, subject only to compliance with applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act and the acts of Congress authorizing and approving the Constitution, as may be interpreted by judicial decision.

Id. at 622-3 (emphasis added). It further noted that “[t]he people of Puerto Rico have complete autonomy in internal economic matters and in cultural and social affairs under a Constitution adopted by them and approved by the Congress.” *Id.* at 623. The Memorandum concluded that “it is no longer appropriate for the United States to continue to transmit information to the United Nations on Puerto Rico under Article 73(e) of the Charter” in light of Puerto Rico’s “new constitutional arrangements.” *Id.* at 624. Specifically, the Memorandum emphasized the following declaration of the Puerto Rico Constitutional Convention:

“When this Constitution takes effect, the people of Puerto Rico shall thereupon be organized into a commonwealth established within the terms of the compact entered into by mutual consent, which is the basis of our union with the United States of America.

Thus we attain the goal of complete self-government, the last vestiges of colonialism having disappeared in the principle of Compact, and we enter into an era of new developments in democratic civilization.”

²⁵ After the United States became a party to the United Nations Charter, Puerto Rico was classified as a non-self-governing territory under Chapter XI of the Charter, “Declaration Regarding Non-Self-Governing Territories.” The United States was obligated under Chapter XI of the Charter to adhere to United Nations decolonization procedures with respect to Puerto Rico, including the specific requirement to transmit reports to the United Nations regarding conditions in the territory under Article 73(e) of Chapter XI of the Charter.

Id. at 624.

Finally, Mason Sears, the United States Representative to the Committee on Information from Non-Self-Governing Territories, explained the legal significance under American law of the fact that Puerto Rico's Constitution was the result of a compact:

A most interesting feature of the new constitution is that it was entered into in the nature of a compact between the American and the Puerto Rican people. A compact, as you know, is far stronger than a treaty. A treaty usually can be denounced by either side, whereas a compact cannot be denounced by either party unless it has the permission of the other.

Press Release No. 1741, United States Mission to the United Nations, at 2 (Aug. 28, 1953) (emphasis added).

The legislative history of Public Law 600 is consistent with these contemporaneous, formal statements by the United States. In response to Representative Meader's question whether Congress's approval of the proposed Puerto Rico Constitution would result in "an irrevocable delegation of authority to Puerto Rico, similar to that granted when we admit a State into the Union." CONG. REC. 6189-90 (daily ed. May 28, 1952), Representative Bentsen responded: "Yes. In my interpretation, I think we are doing that. I think that is what we should be doing for Puerto Rico . . ." *Id.* at 6190. Representative Meader read Public Law 600 precisely the same way, but he opposed an irrevocable grant of commonwealth status, and he therefore introduced an amendment to the House Resolution which contained language declaring "[t]hat nothing herein contained shall be construed as an irrevocable delegation, transfer, or release of the power of the Congress granted by Article IV, section 3, of the Constitution of the United States." This amendment was not adopted. *See id.* at 6203-04.

The compact of 1952 thus wrought a fundamental change in the relationship between Puerto Rico and the United States, and the federal courts have repeatedly recognized this. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 672 (1974), the Supreme Court looked to the compact enacted by Public Law 600 and concluded that "[Puerto Rico] is a political entity created by the act and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact." *Calero-Toledo*, 416 U.S. at 672 (emphasis added). "The authority exercised by the federal government emanated thereafter from the compact itself. Under the compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally, and the government of Puerto Rico is no longer a federal government agency exercising delegated power." *United States v. Quinones*, 758 F.2d 40, 42 (1st Cir. 1985) (emphasis added).²⁶ Thus the courts now look to the compact to determine the scope

²⁶The Department of Justice has sometimes taken the position that the holding in *United States v. Quinones*, 758 F.2d 40 (1st Cir. 1985), as opposed to its language, supports the view that Puerto Rico is an unincorporated territory subject to Congress's plenary power because the court "upheld a Federal law unilaterally altering the 1952 constitution and PRFRA without the consent of Puerto Rico." H.R. REP. NO. 105-131, at 26 (1997) (citing GAO/HRD-91-18, The U.S. Constitution and the Insular Areas; Apr. 12, 1991, Letter to GAO from Assistant Attorney General of the United States, App. VIII, H.R. REP. NO. 104-713, pt. 1.). In fact, *Quinones* holds only that Puerto Rico's laws, just as the laws of a state, are subject to the supremacy of federal laws in certain areas of exclusive federal jurisdiction, such as the question of admissibility of evidence in a federal court. *See Quinones*, 758 F.2d at 43 ("It is well settled that in federal prosecutions evidence admissible under federal law cannot be excluded because it would be inadmissible under state law.") (emphases added) (citing *United States v. Butera*, 677 F.2d 1376, 1380 (11th Cir. 1982)). Thus, as *Quinones* specifically notes, the same result would have been reached in that case if Puerto Rico were a state. Therefore, *Quinones* in no way suggests that Puerto Rico's rights of self-governance are those of an unincorporated territory subject to Congress' plenary power.

Davila-Perez v. Lockheed Martin Corp., 202 F.3d 464 (1st Cir. 2000), is equally inapposite. There the court examined a complex, rather technical statutory issue and held that the defendant was immune from suit under the Longshore and Harbor Workers' Compensation Act, pursuant to a provision of the Defense Base Act. The case did not present the issue of congressional power to make binding compacts with Puerto Rico, nor even address the question whether Puerto Rico is an incorporated or unincorporated territory. Indeed, as pointed out in *United States v. Martinez*, 106 F. Supp. 2d 311, 314 (D.P.R. 2000), *Davila-Perez* "is a narrow ruling concerning statutory interpretation of the definitions within the Defense Base Act."

Nor is there any genuine tension between *Quinones* and *Rodriguez v. Puerto Rico Federal Affairs Administration*, 338 F. Supp. 2d 125 (D.D.C. 2004). The case dealt with a claim under the Fair Labor Standards Act ("FLSA") against a Puerto Rican agency, and held that Puerto Rico did not enjoy sovereign immunity from FLSA claims. To be sure, the opinion contains dictum that "[w]hat Congress giveth, Congress may take away," 338 F. Supp. 2d at 128, but the opinion

Continued

of congressional power over Puerto Rico. See *Moreno Rios v. United States*, 256 F.2d 68, 71 (1st Cir. 1958). For example, in *Mora v. Torres*, 113 F. Supp. 309, 314 (D.P.R. 1953), the court explained that, “[u]nder Law 600, the previous power of the Congress to annul laws approved by the Legislature of Puerto Rico was expressly repealed and eliminated. . . . It was clearly the intention of Congress as to that clause to deprive itself of that power, and that deprivation was within the terms of the compact made with the people of Puerto Rico.”²⁷

Accordingly, the Supreme Court has squarely held that “Puerto Rico, like a state, is an autonomous political entity, ‘sovereign over matters not ruled by the Constitution.’” *Rodriguez*, 457 U.S. at 8. Similarly, in *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 597 (1976), the Court held that Puerto Rico is a “state” rather than a “territory” for purposes of jurisdiction under 42 U.S.C. section 1983, pointing out that “Congress relinquished its control over the organization of the local affairs of the island and granted Puerto Rico a measure of autonomy comparable to that possessed by the States.”²⁸ Thus, “Puerto Rico occupies a relationship to the United States that has no parallel in our history.” *Flores de Otero*, 426 U.S. at 596.

In short, both the history of the relationship between the United States and Puerto Rico and the relevant Supreme Court cases confirm that Puerto Rico’s commonwealth status is predicated upon a binding compact, created through the mutual consent of the sovereign parties and revocable, likewise, only by the mutual consent of the parties.

does not even mention, let alone attempt to rebut, the change in Puerto Rico’s political status in 1952, the effect of congressional endorsement of Puerto Rican sovereignty in Public Law 600 and Public Law 447, the binding nature of congressional compacts, nor any of the many cases decided since 1952 holding that Puerto Rico enjoys a unique territorial status. The case presented only a narrow question of sovereign immunity under a particular statute, and elsewhere acknowledged that it is up to Congress to shape federal relations with Puerto Rico: “It is for Congress, and not this court, to decide” *Id.* at 130.

²⁷Although the recent CRS Report agrees that Congress made a compact with Puerto Rico in 1952, 2005 CRS Report at 1-2, 2-3, it inexplicably asserts that Public Law 600 and the Puerto Rico Constitution approved by Congress “did not materially change the relationship of Puerto Rico to the federal government.” See *also id.* at 2 (“while the approval of the Commonwealth Constitution marked a historic change in the civil government for the islands, neither it, nor the public laws approved by Congress in 1950 and 1952, revoked statutory provisions concerning the legal relationship of Puerto Rico to the United States.”). This *ipse dixit* is unadorned by any analysis or citation, and it totally ignores the body of Supreme Court authority discussed in the text above, not to mention Congress’s own legislative endorsement (in Pub. L. No. 82-447) of article I, §1 of the Puerto Rico Constitution, which provides that government power in Puerto Rico now “emanates from the people” and that federal relations are bound by the “terms of compact.”

For additional authority on the fundamental change in Puerto Rico’s status in 1952, see *Romero v. United States*, 38 F.3d 1204, 1208 (Fed. Cir. 1994) (“Congress approved the proposed Constitution of the Commonwealth of Puerto Rico, which thenceforth changed Puerto Rico’s status from that of an unincorporated territory to the unique one of Commonwealth.”); *United States v. Lopez Andino*, 831 F.2d 1164, 1168 (1st Cir. 1987) (“Puerto Rico, like a state, is an autonomous political entity.”) (quoting *Rodriguez v. Popular Democratic Party*, 457 U.S. 1(1982)); *First Fed. Sav. & Loan Ass’n v. Ruiz De Jesus*, 644 F.2d 910, 911 (1st Cir. 1981) (“Puerto Rico’s territorial status ended, of course, in 1952. Thereafter it has been a Commonwealth with a particular status as framed in the Puerto Rican Federal Relations Act.”); *Mora v. Mejias*, 206 F.2d 377, 387 (1st Cir. 1953) (“Puerto Rico has thus not become a State in the federal Union like the 48 States, but it would seem to have become a State within a common and accepted meaning of the word.”); *United States v. de Modesti*, 145 F. Supp. 2d 171, 174 (D.P.R. 2001) (“Puerto Rico is to be afforded the degree of autonomy and independence normally associated with a state of the union.”); *United States v. Vega Figueroa*, 984 F. Supp. 71, 76-77 (D.P.R. 1997) (rejecting the argument that Puerto Rico is an unincorporated territory); *Hilton Hotels Int’l Inc.*, 2 P.R. Labor Rel. Bd. 888 (1955) (“With the creation of the Commonwealth, Puerto Rico ceased to be a territory within the meaning of that term in the Constitution of the United States and its judicial interpretation.”).

²⁸*Harris v. Rosario*, 446 U.S. 651 (1980), is not to the contrary. See, e.g., *Vega Figueroa*, 984 F. Supp. at 76-77. The narrow issue there was whether Puerto Rico may constitutionally be treated differently than the states under a federal welfare program. In holding that Puerto Rico could be provided less welfare benefits than the states receive, the Court merely reaffirmed that Puerto Rico is not treated as a state for *all* purposes. *Id.* at 651-52. But the Court did not even suggest that Congress may legislate for the Commonwealth of Puerto Rico as it does for unincorporated territories, nor did it question in any way Puerto Rico’s autonomy under Public Law 600 and the Puerto Constitution that Congress endorsed.

STUDY OF W. MICHAEL REISMAN, MYERS S. MCDUGAL PROFESSOR OF INTERNATIONAL LAW, YALE LAW SCHOOL AND ROBERT D. SLOANE, ASSOCIATE PROFESSOR OF LAW, BOSTON UNIVERSITY SCHOOL OF LAW

FUTURE STATUS OPTIONS AND PROCESSES FOR PRESERVING THE RIGHT TO SELF-DETERMINATION OF THE COMMONWEALTH OF PUERTO RICO

A STUDY PREPARED FOR THE STATUS COMMISSION OF THE POPULAR DEMOCRATIC PARTY OF PUERTO RICO

INTRODUCTION

In 1975, W. Michael Reisman, coauthor of the present report, wrote a study of Puerto Rico's status under international law as an associated state and participation in the international legal process.¹ Recent developments in the executive and legislative branches of the United States government in particular, (1) H.R. 856, the "United States-Puerto Rico Political Status Act," which died in the Senate;² (2) the 2005 *Report of the President's Task Force on Puerto Rico's Status*;³ and, most significantly, (3) S. 2304,⁴ the "Puerto Rico Self Determination Act of 2006,"—as well as the evolution of international and constitutional law since then invite an updated appraisal of Puerto Rico's political and legal status and a consideration of future options for preserving and implementing its internationally secured right to self-determination. This report, which has been prepared at the request of Mr. William Miranda Marin, as President of the Subcommittee on International Options of the Status Commission of the Popular Democratic Party, evaluates Puerto Rico's legal status under both international and U.S. constitutional law and considers the processes available to maintain and fully realize that right.

Part I offers an overview of associated states in international law. Part II considers Puerto Rico's history and status, with a focus on the political and legal developments culminating in its present position of association with the United States. Part III then compares and contrasts the status and experiences of the four other states associated internationally with the United States: the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.⁵ Part IV examines the constitutional law pertinent to different associated states. Parts V and VI analyze the right to self-determination under, respectively, contemporary international law and U.S. constitutional law. Part VII, finally, considers potential for and processes available to Puerto Rico to preserve or realize this right fully in view of future developments in the United States and the freely expressed wishes of the Puerto Rican people.

I. ASSOCIATED STATES IN INTERNATIONAL LAW

Contemporary international law guarantees to all "peoples" the right to self-determination. The U.N. Charter proclaimed as one of its paramount principles and purposes the development of "friendly relations among nations based on respect for the principle of equal rights and the self-determination of peoples."⁶ Resolutions of the General Assembly and the Security Council, widely subscribed human rights treaties, decisions of the International Court of Justice (ICJ), and the activities of the United Nations (particularly during the era of decolonization) alike confirm that the right to self-determination has achieved and retained the status of a fundamental norm of international law.⁷ But that is not to say that the conditions for and content

¹ W. MICHAEL REISMAN, *PUERTO RICO AND THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION* (1975).

² H.R. 856, 105th Cong., 2d Sess. (1998).

³ *REPORT BY-THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS* (2005) [hereafter 2005 TASK FORCE REPORT]; see Exec. Order No. 13183, 65 Fed. Reg. 82889 (Dec. 23, 2000) (establishing the Task Force); see also Exec. Order No. 13209, 66 Fed. Reg. 22105 (Apr. 30, 2001); Exec. Order No. 13319, 68 Fed. Reg. 68233 (Dec. 3, 2003).

⁴ S. 2304, 109th Cong., 2d Sess. (2006).

⁵ Parts I, II, and III of this report have been liberally excerpted, paraphrased or adapted and updated from both REISMAN, *supra* note 1, and W. Michael Reisman and Chimene I. Keitner, *Free Association: The United States Experience*, 39 *TEX. INT'L L.J.* 1 (2003).

⁶ U.N. CHARTER art. 1, para. 2; see also U.N. CHARTER art. 55.

⁷ See G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960); G.A. Res. 2621, U.N. GAOR, 25th Sess., Supp. No. 28, at 2, U.N. Doc. A/8028 (1970); G.A. Res. 2878, U.N. GAOR, 26th Sess., Supp. No. 29, at 16, U.N. Doc. A/8429 (1971); G.A. Res. 82, U.N. GAOR, 47th Sess., at 1, U.N. Doc. A/RES/47/82 (1992); S.C. Res. 384 (Dec. 22, 1975); International Covenant on Civil and Political Rights, Art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant

Continued

of the right to self-determination have remained unchanged. Self-determination, in its current legal meaning, does not require or imply a single political status or arrangement for all entities entitled to the exercise of this right;⁸ rather, international law offers self-determining entities, and in particular former colonies, three options: emergence as a sovereign independent state, free association with an independent state, and integration with an independent state. Insofar as these options represent the clear wish of the inhabitants of the self-determining entity, international law deems each of these political arrangements to entail “a full measure of self-government,”⁹ even though two of them do not involve full independence. Territorial communities exercise their right to self-determination by choosing among these options.

Although the Montevideo Convention enumerates formal criteria for statehood under international law,¹⁰ the word “state” has been and continues to be used to refer to a range of territorial phenomena. Notwithstanding the principle of the sovereign, juridical equality of states enshrined in the U.N. Charter,¹¹ factual inequalities and hence patterns of political superordination and subordination persist and receive a degree of legal cognizance. Some institutional arrangements and practices strive to implement the *de iure* equality of states;¹² others recognize and take account of these *de facto* inequalities.¹³ The international decision-making process constantly strives to accommodate the exigencies of power allocation with the major normative goals articulated and pursued by actors in the international system.

Where two states of unequal power establish formal and durable links, we may speak of an “association.” While hardly novel in terms of the power relationships just described, associations enable significant innovations in their allocation of authority. A relationship of association in contemporary international law involves the subordination of and delegation of significant competence by one of the parties (the associate) to the other (the principal), while preserving the international statehood of each.¹⁴ Associations, despite their domestic or internal features, remain a matter of inclusive concern for the international community, for many policies of modern international law, some of them peremptory, now reach communities and individuals in them regardless of the formal status established by authoritative or effective national elites. Self-determination and human rights, for example, clearly cannot be denied by claims that these matters remain, to paraphrase Article 2(7) of the U.N. Charter, solely within the domestic jurisdiction of states.¹⁵ An association, precisely because it is a pattern characterized by the continuing subordination of one community, remains subject at all times to the invocation of international scrutiny.

Invocation, however, does not necessarily import condemnation. Not all associations should be deemed unlawful or pathological under international law. To the contrary, many associations appear to be lawful and mutually beneficial relationships, though they often also involve certain costs and uncertainties. Associations as such cannot, therefore, be deemed unlawful, either under past doctrines or under the regime established by General Assembly Resolutions 1514 (XV) and 1541 (XV).¹⁶ Nor, however, can the mere appellation of association conceal circumstances of de

on Economic, Social and Cultural Rights, Art. 1, Dec. 16, 1966, 9993 U.N.T.S. 3; Advisory Opinion No. 53, Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 57-58 (June 21); *see also* Vienna Declaration and Programme of Action, June 25, 1993, para. 2, U.N. Doc. A/Conf.157/24 (Part I) (1993), 32 I.L.M. 1661, 1665 (1993) (declaring the denial of self-determination a human rights violation); Rupert Emerson, *The New Higher Law of Anti-Colonialism*, in THE RELEVANCE OF INTERNATIONAL LAW 153 (Karl W. Deutsch & Stanley Hoffmann eds., 1968).

⁸The right to self-determination belongs to “peoples,” but the definition of that term in international law remains elusive. *See, e.g.*, Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 123. For present purposes, this debate is not relevant; no one denies that the peoples of former colonies such as Puerto Rico enjoy the right to self-determination.

⁹G.A. Res. 1541, *supra* note 7, at 29.

¹⁰Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19.

¹¹U.N. CHARTER art. 2, para. 1.

¹²*See, e.g.*, U.N. CHARTER art. 18, para. 1 (giving each member of the General Assembly one vote).

¹³*See e.g.*, U.N. CHARTER ch. V (establishing the Security Council); Advisory Opinion No. 43, Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, 1960 I.C.J. 150 (June 8).

¹⁴*See* Margaret Broderick, *Associated Statehood—A New Form of Decolonisation*, 17 INTL & COMP. L.Q. 368 (1968).

¹⁵*See, e.g.*, Myres S. McDougal and W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INTL L. 1, 16 (1968).

¹⁶G.A. Res. 1514, *supra* note 7, at 66; G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960). *See, e.g.*, G.A. Res. 2064, U.N. GAOR, 20th Sess., Supp. No. 14, at 56, U.N. Doc. A/6014 (1965) (approving associated status of Cook Islands); G.A. Res. 1626, U.N. GAOR, 16th Sess., Supp. No. 17, at 33, U.N. Doc. A15100 (1962) (revoking the Trusteeship Agreement for Western Samoa).

facto colonial subordination or transform them into a lawful arrangement. The key to legality resides in the substance of the relationship, not its label. No one, for example, assumed that the colonial wars in Portuguese Africa ceased to be such because metropolitan Portugal proclaimed its overseas territories integral parts of Portugal, or that the character of the Algerian war of independence should be characterized differently because France solemnly insisted that Algeria remained an integral part of metropolitan France. Content, not form, is determinative.

Resolution 1541 (XV),¹⁷ which the General Assembly adopted on the same day as its historic “Declaration on the Granting of Independence to Colonial Countries and Peoples,”¹⁸ can for that reason be Understood as an authoritative embodiment of the key conditions that render associations a lawful and appropriate discharge of the duty to provide former colonies and peoples with a genuine form of self-determination. It includes the following indicia of lawfulness:

First, the extent of the associate population’s consent. Principle VII of the annex to Resolution 1541 (XV) states:

(a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes.

(b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.¹⁹

Note here how the contemporary associated state differs from the classic protectorate. For the latter, the consent of the elite or the effective authority sufficed regardless of either the degree of popular support for that authority or for a decision to self subordinate to a more powerful state. Associations under contemporary international law, by contrast, require a plebiscite or some other reliable indicia of the popular will. The disposition of a territorial community can be effected lawfully only with the free and informed consent of its members.²⁰

Second, the extent to which the association conduces to the fulfillment of the human, including economic and social, rights that international law now regards as minimum standards. The significance of this criterion is reflected in the express language of mandate and trust agreements, as well as Article 73 of the U.N. Charter, which stipulates how U.N. member states responsible for non-self-governing territories must exercise their authority:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international

¹⁷G.A. Res. 1541, *supra* note 7, at 29. The General Assembly declared 1990-2000 the “International Decade for the Eradication of Colonialism,” and 2001-2010 the “Second International Decade for the Eradication of Colonialism.” G.A. Res. 43/47, U.N. GAOR, 43d Sess., Supp. No. 49, at 49, U.N. Doc. A/43/49 (1988); G.A. Res. 55/146, U.N. GAOR, 55th Sess., Supp. No. 49, at 96, U.N. Doc. A/55/49 (2000).

¹⁸G.A. Res. 1514, *supra* note 7, at 66.

¹⁹G.A. Res. 1541, *supra* note 7, at 29-30.

²⁰See Lung-chu Chen & W. Michael Reisman, *Who Owns Taiwan: A Search for International Title*, 81 YALE L.J. 599, 660-69 (1972). The Annex to the Report of the Secretary-General on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples emphasizes the importance of the free, uncoerced, and well-informed exercise of the right to self-determination, and in particular the right of peoples of Non-Self-Governing Territories to “decide their future political status with complete knowledge and awareness of the full range of political options available to them, including independence.” *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. GAOR, 46th Sess., Annex, Agenda Item 19, at 3, U.N. Doc. A/46/634/Rev.1 (1991). Following this, the General Assembly, at its 78th plenary meeting in 1991, adopted an Action Plan for the International Decade for the Eradication of Colonialism, in which it declared “that exercise of the right to self-determination should be carried out freely and without outside pressure, in a form reflecting authentic interests and aspirations of the peoples of Non-Self-Governing Territories and with the United Nations playing an appropriate role.” G.A. Res. 46/181, U.N. GAOR, 46th Sess., Supp. No. 49, at 49, U.N. Doc. A/46/49 (1991).

peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

- a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
- b. to develop self government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
- c. to further international peace and security;
- d. to promote constructive measures of development, to encourage research, and to cooperate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and
- e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature, relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.²¹

International law uses various criteria to determine whether particular associations meet these two key, requirements of lawfulness. These include cultural, linguistic or ethnic, identity between the associate and its principal and relative social and economic development. But such criteria constitute indicia rather than formal prerequisites of lawfulness. Where cultural or linguistic differences between principal and associate exist but have been ignored in the association arrangement, the international community will tend to evince greater concern that the possibilities of self-determination for the associate may be limited or its autonomous cultural development impeded. Official attitudes of ethnic superiority on the part of the principal, similarly, may well interfere with or prevent the associate from enjoying its internationally guaranteed human rights. In part for this reason, Principle IV of Resolution 1541 (XV) shifts the burden of proof in such circumstances to the principal through the legal device of presumption. The principal “[p]rima facie” must transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.”²²

Where a prima facie obligation exists, other criteria must be examined, including “elements . . . of an administrative, political, juridical, economic or historical nature,” and if these elements “affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73e of the Charter.”²³ Equally, because socioeconomic and developmental disparities may limit the real ability of a community fully to participate in the relationship of association despite formal guarantees of broad participatory rights, Principle VIII of Resolution 1541 (XV) indicates a reluctance to terminate non-self-governing status by integration where socioeconomic disparities exist and implies that closer international scrutiny will be appropriate for putative associations characterized by imbalances of this sort.²⁴ Principle IX(a) thus stipulates that genuine integration should be realized only where the former non-self-governing territory has “attained an advanced stage of self-government with free political institutions, so that its people have the capacity to make a responsible choice through informed and democratic processes.”²⁵ Still, cultural, ethnic, social, and economic differences do not, ipso facto, violate the associate relation-

²¹ U.N. CHARTER art. 73.

²² G.A. Res. 1541, *supra* note 7, at 29.

²³ *Id.*

²⁴ *See id.* at 30 (emphasizing that integration “should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is [to be] integrated,” meaning that the peoples of both should enjoy, without discrimination of distinction of any kind, equal status, citizenship, fundamental right and freedoms, and “opportunities for representation and effective participation at all levels . . . of government”).

²⁵ *Id.* Accordingly, Principle IX(b) provides that integration should be realized by impartial and informed democratic processes “based on universal adult suffrage,” with the United Nations acting, where necessary, to supervise those processes. *Id.*

ship, rendering it unlawful as such or subject to intense and continuing international scrutiny.

Besides voluntary, *de jure*, integration under Principle VI(c), is there a stage in the evolution of the associate-principal relationship beyond which the associate can no longer be considered a state, as a matter of international law but must instead be deemed an integral part of the principal?²⁶ A survey of international practice does not indicate any bright-line rules; rather, the determination must be made based on contextual features and tested against a number of international policies and norms. Several examples show how unreliable certain seemingly obvious indicia of integration can be:

First, common citizenship or nationality might be thought to indicate integration. But shared citizenship with the principal, has not been deemed to extinguish the separate international legal existence of the associate. The British Nationality Act of 1948, for example, provided:

1.—(1) Every person who under this Act is a citizen of the United Kingdom and Colonies or who under any enactment for the time being in force in any country mentioned in subsection (3) of this section is a citizen of that country shall by virtue of that citizenship have the status of a British subject.

(2) Any person having the status aforesaid may be known either as a British subject or as a Commonwealth citizen; and accordingly in this Act and in any other enactment or instrument whatever; whether passed or made before or after the commencement of this Act, the expression "British subject" and the expression "Commonwealth citizen" shall have the same meaning.

(3) The following are the countries herein before referred to, that is to say, Canada, Australia, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon.²⁷

Article 77 of the 1958 French Constitution, as amended in 1960, provided similarly.²⁸ Notwithstanding these provisions, the United Nations admitted as member states many territorial entities of the British Commonwealth and the French, metropolitan community.²⁹

Second, common trade or currency agreements, which might also be thought to indicate integration, have not been deemed to extinguish the separate international legal personality of associates. In the *Austro-German Customs Regime* case,³⁰ the Permanent Court of International Justice (PCIJ) struck down a proposed customs regime between Austria and Germany because it violated specific prohibitions imposed on Austria by the Treaty of St. Germain, not because a customs regime per se involved an alienation of independence. In fact, the Court explained that

the establishment of this regime does not in itself constitute an act alienating Austria's independence, for Austria does not thereby cease, within her own frontiers, to be a separate State, with its own government and administration; and, in view, if not of the reciprocity in law, though perhaps not in fact, implied by the projected treaty, at all events of the possibility of denouncing the treaty, it may be said that legally Austria retains the possibility of exercising her independence.³¹

Consider also a current example: Successive stages of European integration following the establishment of the European Coal and Steel Community by the Treaty of Paris, including the customs regime established by the Treaty of Rome and the economic and monetary union adopted at Maastricht by the Treaty on European Union, may have been thought by some to foreshadow a "United States of Eu-

²⁶ De facto incorporation would presumably bar the former associate from access to certain international fora and arenas but would not preclude its status as a claimant in some situations. The ability to be a claimant is not limited to nation-states.

²⁷ British Nationality Act, 1948, 11 & 12 Geo. 6, c. 56, § 1 (Eng.).

²⁸ 28 CONST. art. 77 (Fr.).

²⁹ While rejection of an applicant to the United Nations does not necessarily mean that it is not a state, the converse—admission as a U.N. member as opposed to, for example, an observer—would appear to indicate international acceptance of the applicant as a state.

³⁰ Advisory Opinion No. 41, *Customs Regime Between Germany and Austria*, 1931 P.C.I.J. (ser. A/B) No. 41, at 37 (Sept. 5).

³¹ *Id.* at 52; see also *id.* at 48-49 (observing that Austria must abstain from compromising its independence). Of course, the word "independence" in the St. Germain Treaty conveyed a political conception of European security. As the Court tersely put it at the outset of its opinion, "Austria, owing to her geographical position in central Europe and by reason of the profound political changes resulting from the late war, is a sensitive point in the European system." *Id.* at 42.

rope.”³² None of these arrangements, however, has been deemed to extinguish the independence or international legal personality of the European Union’s member states. Indeed, the recent rejection of the proposed Constitution of Europe by the citizens of a number of the Union’s member states reflects, among other sentiments, popular resistance to any implication that greater cooperation and union in economic and other issues of common concern need presage the demise of the separate political identities of those states.³³

Third, a territorial community’s delegation of foreign affairs power has not been deemed to extinguish its international legal personality. In *Rights of Nationals of the United States of America in Morocco*, the ICJ noted that the France did not dispute “that Morocco, even under the Protectorate, has retained its personality as a State in international law. The rights of France in Morocco are defined by the Protectorate Treaty of 1912.”³⁴ The Court explained that “[u]nder [the Treaty of Fez of 1912], Morocco remained a sovereign State, but it made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco, and, in principle, all of the international relations of Morocco.”³⁵ A line of English cases from the nineteenth century supports the same view.³⁶ And Cyprus’s admission to the United Nations shows that the reservation of broad military privileges or “military servitudes”³⁷ by the former principal does not extinguish independence.³⁸ Even the peculiar and broad limitations on the foreign affairs power built into the very existence of the Free City of Danzig did not deprive that entity of statehood, as both international practice and jurisprudence confirm.³⁹ In short, state practice confirms that the delegation of foreign affairs power to another state does not alone extinguish a territorial entity’s international legal personality.

Fourth, subordination of the associate state’s judiciary to the highest judicial body of the principal state has not been deemed to extinguish the associate’s independent international existence. Many of the members of the British Commonwealth retained, and some still retain, various ties to the Judicial Committee of the Privy Council, yet none of these relationships has been thought to jeopardize their recognition as independent entities.⁴⁰

None of these four factors, then, necessarily terminates the associate’s independent existence or even offers prima facie evidence indicating its de facto merger with the principal. Rather, in contemporary international law, the paramount factor that would indicate lawful transition from association to integration is the genuine

³² See Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 247 (1992); Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (Treaty of Rome); Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951 (Treaty of Paris).

³³ Treaty Establishing a Constitution for Europe, Oct. 29, 2004. On May 29 and June 1, 2005, respectively, French and Dutch voters rejected the treaty, and other states have since suspended the ratification process. See, e.g., *The Europe that Died*, ECONOMIST, June 4, 2005.

³⁴ *Rights of Nationals of the United States in Morocco* (Fr. v. U.S.), 1952 I.C.J.176, 185 (Aug. 27).

³⁵ *Id.* at 188.

³⁶ See, e.g., *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149, 154-62 (Eng. C.A. 1893) (explaining that the treaty of alliance with England does not deprive Johore of its independence); *Duff Dev. Co. v. Gov’t of Kelantan*, [1924] A.C. 797, 808 (H.L. 1924) (Eng.) (“[N]otwithstanding the engagements entered into by the Sultan of Kelantan with the British Government . . . His Majesty does not exercise or claim any rights of sovereignty or jurisdiction over that country.”).

³⁷ Albert J. Esgain, *Military Servitudes and the New Nations*, in 3 THE NEW NATIONS IN INTERNATIONAL LAW AND DIPLOMACY: THE YEARBOOK OF WORLD POLITY 42, 42 (William V. O’Brien ed., 1965).

³⁸ See, e.g., Treaty Concerning the Establishment of the Republic of Cyprus, Aug. 16, 1960, U.K.-Greece-Turk.-Cyprus, 382 U.N.T.S. 9, 38.

³⁹ For a survey of virtually all the decisions made in the League on Danzig’s status, see JOHN BROWN MASON, *THE DANZIG DILEMMA: A STUDY IN PEACEMAKING BY COMPROMISE* 238-41 (1946). For a compendium of treaty and diplomatic practice, see *id.* at 228-47. Issues related to Danzig’s status came before the Permanent Court on a number of occasions. See, e.g., Advisory Opinion No. 18, *Free City of Danzig and Int’l Lab. Org.*, 1930 P.C.I.J. (ser. B) No. 18, at 13 (suggesting that notwithstanding its special relationship with Poland, the Free City of Danzig remains entitled to look out for its own interests and to represent itself); Advisory Opinion No. 44, *Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels*, 1931 P.C.I.J. (ser. A/B) No. 43, at 18 (detailing Danzig’s treatment as an independent political entity); Advisory Opinion No. 42, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, 1932 P.C.I.J. (ser. AB) No. 44, at 23-24 (suggesting that the *sui generis* status of the Free City of Danzig does not preclude the application of international over municipal laws in a dispute between Danzig and Poland). In the *War Vessels* case, Danzig appointed an ad hoc judge. *Polish War Vessels*, 1931 P.C.I.J. at 131.

⁴⁰ See, e.g., Agreement for the Reference of Appeals from the Supreme Court of the Federation of Malaya to the Judicial Committee of the Privy Council, Mar. 4, 1958, U.K.-N. Ir.-Malaya, 314 U.N.T.S. 253 (demonstrating ties between members of the Commonwealth and Great Britain).

and freely expressed desire of the associate's people to terminate an independent existence and merge with the principal. The international community thus accepted overt and apparently uncoerced demonstrations of popular sentiment in favor of merger in the cases of Syria and the United Arab Republic and of the Northern Cameroons and the Federation of Nigeria.⁴¹ But given the conceptual and logistical difficulties in assessing the will of the relevant populace, the international community may not always accept at face value a purported expression of integrationist desires. Or, as in the case of West Papua and Indonesia,⁴² it may be either misguided or simply disingenuous for the international community to accept the results of a purportedly free, but manifestly rigged, "act of free choice."⁴³

Multiple and diverse forms of possible legal association exist. The rights and duties of associated states in international law vary according to, inter alia, activity, organizational setting, and the terms of the association. As the ICJ said in the *Reparations* case, "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community."⁴⁴ Associated states may, depending on their form and status, conclude treaties, join the United Nations and specialized agencies, and be parties to contentious cases before the ICJ.⁴⁵ The Covenant of the League of Nations explicitly allowed colonies to become members of the League. As practice shows, the U.N. Charter, while not as explicit as the Covenant on this point, also permits associated states to become members of the United Nations.

In the modern era, international actors have paid insufficient attention to the potential contribution of associate status to the public order of the world community. Association, as noted, involves the recognition of the political dependence of an entity but insistence on its continuing discrete identity under international scrutiny. Especially during the Cold War, this status represented a potentially beneficial option for small states that found themselves in the comparatively uncontested sphere of one of the Great Powers; the "balance of power" might have availed the principal and its counterparts, but it did not provide opportunities for survival and minimum political effectiveness for associates. Today, the economic, political, and military dominance of certain states may make association worthwhile for smaller states. By seeking membership in international organizations, they can concede dependence in one arena while asserting their independence in another; membership itself becomes a guarantee of continued independence. The *Economist* made the point with characteristic bluntness in regard to Kuwait: "[c]ertainly Kuwait has built up a surer defence by getting itself accepted as an independent state—or anyhow a fair imitation of one" than by British protection.⁴⁶ The rallying of an international coalition in 1991 to repel the Iraqi invasion of Kuwait would seem to confirm this observation.

A legal status is not a physical phenomenon; it is an artifact, a human creation. Its content and social significance reflect its designers' objectives within the constraints imposed by the political context (itself subject to shaping). In certain politically charged areas, such as the West Bank, the possibility for a meaningful regional accommodation based on the principle of association seems remote. In other areas, such as Taiwan or Kosovo, the concept of free association may yet hold some

⁴¹On Syria, see *Note verbale dated 7 March 1958 from the Secretary-General to the president of the Security Council*, U.N. SCOR, 13th Sess., Supp. Jan.-Mar. 1958, at 31-32, U.N. Doc. S/3976 (1958); see also *Notification About United Arab Republic*, 1958 U.N.Y.B. 106, U.N. Sales No. 59.I.1. For the sequence of events involved in the "reactivation" of Syria's membership, see *The Admission of New Members and Related Matters*, 1961 U.N.Y.B. 166, 168, U.N. Sales No. 62.I.1. On the Northern Cameroons, see G.A. Res. 1608, U.N. GAOR, 15th Sess., Supp. No. 16A, at 10-11, U.N. Doc. A/4684/Add.1 (1961); see also *The Northern Cameroons (Cameroon v. U.K.)*, 1963 I.C.J. 15 (Dec. 2).

⁴²Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian), 18 U.N. GAOR Annex I (Agenda Item 20), U.N. Doc. A/5578 (1963).

⁴³G.A. Res. 2504 (XXVI), 24 U.N. GAOR Supp. (No. 30) at 3, U.N. Doc. A/7630 (1969). For a description of the purported act of free choice, see Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 575-76 (1992); see also Thomas M. Franck, *Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War*, 77 AM. J. INT'L L. 109, 120 (1983) (denouncing Indonesia's "rigged 'consultation' which a shamefaced international community accepted as a fait accompli").

⁴⁴Advisory Opinion No. 4, *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 178 (Apr. 11).

⁴⁵See Reisman & Keitner, *supra* note 5, at 58-61 (providing a tabular comparison of the activities and involvement in various international organizations and treaties of the freely associated states of the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau).

⁴⁶*Phantom War in the Desert*, *ECONOMIST*, May 21, 1966, at 802, 803.

promise, even if current political tensions preclude the immediate likelihood of constructive innovation. In a world where independent states exist within increasingly constraining economic, legal, and even political frameworks, free association can provide a basis for a range of constructive state relationships on the spectrum between full independence and integration. Were the potential for free association and an appreciation of its international legal legitimacy made more explicit, might not erstwhile secessionist movements such as Biafra and the Southern Sudan have been resolved more quickly and peacefully?

II. PUERTO RICO: HISTORY, SOCIOECONOMICS, AND POLITICS

A. Introduction

Puerto Rico, the easternmost island of the Greater Antilles, lies 75 miles east of the Dominican Republic and just west of the Virgin Islands. A little over 180 kilometers (100 miles) in length and 65 kilometers (40 miles) in width at its maximum extensions, its total area measures 9104 square kilometers (5657 square miles), 145 square kilometers (90 square miles) of this being water. In July 2006, Puerto Rico's population stood at about 3,927,188 people, giving it a population density of more than 1000 people per square mile.⁴⁷

Since 1952, the people of Puerto Rico have associated themselves with the United States as an "estado libre" or "commonwealth." This status has been interpreted in complex and contradictory ways by different agencies of the U.S. government and Congress. But under international law, Puerto Ricans enjoy the right to change their status if and when they so desire.⁴⁸ Three options have been regularly advanced by advocates in the vigorous political life of the island: (1) integration into the United States as a state of the federal union; (2) severance from the United States and emergence as a fully distinct and independent nation-state; and (3) continuation as a Commonwealth, an "estado libre" in association with the United States.

Puerto Ricans have repeatedly opted to maintain Puerto Rico's status as an associated state, most recently in 1998—not so much because a decisive majority favors the continuation of that status but rather because the Puerto Rican electorate remains divided and unable to agree upon an alternative, be it statehood, independence, or some other modification of the status quo. In the 1998 plebiscite, 0.06% of the electorate voted for "Territorial Commonwealth," 0.29% for "Free Association," 46.49% for "Statehood," 2.54% for "Independence," and 50.30% for "None of the Above."⁴⁹

Puerto Rico is not a member of the United Nations, but it legally can and does participate extensively in the international system.⁵⁰ The question for Puerto Ricans, now as much as in the past, is how to do so in ways that will best contribute to the realization of its national, cultural, economic, and social goals. Questions also persist about the appropriate relationship between the United States, and particularly the U.S. military, and Puerto Rico. The key issue for Puerto Rico, as for other "seasoned" associated states, remains how to balance the benefits of association with its potential costs and compromises. It is therefore unsurprising that the question of Puerto Rico's future status remains central to Puerto Rican consciousness but has yet to produce a consensus, or even a clear majority, in favor of any particular arrangement.

Many small territorial communities throughout the globe straggle with a similar dilemma: how best to establish and maintain links with larger social and wealthier economic systems, while retaining and developing an indigenous culture and preserving substantial autonomy. Today, in the era of globalization, in which events and developments throughout the globe inevitably penetrate and shape local community life, the significance of international participation to the diverse issues raised by this dilemma has become even more pronounced.

Puerto Ricans occupy a distinct place in the American family. They comprise a discrete and numerically significant community—nearly four million people on the island alone. But because Puerto Rico is not a "territory," Puerto Ricans cannot participate in those international organizations that permit a "territorial" exception. Because it is not a state of the United States, Puerto Ricans lack effective representation or input in Congress's participation in U.S. foreign policy. Because Puerto Ricans have not organized themselves or been conceived of as an interest group,

⁴⁷ CIA, *The World Factbook* (2006), *Puerto Rico*, at <<http://www.cia.gov>> (last visited Apr. 10, 2006) [hereafter *World Factbook*].

⁴⁸ For a discussion of the international right to self determination, see Part IV, *infra*.

⁴⁹ 2005 TASK FORCE REPORT, *supra* note 3, at 4.

⁵⁰ See REISMAN, *supra* note 1, at 51-103.

they have not refined the informal techniques of influence that facilitate the sharing of power in the U.S. political system. Nor have alternative forms of “consultation” between the executive branch and the government of Puerto Rico been worked out.⁵¹ Puerto Rico, in short, is as influenced by world affairs as any other territorial community but has virtually no influence on most of the international decisions that may shape its destiny.

Today, as in the past, Puerto Rican international participation emerges *as an indispensable way of maintaining effective internal autonomy*. The increasing social ambitions of domestic governments require recruitment of resources from the entire world arena. Inability to turn to the world inevitably reduces the internal efficacy and autonomy of a government. It is now routine for states and even some cities within the United States to send trade delegations abroad.⁵² Equally, Puerto Rico’s efficacy and autonomy at home increasingly depend on its international activity abroad.

The following analysis shows that Puerto Rico remains—at least as a matter of *international law*—an associated state, an international entity with independent legal personality rather than an integrated component of another international entity; that diverse international institutional arrangements exist for the participation of associated states in the international system; and that participation by associated states in a number of international institutional settings offers policy advantages for both the associate and the principal. It also shows, however, that Puerto Rico remains entitled, as a matter of international law, to change the manner in which it exercises its internationally secured right to self-determination should future developments lead the electorate to reappraise the costs and benefits of continued association with the United States.

While U.S. constitutional law will be examined in Part IV, in the final analysis, constitutional issues need not present a serious obstacle to Puerto Rico’s ability to exercise its right to self-determination or to participate more robustly in the international system, provided—a major proviso—that the political consensus and will for it can be generated within Puerto Rico. The ultimate point of emphasis here, as in the earlier study, is that the disposition of the future of Puerto Rico is first and foremost a Puerto Rican prerogative. In the final section of this report, we consider the fora and processes that may be available to Puerto Rico as it strives to preserve and enjoy its right to self-determination well into the twenty-first century.

B. Culture and Society

1. Descent and Language

Puerto Rico’s society is internally homogenous but remarkably distinct from both its island neighbors and the United States. Most of its people are of Spanish descent with some African and Indian strains,⁵³ including recent immigrants from neighboring Caribbean islands, such as Cuba and the Dominican Republic. Although Puerto Rico is officially bilingual, Spanish is the common and, for most, the native language, and few Puerto Ricans can read, write, and speak fluently both English and Spanish. In practice, Spanish is therefore the language of home, business, and government, and the majority of the media operates exclusively in Spanish.

2. Religion

An estimated 85% of Puerto Ricans observe Roman Catholicism.⁵⁴ One student of Puerto Rico suggests that the church’s dogma contributes to a “fatalistic” outlook in Puerto Rican society: projecting an established social order and a promise of life after death, it places a high value on stoicism and teaches acceptance of one’s lot in life as God’s will.⁵⁵ But another student argues, more plausibly in our view, that under the press of modernization, attitudes change as do the institutions responsible for forming them, and “major social transformations seem eminently possible with-

⁵¹ On very rare occasions, individual Puerto Ricans have been appointed to American delegations, but this sporadic practice does not offer an avenue for the systematic and effective presentation of Puerto Rico’s views to the world.

⁵² See, e.g., *Looking to Sell, Buy South of Border*, HOUSTON CHRON., Aug. 24, 2003, at 7; *Countdown to Beijing Olympics California Firm Pitch Services to Bustling Market*, CAL. CONSTRUCTION LINK, Mar. 1, 2003, at 27; Tim Sullivan, *Utah Trade Delegation Seeks to Develop Mexican Business Connections on Trip*, SALT LAKE TRIB., Feb. 5, 2003; *U.S. Houston Trade Delegation Arrives in Saudi Arabia*, SAUDI ARABIAN NEWS DIG., Oct. 29, 2002, available at 2002 WL 4340289.

⁵³ U.S.-PUERTO RICO COMM’N ON THE STATUS OF PUERTO RICO, STATUS OF PUERTO RICO 143 (1966).

⁵⁴ World Factbook, *supra* note 47.

⁵⁵ KAL WAGENHEIM, PUERTO RICO: A PROFILE 221-22 (2d ed. 1970).

out much help or hindrance from the institutional forms of religious belief and worship.”⁵⁶

3. National and Cultural Identity

A great complex of factors indicates the extent and intensity of Puerto Rico's distinct national identity. Puerto Ricans have their own flag and national anthem. They celebrate a unique mix of special holidays and holy days, which reflect meaningful aspects of Puerto Rican history and culture.⁵⁷ *Dias de Fiesta* commemorate the abolition of slavery in 1873, the establishment of the Commonwealth government in 1952, and the *Grito de Lares* insurrection against the Spanish colonial authorities in 1868.⁵⁸ Holidays honor such men as Eugenio Maria de Hostos, writer, abolitionist, and educator; José de Diego, the first president of the Puerto Rican House of Representatives; and Luiz Muñoz Rivera, a liberal journalist, writer, and poet who negotiated the Charter of Autonomy with Spain and later served as Puerto Rico's resident commissioner in Washington.

Several Puerto Rican writers and historians identify the nineteenth century as the decisive period in the formation of a Puerto Rican culture distinct from the Hispanic tradition.⁵⁹ In that period all forms of cultural expression—literature, music, dance, art—apparently developed into more than an extension or variant of the Hispanic tradition.⁶⁰ Political developments during this period were also a major factor contributing to the awakening of national consciousness. One of the first Puerto Rican historians, Brother Inago Abbad y Lasierra, writing in 1796, described the attitude of the Spanish colonial elite: “they gave the name of Creole indistinctly to everyone born on the island, no matter what race or mixture he comes from. The Europeans are called whites, or to use their own expression, ‘men of the other band.’”⁶¹ This distinction between the native Puerto Rican and the “man of the other band” was the cornerstone of a regime of privilege favoring the Spaniard over the Puerto Rican; and this and other manifestations of despotic Spanish rule gave rise to a hostility toward Spain and an increasingly widespread demand for a fundamental change in the colonial condition, either by way of autonomy or independence.

Puerto Rico, like other states, has its idealized folk hero: *El Jibaro*. In the eighteenth century, the rural people of Puerto Rico were known as *jibaros*, and even today the word expresses a nostalgia for, and idealization of, the old rural ways of life. To the Puerto Rican, *El Jibaro* represents “the honest man, the man with both feet firmly planted on the soil, the man whose lack of schooling does not deprive him of a native shrewdness and wisdom that has something to do with the timelessness of nature.”⁶²

For many, *El Jibaro* became, and remains, a symbol of Puerto Rican culture and an expression of the intensely felt need to preserve the essence of that culture from the onslaught of Western and American culture. In 1968, Governor Ferre of the New Progressive Party elected in November of that year, introduced and popularized the concept of “*jibaro*” statehood: that Puerto Rico could become a state of the United States without suffering cultural assimilation. Commonwealth proponents have sought to interpret his defeat in 1972 and the restoration of the Popular Democrats as a sign of the incompatibility between *El Jibaro* and incorporation into the United States as a component state. National identity, on this view, can best be preserved and strengthened by the development of autonomous Commonwealth status.

C. Political and Economic History

1. Spanish Jurisdiction (1493-1898)

The Kingdom of Spain asserted title to Puerto Rico in 1493 following Columbus's second voyage to the Americas,⁶³ and for more than four centuries thereafter, it remained under Spanish jurisdiction. During that time, Puerto Rico advanced from the status of a colony, subject to the absolute authority of the Spanish Governor

⁵⁶ MELVIN M. TUMIN & ARNOLD S. FELDMAN, SOCIAL CLASS AND SOCIAL CHANGE IN PUERTO RICO 296 (2d ed. 1971).

⁵⁷ WAGENHEIM, *supra* note 55, at 230-33.

⁵⁸ In 1868, revolutionaries, inspired by the separatist Dr. Ramon Emeterio Betances, mounted a brief but unsuccessful uprising known as the *Grito de Lares*. Under the motto “Viva Puerto Rico Libre,” they marched on Lares and declared the Republic of Puerto Rico. Although the Spanish quickly crushed the insurrection, the *Grito de Lares* remains an important element of Puerto Rican folklore and national identity. MANUEL MALDONADO-DENIS, PUERTO RICO: A SOCIO-HISTORIC INTERPRETATION 39-43 (Elena Vialo trans., 1972).

⁵⁹ WAGENHEIM, *supra* note 55, at 220.

⁶⁰ MALDONADO-DENIS, *supra* note 58, at 22.

⁶¹ *Id.* at 21.

⁶² WAGENHEIM, *supra* note 55, at 228.

⁶³ World Factbook, *supra* note 47.

General and his troops, to an autonomous or semi-autonomous overseas province of Spain.⁶⁴ It achieved its most significant improvements in status in the nineteenth century. From 1812 to 1836, Puerto Rico “was granted equal status with that of Spanish provinces on the Iberian Peninsula.”⁶⁵ In 1836, however, a new absolutist regime ousted the former liberal regime and demoted Puerto Rico to its former colonial status.⁶⁶

In 1868, after a Spanish revolution, Spain again granted Puerto Rico the right to participate in its national councils, and as a consequence, Puerto Rican representatives helped draft the 1876 Spanish Constitution.⁶⁷ Under Article 88 of the 1876 Constitution, overseas provinces enjoyed voting representation in the Spanish *Cortes* and were to be governed by special laws.⁶⁸ During this period, roughly from 1868 to the late 1890s, Puerto Rico became the scene of increased political activity. In 1870, Puerto Ricans organized the Liberal Reformist Party, and in 1873, its demands that slavery be abolished prevailed.⁶⁹ In 1887, the Liberal Reformist Party, which embraced a platform of autonomy within the Spanish empire rather than independence, changed its name to the Puerto Rican Autonomist Party.⁷⁰ Ten years later, its leader, Luis Muñoz Rivera, entered into an agreement of mutual support with Praxedes Sagasta, leader of the Spanish Liberal Party.⁷¹

Perhaps because of this collaboration, when, in October 1897, Sagasta became prime minister of the Spanish government, Puerto Rico received a genuine charter of autonomy within two months.⁷² Article 88 of the 1876 Constitution, combined with Puerto Rico’s escalating demands for self-government, thus culminated in the Royal Decree of 1897 (essentially a counterpart of the 1876 Constitution), which granted the island a charter of self rule.⁷³

The Charter gave the insular government power over most matters of insular concern. The elected lower house of the Puerto Rican legislature enjoyed the power to initiate tax and credit legislation,⁷⁴ and municipalities were authorized to govern their own affairs under legislative guidance.⁷⁵ Acts contrary to the spirit of the Charter could be judicially challenged by aggrieved persons.⁷⁶ The insular government also enjoyed some control over its external commercial relations, including the power to enact tariffs and make commercial treaties under certain circumstances, and it participated as an equal in the Spanish Customs Union.⁷⁷ Puerto Rico’s local government thus possessed some attributes of a fully sovereign state.

Spain reserved significant royal power, however, through the powers conferred on the governor general, an appointee of the king on nomination of the Council of Ministers. He exercised full executive authority and had the power to appoint members of the judiciary and to select for life tenure seven of the fifteen members of the Council of Administration, the upper chamber of the legislature.⁷⁸ But two provisions of the Charter limited royal control to some extent: Article 21, as noted, provided that only the Chamber of Representatives, the lower legislative house, could

⁶⁴ HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 86TH CONG., PUERTO RICO: A SURVEY OF HISTORICAL, ECONOMIC, AND POLITICAL AFFAIRS 1 (Comm. Print 1959). *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ SPANISH CONST. art. 88 (Sp.), translated in DOCUMENTS OF THE CONSTITUTIONAL HISTORY OF PUERTO RICO 21 (Office of the Commonwealth of Puerto Rico in Washington, D.C. ed., 2d ed. 1964) [hereafter CONSTITUTIONAL HISTORY].

⁶⁹ MALDONADO-DENIS, *supra* note 58, at 36.

⁷⁰ *Id.* at 28-29; see also Lidio Cruz Monclova, *The Puerto Rican Political Movement in the 19th Century*, in STATUS OF PUERTO RICO: SELECTED BACKGROUND STUDIES PREPARED FOR THE UNITED STATES-PUERTO RICO COMMISSION ON THE STATUS OF PUERTO RICO 31-32 (1966).

⁷¹ MALDONADO-DENIS, *supra* note 58, at 48.

⁷² *Id.*

⁷³ Constitution Establishing Self Government in the Island of Puerto Rico by Spain in 1 897, Nov. 25, 1897, reprinted in CONSTITUTIONAL HISTORY, *supra* note 68, at 22-46 [hereafter Puerto Rico Charter]. While the Puerto Rico Charter did not include a Bill of Rights, the Spanish Constitution did, and under the Charter, the governor general could invoke its protection. *Id.* art. 43.

⁷⁴ See Puerto Rico Charter art. 11 (representatives to be “named by the electoral boards in the manner prescribed by law”); see also *id.* art. 21; *id.* art. 32 (delegating the legislature the authority to govern purely local matters, including public credit, banks, and monetary systems), *id.* art. 35 (mandating that local legislature bear responsibility for forming a national budget).

⁷⁵ See *id.* tit. VIII.

⁷⁶ *Id.* art. 63.

⁷⁷ *Id.* arts. 37-40.

⁷⁸ *Id.* arts. 5, 41-42.

initiate tax and credit legislation; another provision authorized Charter amendments only “by virtue of a law and on the petition of the insular parliament.”⁷⁹

In short, despite limitations, the Charter gave Puerto Rico a degree of self-government that greatly exceeded that afforded to it by the United States in the early 1900s. With the Autonomist leader Luis Muñoz Rivera as president of the Council of Secretaries (in effect, prime minister), the colonial Creole elite enjoyed formal power; for the first time, Puerto Ricans governed Puerto Rico. While this interlude of self-government did not last long, and the Charter suffered from several extreme ambiguities, it signaled the beginning of a tradition favoring autonomy rather than independence or assimilation—a tradition that has continued to occupy the mainstream of Puerto Rican political life.

2. *Early U.S. Administration (1898-1952)*

The Charter government lasted for only five months, brought to an abrupt end by the U.S. invasion on July 25, 1898 and Spain’s defeat in the Spanish-American War. Under the terms of the Treaty of Paris,⁸⁰ which ended the war, Spain ceded Puerto Rico to the United States. Article IX provided that “the civil rights and political status . . . of the territories hereby ceded to the United States shall be determined by the Congress.”⁸¹ Congress thus assumed ultimate authority in the determination of Puerto Rico’s political status and operation.

During the eighteen-month interval between the end of the Spanish-American War and enactment of the Foraker Act in 1900,⁸² U.S. military authorities ruled Puerto Rico and introduced substantial changes in its political system. They replaced the parliamentary form of government with a nominal separation of powers in three branches, mirroring the American system, but with preponderant power invested in an executive appointed by the U.S. president. They also reorganized the judiciary, laid the foundation for the separation of church and state, and established a public school system modeled on that of the United States.⁸³

The Foraker Act replaced the military government with a civilian one, which affirmed and extended the basic changes made by the former. While the Act vested executive authority in a governor and an eleven-member executive council, five of whom were to be Puerto Ricans, it gave the U.S. president powers virtually Caudillan in scope—for he enjoyed the authority to appoint all twelve of these executive officials and all of the justices of the Puerto Rican Supreme Court. Because the executive council constituted the upper house of the Puerto Rican legislature, the president’s power of appointment also effectively extended to the legislative branch.⁸⁴ Puerto Ricans were enfranchised to elect the thirty-five members of the lower legislative house and a resident commissioner authorized to speak for them, but not to vote, in the U.S. Congress.⁸⁵ which the Act entitled to annul any law passed by the Puerto Rican legislature.⁸⁶ The Act also declared that all federal legislation except internal revenue laws and other measures “not locally applicable” would have the same force and effect in Puerto Rico as in the United States.⁸⁷ Though politically restrictive, the Foraker Act did confer economic benefits on Puerto Rico. It established free trade with the mainland, exempted Puerto Ricans from federal taxation, and provided that federal excise taxes on the importation of Puerto Rican rum and tobacco be turned over to the Puerto Rican treasury.⁸⁸

After the Foraker Act’s enactment, political leaders like Muñoz Rivera and de Diego (primarily an *independentista*) led a struggle for greater autonomy and self-government, and Congress responded in 1917 with the Jones Act,⁸⁹ a slight liberalization of existing law. The Jones Act created a bill of rights for Puerto Rico, provided for election of the upper legislative house, and required that department heads be appointed by the governor with the advice and consent of the Puerto Rican Senate. The president, however, retained the power to appoint the attorney general,

⁷⁹ *Id.* Additional Articles, art. 2.

⁸⁰ Treaty of Peace, U.S.-Sp., Dec. 10, 1898, 30 Stat. 1754, T.S. No. 343.

⁸¹ *Id.* art. IX.

⁸² Foraker Act, Act of Apr. 12, 1900, ch. 191, 31 Stat. 77.

⁸³ INST. FOR THE COMP. STUDY OF POL. SYS., PUERTO RICO ELECTION FACTBOOK 6 (1968) [hereafter PUERTO RICO ELECTION FACTBOOK].

⁸⁴ See Foraker Act §§ 17-18, 33.

⁸⁵ *Id.* § 29.

⁸⁶ *Id.* § 31.

⁸⁷ *Id.* § 14.

⁸⁸ PUERTO RICO ELECTION FACTBOOK, *supra* note 83, at 6.

⁸⁹ Act of Mar. 2, 1917, Pub. L. No. 368, ch. 145, 39 Stat. 951 (codified at 48 U.S.C. § 794 (2000)).

the auditor, the Commission on Education, and all of the justices of the Puerto Rican Supreme Court.

Most significantly, the Jones Act granted U.S. citizenship to all Puerto Ricans. Leaders of the Union of Puerto Rico, the dominant political party at that time, opposed this change because they believed that citizenship would jeopardize their ultimate aspiration, “nationalism with or without an American protectorate.”⁹⁰ It was probably difficult for citizens of a powerful ethnocentric state—enraptured by their own national symbols and pride and in the midst of an imperial estrus—to entertain the notion that others would not want the badge of citizenship; and, to be sure, some Puerto Ricans lobbied in favor of it. The Union Party’s opposition in any event failed to dissuade Congress, and Puerto Ricans became citizens, with some but not all of the attendant rights and duties of that status: Puerto Ricans, for example, became subject to the draft,⁹¹ but they also gained certain fundamental rights guaranteed by the U.S. Constitution.⁹²

3. *Development of the Puerto Rican Political Economy*

Until about 1940, agriculture remained the primary, almost exclusive, economic activity in Puerto Rico, and the associated political structure could be characterized as virtually feudal.⁹³ The primary crops, in order of importance, were sugar, tobacco, and coffee.⁹⁴ In the first two decades of the twentieth century, U.S. citizens and corporations invested substantial capital in Puerto Rico, particularly in its sugar industry, and most of the profits were repatriated to the United States. The seasonal nature of the agricultural economy and low wages created conditions of instability.

During the New Deal era, however, Puerto Rico benefited from U.S. aid. Between 1929 and 1933, the island suffered terrible calamities. Public funds, first provided by the Puerto Rican Emergency Relief Administration in 1933 and later by other federal agencies, amounted to \$230 million by 1946.⁹⁵ Federal aid programs included public works construction, food distribution, agricultural subsidies, and loans to farmers and businessmen. These programs began to wind down by the end of the 1930s, but at about that time, Rexford Tugwell, the last mainland-appointed governor of the island, and Muñoz-Mann, who had become president of the Senate, began a series of new programs aimed at development.⁹⁶

They created several development agencies, the most important being the Puerto Rico Industrial Development Company (PRIDCO), which after 1950 was known as the Economic Development Administration (EDA).⁹⁷ Initially, PRIDCO remained wary of encouraging direct U.S. investment, and its operations involving investment of about \$21 million were for the most part funded by direct grants, tax and revenue remissions, and returns on profitable investments. In 1947, however, PRIDCO began to encourage foreign investment, sold its own holdings, and became a promotional agency. To this end, an industrial incentives act was passed, which gave long-term tax exemptions to eligible outside industries.⁹⁸ From 1948 to 1967, 1406 firms were promoted, 67% of them foreign.⁹⁹ National income increased fourfold (from \$407 million to \$2163 million), and employment increased by 28%.¹⁰⁰ While corresponding population growth (1,880,000 in 1940 to 2,712,000 in 1970) offset these increases to some extent,¹⁰¹ Puerto Rican economic growth rates, during this period compared quite favorably with those of other developing states.

⁹⁰ MALDONADO-DENIS, *supra* note 58, at 107.

⁹¹ *See id.* at 108 (noting that months after passage of the Jones Act, President Woodrow Wilson ordered the registration and recruitment of Puerto Ricans for the U.S. armed forces).

⁹² *See Balzac v. People of Porto Rico*, 258 U.S. 298, 312-13 (1922). The scope of these rights has been subject to controversy and adjudication. *See* Part IV, *infra*.

⁹³ RITA M. MALDONADO, *THE ROLE OF THE FINANCIAL SECTOR IN THE ECONOMIC DEVELOPMENT OF PUERTO RICO* 18-21 (1970).

⁹⁴ *Id.* at 23.

⁹⁵ *Id.* at 24.

⁹⁶ *Id.* An initial attempt to enforce a 500 acre law, dormant since its enactment in 1900, also broke much of the land monopoly, though it was not carried to completion because, among other reasons, public attention shifted to industrialization.

⁹⁷ *Id.* at 25.

⁹⁸ *Id.* at 26.

⁹⁹ MALDONADO, *supra* note 93, at 27.

¹⁰⁰ *Id.* at 28 tbl. 3.3.

¹⁰¹ *Id.* at 27-30; *see also* U.S. DEPT OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 792 (1973). On the other hand, agriculture surrendered a 50% hold of the work force and dropped to about 13%. Because agriculture in traditional settings is notorious for “hiding” unemployment, the increase in real employment may be somewhat greater than the

Several factors appear to have contributed to this trend: (1) a duty free customs union with the United States; (2) no federal income tax; (3) local tax exemptions for eligible direct investments; (4) use of the U.S. dollar as currency and therefore, during the period, no repatriation or convertibility problems; (5) political stability attributable to association with the United States; (6) federal grants, disbursements, and transfer payments; and (7) cheap recruitment of funds in U.S. capital markets because Puerto Rican bonds enjoy exemption from federal income taxation.¹⁰² Financial and planning institutions also contributed to Puerto Rico's strong economic growth during this time.

Nonetheless, several failures of economic development have afflicted, and continue to afflict, Puerto Rico's economy. In 2002, Puerto Rico's unemployment rate stood at 12% out of a labor force of about 1.3 million people.¹⁰³ From 1940 to 1972, its population increased from about 1.8 million to 2.8 million; as of July 2006, it exceeded 3.9 million.¹⁰⁴ Puerto Rico also suffers from a continuing dependence on foreign capital, which PRIDCO's shift to promoting private enterprise in the 1940 made virtually inevitable, and a high inflation rate, which at times is twice or more that of the general rate in the United States.¹⁰⁵ Finally, repatriation of foreign investment profits (a regular aspect of foreign investment) continues to deprive Puerto Rico of significant local capital generation.¹⁰⁶

4. *Toward a Commonwealth Arrangement (1952-present)*

Throughout the first half of the twentieth century, the Unionist Party and other groups continued to fight for greater autonomy. Not until 1947, however, did Congress pass the first major amendment to the Jones Act, Public Law 362, which provided for an elected governor.¹⁰⁷ Some Puerto Rican groups advocating both autonomy and independence continued to press Congress for a constitution and government of their own drafting. In 1950, the resident commissioner for Puerto Rico, fulfilling a campaign promise, introduced a bill in Congress, H.R. 7674, which provided for the organization of a constitutional government by the people of Puerto Rico. In 1950, Congress adopted the bill "in the nature of a compact" as Public Law 600,¹⁰⁸ which "fully recognized] the principle of government by consent" and affirmed that "the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption."¹⁰⁹ That constitution would enter into force upon its approval by a Puerto Rican referendum.¹¹⁰

Public Law 600 did not dictate the content of the constitution except to require that it provide for a republican form of government and include a bill of rights. The Act also provided for the automatic repeal of many provisions of the Jones Act, as amended (the pre-existing Organic Act), upon the constitution's entry into force.¹¹¹ The repealed sections related primarily to matters of purely local concern, including the structure of the insular government. The rest of the provisions remained in force and were renamed the Puerto Rican Federal Relations Act (PRFRA).¹¹² The PRFRA remains a major source of authority governing U.S.-Puerto Rico relations and will be discussed in greater detail below. Though its name conveys the impression of a logically structured set of considered and coherent norms, the PRFRA actually consists of a melange of acts that have survived and accumulated since 1900.

figures suggest. Personal income increased from \$218 in 1940 to \$804 in 1967 per capita per annum. MALDONADO, *supra* note 93, at 30-31.

¹⁰² MALDONADO, *supra* note 93, at 31-33.

¹⁰³ World Factbook, *supra* note 47.

¹⁰⁴ *Id.*

¹⁰⁵ In 2003, Puerto Rico's inflation rate was estimated at 6.5%, *see* World Factbook, *supra* note 47, while in 2004, that of the United States stood at 2.7%. THE ECONOMIST, POCKET WORLD IN FIGURES 234 (2005).

¹⁰⁶ *See* MALDONADO, *supra* note 93, at 36038. PRIDCO is currently advocating reforms to the U.S. Internal Revenue Code to provide additional incentives for investment in Puerto Rico. Sheryl Fred, *Big Spender: Puerto Rico Outdoes Mainland States in Federal Lobbying Efforts*, P.R. HERALD, Apr. 10, 2003. But these incentives include tax benefits for reinvesting in the United States as well as in Puerto Rico.

¹⁰⁷ Act of Aug. 5, 1947, Pub. L. No. 362, ch. 490, 61 Stat. 770.

¹⁰⁸ Act of July 3, 1950, Pub. L. No. 600, ch. 446, 64 Stat. 319 (codified at 48 U.S.C. § 731 (2000)).

¹⁰⁹ 48 U.S.C. § 731b.

¹¹⁰ 48 U.S.C. § 731c.

¹¹¹ 48 U.S.C. § 732.

¹¹² 48 U.S.C. § 731e. Public Law 600 rescinded most of the provisions of the Jones Act related to internal governance; but it maintained the laws governing the economic relations between Puerto Rico and the United States that had remained unchanged since 1900. PUERTO RICO ELECTION FACTBOOK, *supra* note 83, at 8.

On June 4, 1951, 65% of qualified voters participated in a referendum on Public Law 600, and 76.5% of them voted to approve it.¹¹³ Delegates were then elected for a constitutional convention. They drafted a constitution and submitted it to the Puerto Rican people in a second referendum. Fifty-nine percent of qualified voters participated, and 81.9% of them voted to adopt the Constitution.¹¹⁴ By Public Law 447, the United States also approved it subject to the condition that three changes be made to its text:

- (1) the following sentence be added to Art. VII: "Any amendment or revision of this constitution shall be consistent with the resolution enacted by the Congress of the United States approving this constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, Eighty-first Congress, adopted in the nature of a compact";
- (2) that a provision patterned after the Universal Declaration of Human Rights recognizing the right to work, obtain an adequate standard of living and social protection in old age or sickness be deleted; and
- (3) that a provision assuring continuance of private elementary schools be added.¹¹⁵

All three of these changes were made and approved by the Puerto Rican Constitutional Convention and later by another referendum.

The allocation of power between the United States and Puerto Rico embodied in the new Constitution left many questions of international and U.S. constitutional law unanswered. Beyond doubt, however, it effected a significant change in the federal-commonwealth relationship, despite the curious fact that many members of Congress seemed to believe that their legislative exercise did not alter the basic relationship.

Under the 1952 Constitution, Puerto Rico elects its own governor and legislature; appoints all judges, cabinet officials, and other lesser officials in its executive branch; sets its own educational policies; determines its own budget; and amends its own civil and criminal code. All of this is done without participation by, concurrence of, or even information submitted to, federal officials. According to the 1966 United States-Puerto Rico Report, "[n]o one in the Puerto Rican or Federal Government, either in the legislative or executive branch, has indicated that these conditions should change and that what has in fact occurred should not continue to be the situation."¹¹⁶

The Constitution's "political power emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America."¹¹⁷ The Constitution establishes a tripartite government, consisting of an executive, a popularly elected bicameral legislature, and a judiciary. The governor appoints the heads of all executive departments, with the advice and consent of the Puerto Rican Senate. Neither the U.S. president nor the U.S. Senate participates in any way in the appointment of any official of the Commonwealth.¹¹⁸ The Legislative Assembly, "elected by free, universal and secret suffrage of the people of Puerto Rico, has full legislative authority with respect to local matters," and the U.S. president "may no longer prevent a bill which has been repassed over the Governor's veto from becoming law by disapproving it."¹¹⁹

At the same time, the Commonwealth arrangement enforces significant ties to the United States. All Puerto Rican public officials must take an oath to support the Constitution of the United States as well as the Constitution and laws of the Commonwealth.¹²⁰ Amendments to the Puerto Rican Constitution must be consistent with the resolution (Act of July 3, 1952) approving the Constitution, the applicable provisions of the U.S. Constitution, the Puerto Rican Federal Relations Act, and the Act of the U.S. Congress authorizing the drafting and adoption of the Puerto Rican

¹¹³ PUERTO RICO ELECTION FACTBOOK, *supra* note 83, at 8. Puerto Rico has held all elections and referenda based on universal adult suffrage without a literacy requirement. *Id.* at 13.

¹¹⁴ *Id.* at 15.

¹¹⁵ H.J. Res. 430, 82d Cong. 66 Stat. 327 (1952).

¹¹⁶ STATUS OF PUERTO RICO: REPORT OF THE UNITED STATES-PUERTO RICO COMMISSION ON THE STATUS OF PUERTO RICO 37 (Arno Press Inc. 1975).

¹¹⁷ P.R. CONST. art. 1, § 1.

¹¹⁸ Lidio Cruz Monclova, *The Puerto Rican Political Movement in the 19th Century, in Status of Puerto Rico: Selected Background Studies Prepared for the United States-Puerto Rico Commission on the Status of Puerto Rico 37* (1966).

¹¹⁹ 1 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 395 (1963).

¹²⁰ P.R. CONST. art. VI, § 16.

Constitution.¹²¹ Furthermore, under the Puerto Rican Federal Relations Act, Puerto Rico has free trade with the United States, only U.S. currency is legal tender in Puerto Rico, and federal statutes of the United States not locally inapplicable, with some exceptions, have the same force and effect in Puerto Rico as in the United States.

Judgments of the Supreme Court of Puerto Rico may be appealed to the Supreme Court of the United States. But the Supreme Court of Puerto Rico is the final authority on the meaning of Puerto Rican law; “to justify reversal in such cases,” the U.S. Supreme Court has held, “the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous.”¹²² Puerto Rico continues to have a U.S. district court, and while technically a legislative court (that is, a federal court not established under Article III of the U.S. Constitution), its jurisdiction does not differ from that of the federal district courts sitting within the boundaries of U.S. states.¹²³

The people of Puerto Rico continue to be U.S. as well as Puerto Rican citizens, and the fundamental provisions of the U.S. Constitution continue to apply to Puerto Rico. Puerto Rico also continues to be represented in the House of Representatives by a resident commissioner, whose functions the establishment of the Commonwealth did not alter, and the governor of Puerto Rico maintains an office in Washington, D.C. Matters of foreign relations and defense, though not explicitly mentioned, continue to be conducted by the United States.

D. The Legal Status of Puerto Rico Under U.S. Law

Four documents the Constitution of the Commonwealth of Puerto Rico, the Puerto Rican Federal Relations Act, the Constitution of the United States, and Public Law 600—together define the formal contours of the domestic (as opposed to the international) legal relationship of Puerto Rico to the United States.

Before the creation of the Commonwealth, U.S. law characterized Puerto Rico as a territory subject to the Constitution’s Territorial Clause, Article IV, Section 3, Clause 2, and the inherent powers of the federal government to acquire and govern territory.¹²⁴ In 1952, as noted earlier, Congress approved the draft Puerto Rican Constitution subject to three conditions, one of which has major and continuing structural importance:

Any amendment or revision of this constitution shall be consistent with the resolution enacted by the Congress of the United States approving this constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, Eighty-first Congress, adopted in the nature of a compact.¹²⁵

The PRFRA authorizes a wide but ambiguous area in which the federal government arguably remains authorized to intervene in Puerto Rico’s internal affairs. Section 9 provides “[t]hat the statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in [Puerto] Rico as in the United States, except the internal-revenue laws”¹²⁶ Despite the Puerto Rican Constitution’s grant of power over local affairs to the government of Puerto Rico, to which Congress acceded by enacting Public Law 447, Congress thereby appears to have reserved for itself the right to enact general legislation applicable to Puerto Rico. Furthermore, nothing in the PRFRA commits Congress to legislate as to matters affecting Puerto Rico only after consultation with the Puerto Rican people, still less with their express consent.¹²⁷ From the perspective of effective Puerto

¹²¹*Id.* art. VII, § 3.

¹²²*Bonet v. Tex. Co.*, 308 U.S. 463, 471 (1940).

¹²³See 28 U.S.C. § 119 (2000) (establishing Puerto Rico as a federal judicial district); Kenneth L. Karst, *Legislative Court*, in 3 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1144 (1986) (citing the U.S. district court for Puerto Rico as an example of a legislative court).

¹²⁴U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.”); see also *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828).

¹²⁵H.R.J. Res. 430, 82d Cong. (1952), subsequently adopted in P.R. CONST. art. VII, § 3.

¹²⁶Act of Mar. 2, 1917, 39 Stat. at 954; see also 48 U.S.C. § 734 (2000) (extending some internal revenue laws to Puerto Rico without repealing Section 9 of the PRFRA); *CONSTITUTIONAL HISTORY*, *supra* note 68, at 160 (providing the version of the PRFRA referred to in Section 4 of Public Law 600).

¹²⁷Some argue that the compact between the United States and Puerto Rico includes both the Commonwealth Constitution and the PRFRA and therefore that Congress may not amend the PRFRA unilaterally. Whatever the legal force of this view, Congress, has, in fact, done so. The Act of June 2, 1970, Pub. L. No. 91-272, § 13, 84 Stat. 294, 298, unilaterally repealed that

Rican autonomy, the problem is not so much the existence of Section 9 of the PRFRA as the absence of institutional arrangements for defining its scope. Arguably, as part of the “compact,” the U.S. authorized and approved a constitution providing for local self government, and it therefore may not invoke Section 9 to justify interference with the organization and operation of the local government without breaching the solemn compact to which it committed itself.¹²⁸

As amended, the PRFRA today contains the following additional provisions: Provisions relating to Puerto Rican economic interests and external commercial relations include: (1) elimination of tariffs on trade between Puerto Rico and the United States;¹²⁹ (2) Provision of equal tariffs for Puerto Rico and the United States on all items except for coffee imported from abroad;¹³⁰ (3) exemption from the internal revenue laws;¹³¹ (4) exemption from duties levied on exports from Puerto Rico;¹³² (5) a requirement that funds collected on exports (excise taxes) transported from Puerto Rico to the United States and customs duties collected in Puerto Rico on foreign imports be returned to the Puerto Rico treasury;¹³³ and (6) exemption from federal taxation of bonds issued by the government of Puerto Rico.¹³⁴

Provisions relating to the federal-insular sharing of power include: (1) harbors, navigable streams, bodies of water, and submerged land around Puerto Rico, not used by the United States for public purposes, fall under the control of Puerto Rico;¹³⁵ (2) citizens of Puerto Rico are citizens of the United States with unrestricted freedom to migrate to the United States with full citizenship rights;¹³⁶ (3) a resident commissioner with no vote sits in the U.S. House of Representatives;¹³⁷ and (4) Puerto Rico is exempted from the Interstate Commerce Act, the Safety Act, and the Safety Appliance Acts.¹³⁸

The Puerto Rican Constitution also limits the power of the Puerto Rican people to amend their Constitution insofar as any amendment must be consistent with the “applicable provisions of the Constitution of the United States.”¹³⁹ Which provisions qualify as “applicable” has varied over time with the expansion and contraction of the doctrine of incorporated versus unincorporated territories. Originally, because U.S. law deemed Puerto Rico an unincorporated territory, only “fundamental” provisions of the Constitution applied to it.¹⁴⁰ The Uniformity Clause, the Fifth Amendment requirement of indictment by grand jury, and the Sixth Amendment require-

section of the PRFRA, formerly 48 U.S.C. § 863, under which the federal district court for Puerto Rico exercised the “territorial jurisdiction.” And the Act of Mar. 27, 1968, Pub. L. No. 90-274, § 103(g), 82 Stat. 53, 63, unilaterally repealed the Act of Mar. 2, 1917, 39 Stat. at 966, setting out qualifications for jurors. On the other hand, Congress has also conditioned the repeal of another section of the PRFRA on a Puerto Rican referendum approving the inclusion of the substance of the section in an amendment to the Commonwealth Constitution. The Act of Aug. 3, 1961, Pub. L. No. 87-121, 75 Stat. 245, eliminated the limitation on Puerto Rican public indebtedness, found in the PRFRA, only upon adoption of an amendment to the Constitution of Puerto Rico providing for a similar limitation.

¹²⁸Under federal case law, Congress itself has the power to answer unilaterally whether a particular federal law is “locally inapplicable” under the PRFRA. Challenges may be mounted, however, based on the Commonwealth Constitution, and if the federal law conflicts with or attempts to modify that Constitution, the federal law will be held “inapplicable.” See, e.g., *Moreno Rios v. United States*, 256 F.2d 68 (1st Cir. 1958); *Figueroa v. Puerto Rico*, 232 F.2d 615 (1st Cir. 1956). But where the federal law does not clearly conflict with the Commonwealth Constitution, but rather represents an intervention into intra-Commonwealth transactions, precedent is less clear as to whether the law should be held “inapplicable.” Some courts have indicated that that the establishment of the Commonwealth insulates some intra-Puerto Rican activities from the reach of the federal government, especially if the activity at issue is not one affecting an industry engaged in interstate commerce. See *Mora v. Tones*, 113 F. Supp. 309 (D.P.R. 1953); see also Arnold H. Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 Geo. L.J. 219, 232 (1967).

¹²⁹48 U.S.C. § 738.

¹³⁰*Id.* § 739; 19 U.S.C. §§ 1319, 1319a. Sections 738-39 of 48 U.S.C., originally enacted by the Foraker Act, 31 Stat. 77, were not enacted into the PRFRA per se (under 48 U.S.C. § 731(e) or the Act of July 3, 1950, 64 Stat. 319), but remain in the current U.S. Code.

¹³¹48 U.S.C. § 734.

¹³²*Id.* § 741.

¹³³*Id.* §§ 734, 740.

¹³⁴*Id.* § 745.

¹³⁵*Id.* § 749.

¹³⁶*Id.* § 733.

¹³⁷48 U.S.C. § 891.

¹³⁸*Id.* § 751.

¹³⁹P.R. CONST. art. VII, § 3.

¹⁴⁰Leibowitz, *supra* note 128, at 241.

ment of trial by jury were held not to apply to Puerto Rico.¹⁴¹ The only constitutional—guarantee specifically applied to Puerto Rico before the establishment of the Commonwealth was due process, but “whether this is under the fifth amendment or fourteenth amendment is unclear.”¹⁴²

E. Foreign Affairs Competence

Puerto Rico’s Constitution does not expressly mention the allocation of foreign affairs power between the United States and Puerto Rico. It is also difficult to infer any principles in this regard from statements made in the course of the Commonwealth’s formation because they reflect a pervasive assumption of a sharp distinction between internal affairs and international affairs. But this distinction is only a shadow cast by one’s perspective. In an interdependent, globalized world, the clarification and implementation of “internal” policies regularly involve mobilization of many components of the world political process. Internal autonomy may become meaningless without effective access to the resources of the more inclusive world community. Experience suggests that real autonomy can be enjoyed only by learning to operate within and derive benefits from an ineluctably interdependent environment.

Against this backdrop of concerns for viable autonomy within the world community, discussions at the constitutional phase were plainly aimed at accommodating a variety of divergent interests. Tensions were manifest in the well-known “Resolution 22” of the Constitutional Convention in 1952, which considered an appropriate name for the new political organization of Puerto Rico. Its produced, for example, the following representative oddity:

Whereas, the word “commonwealth” in contemporary English usage means a politically organized community, that is to say, a state (using the word in the generic sense) in which political power resides ultimately in the people, hence a free state, but one which is at the same time linked to a broader political system in a federal or other type of association and therefore does not have independent existence;

Whereas, the single word “commonwealth”, as currently used, clearly defines the status of the body politic created under the terms of the compact existing between the people of Puerto Rico and the United States . . .

Whereas, there is no single word in the Spanish language exactly equivalent to the English word “commonwealth” . . .

Whereas, in the case of Puerto Rico the most appropriate translation of “commonwealth” into Spanish is the expression of “estado libre asociado”, which however should not be rendered “associated free state” in English inasmuch as the word “state” in ordinary speech in the United States means one of the States of the Union . . .¹⁴³

This incredible tissue of legalisms, fictions, metaphysical abstractions and ad hoc definitions offers no real guidance for determining through time the allocation of the bundle of competences that we habitually refer to as foreign affairs powers. That, of course, is the operational problem.

Nor do analogies to states of the United States prove helpful; Puerto Rico is not a state,¹⁴⁴ and in any event, the federal-state allocation of foreign affairs competence is far more complex than the text of Article I, Section 10 of the U.S. Constitution would appear to suggest.¹⁴⁵ Former U.S. Supreme Court Justice Story dis-

¹⁴¹*Id.* at 242. See *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (sustaining the constitutionality of the Foraker Act); *Balzac v. Porto Rico*, 258 U.S. 298, 304-05 (1922) (finding the Sixth Amendment right to jury trial inapplicable to Puerto Rico because of its status as an unincorporated territory).

¹⁴²Leibowitz, *supra* note 128, at 242. For analysis of the legal relationship of Puerto Rico to the United States under U.S. constitutional law, see Part IV.B *infra*.

¹⁴³CONSTITUTIONAL HISTORY, *supra* note 68, at 164. The Constitutional Convention approved this resolution on February 4, 1992. *Id.* But cf. José A. Cabranes, *The Evolution of the “American Empire”*, AM. SOC’Y INT’L L. PROC. 1, 2 (1973) (arguing that “Free Associated State” is a preferable term, in both Spanish and English, because it is less ambiguous than the word ‘Commonwealth’ and properly suggests the essential attributes of Puerto Rico’s current political status”). Note in this regard that the three-word term “free associated state” was not used in English because of the potential for confusion of “state” with a federated state of the United States. There appeared to be no objection at the time to the words “free associated.”

¹⁴⁴See, e.g., *Mora v. Torres*, 113 F. Supp. 309 (D.P.R. 1953), *aff’d* 206 F.2d 377 (1st Cir. 1953).

¹⁴⁵U.S. CONST. art. I, § 10, provides:

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

tinguished between treaties of critical national concern and agreements implicating primarily local interests.¹⁴⁶ This division may explain the apparent disparity between constitutional text and subsequent practice summarized by professor Henkin:

Whether by so narrowing the constitutional requirement of Congressional consent, or because consent was assumed, state and local authorities have in fact entered into agreements and arrangements with foreign counterparts without seeking consent of Congress, principally on matters of common local interest such as the coordination of roads, police cooperation, and border control. The State and the City of New York have arrangements with the United Nations about the U.N. Headquarters and its personnel, and with permanent missions to the U.N. of various foreign governments. An interstate compact to facilitate the interpleader of other parties to judicial proceedings, which contemplates adherence by foreign governments and their component units, also appears not to have obtained the consent of Congress.¹⁴⁷

Even local governments can no longer exist in isolation, for international concerns attend some of the most mundane local activities. Where those activities do not significantly affect national policies, their unsupervised exercise by components of the federal system is increasingly deemed lawful.

In short, two rough legal categories emerge: first, those involving matters of exclusive federal competence; and second, those involving matters, which, though affecting national affairs, do not threaten such serious consequences for the Union as to demand exclusive federal competence. The tradition of U.S. decentralization leaves these matters to state and local governments and, by implication and in practice, to the government of the Commonwealth. Indeed, Puerto Rico should be deemed to enjoy—under U.S., as opposed to international law—at least as much international competence as a state of the Union; in certain areas, it plainly does or should enjoy more. Because the general principles, still less the precise contours, of its foreign affairs competence were not addressed in the establishment of the Commonwealth, they have been and will continue to be worked out through time by references to general principles of international law, domestic policies, and the political needs and priorities of both parties.

F. The Legal Status of Puerto Rico Under International Law

The final declaration of the Constitutional Convention of Puerto Rico (Resolution 23), approved on February 4, 1952, stated:

When this Constitution takes effect, the people of Puerto Rico shall thereupon be organized in a commonwealth established within the terms of the compact entered into by mutual consent, which is the basis of our union with the United States of America Thus we attain the goal of complete self-government, the last vestiges of colonialism having disappeared in the principle of Compact, and we enter into an era of new developments in democratic civilization¹⁴⁸

Shortly thereafter, in a letter to the U.S. president dated January 17, 1953, Luis Muñoz-Marin, the governor of the Commonwealth, expressed his view that “[t]he laws enacted by the Government of the Commonwealth pursuant to the compact

No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

In a telephone conversation with U.S. Assistant Legal Advisor Marjorie M. Whiteman, Resident Commissioner Antonio Fernós-Isern stated that the foreign relations powers of Puerto Rico “belong completely to the Federal Government.” Memorandum from the Office of Inter-American Political Affairs (Mar. 12 1962), in 1 WHITEMAN, *supra* note 119, at 400. If that is correct, then Puerto Rico possesses less foreign affairs competence than a state of the Union in addition to having no input through congressional processes. This breathtaking conclusion, implied by an informal comment does not, however, seem to be a particularly authoritative statement of either policy or practice.

¹⁴⁶ JOSEPH STORY, COMMENTARIES §§ 1396-97 (1884).

¹⁴⁷ LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 155 (1996) (citations omitted); see also *Virginia v. Tennessee*, 148 U.S. 503, 518 (1893); Raymond Spencer Rogers, *The Capacity of States of the Union to Conclude International Agreements: The Background and Some Recent Developments*, 61 AM. J. INT’L L. 1021, 1023-28 (1969) (discussing examples of agreements between states and foreign sovereigns concluded without congressional consent).

¹⁴⁸ CONSTITUTIONAL HISTORY, *supra* note 68, at 166-67.

cannot be repealed or modified by external authority Our status and the terms of our association with the United States cannot be changed without our full consent.”¹⁴⁹

Later that year, Henry Cabot Lodge, Jr., U.S. Ambassador to the United Nations, conveyed a message to the General Assembly from President Eisenhower:

I am authorized to say on behalf of the President that, if at any time the Legislative Assembly of Puerto Rico adopts a resolution in favor of more complete or even absolute independence, he will immediately thereafter recommend to Congress that such independence be granted. The President also wishes to say that in this event he would welcome Puerto Rico's adherence to the Rio Pact and the United Nations Charter.¹⁵⁰

He also advised the United Nations that the United States would no longer report on Puerto Rico under Article 73(e), for Puerto Rico, in the view of the United States, now qualified as a fully self-governing entity. A statement by Congresswoman Frances P. Bolton, U.S. representative in the Fourth Committee of the General Assembly, described the new relationship between the United States and Puerto Rico as follows:

The previous status of Puerto Rico was that of a territory subject to the full authority of the Congress of the United States in all governmental matters. The previous constitution of Puerto Rico was in fact a law of the Congress of the United States, which we called an organic act. Only Congress could amend the organic act of Puerto Rico. The present status of Puerto Rico is that of a people with a constitution of their own adoption, stemming from their own authority which only they can alter or amend. The relationships previously established also by a law of the Congress [that is, by the Puerto Rican Federal Relations Act], which only Congress could amend, have now become provisions of a compact of a bilateral nature whose terms may be changed only by common consent.¹⁵¹

In response, the General Assembly adopted Resolution 748 (VIII), which recognized that “the people of the Commonwealth of Puerto Rico, by expressing their will in a free and democratic way, have achieved a new constitutional status”; that by “choosing their constitutional and international status, the people of the Commonwealth of Puerto Rico have effectively exercised their right to self-determination”; and that “in the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity.”¹⁵²

No historical evidence indicates corruption in the Puerto Rican vote or otherwise suggests that a majority of the voters in the referendum did not genuinely express a preference for free association. Nonetheless, several flaws marred the procedure—although the General Assembly's approval suggests that they were not deemed material at the time. These flaws included (1) the absence of U.N. supervision of the referendum, (2) that acceptance of the Puerto Rican Constitution required U.S. congressional approval as well as Puerto Rican acceptance, and (3) that future changes in Puerto Rico's status would require U.S. assent.

The absence of U.N. supervision would appear to be the only formal flaw, and the evidence, as noted, does not suggest any serious problems with the quality of the referendum. The requirement that the United States accept the Puerto Rican Constitution, which should be viewed as an aspect of the negotiating process between the two parties (the putative associate and putative principal), likewise does not seem to impugn the legitimacy of the process: Both parties to an association must accept the contemplated relationship, and it does not seem either unreasonable or coercive for the principal to insist on—and the associate to accept—certain *minima* in the organization of the associate, provided that they do not violate substantive international law. The principal's conditions for association, in our judgment, would become unlawful only if (1) they were de facto coercive in that the putative associate

¹⁴⁹Luis Muñoz-Marin, *The Governor of Puerto Rico to the President of the United States*, DEPT ST. BULL., Apr. 1953, at 589; 1 WHITEMAN, *supra* note 119, at 400.

¹⁵⁰Henry Cabot Lodge, Jr., *U.S. Relationship with Puerto Rico*, Nov. 27, 1953, DEPT STATE BULL., Dec. 1953, at 841; 1 WHITEMAN, *supra* note 119, at 400.

¹⁵¹Frances P. Bolton, *Nov. 3 Statement by Mrs. Bolton*, DEPT ST. BULL., Dec. 1953, at 804; *see also* 1 WHITEMAN, *supra* note 119, at 400 (stating that the laws enacted by Puerto Rico, as well as its association with the United States, cannot be altered without Puerto Rico's consent).

¹⁵²G.A. Res. 748, U.N. GAOR, 8th Sess., Supp. No. 17, at 25, U.N. Doc. A/2630 (1953).

could not refuse association; (2) they deviated sharply from social and political demands in the associate; or, as noted, (3) they violated substantive international law. None of these problematic conditions afflicted the 1952 compact.

The third flaw—that future changes to Puerto Rico’s status would require the assent of the United States—is arguably more problematic. Recall that Henry Cabot Lodge, Jr., on behalf of President Eisenhower, represented to the General Assembly that “if at any time the Legislative Assembly of Puerto Rico adopts a resolution in favor of more complete or even absolute independence, [the president] would] immediately thereafter recommend to Congress that such independence be granted.”¹⁵³ The final paragraph of Resolution 748 (VIII) reflects the General Assembly’s understanding of that commitment.¹⁵⁴ Under the precedent established by the PCIJ and the ICJ in, respectively, the *Eastern Greenland* and *Nuclear Tests* cases, this statement may well constitute a binding obligation under international law, which would supersede even a constitutionally prescribed procedure.¹⁵⁵ And in practice, it is difficult to imagine the United States refusing to acknowledge and comply with a Puerto Rican majority demand for independence. Still, even if the flaws in the referendum had been more material and serious, it is likely that Resolution 748 (VIII) would be deemed to have cured them. In *Northern Cameroon*, the ICJ indicated a very high level of deference to decisions of the General Assembly in such matters.¹⁵⁶ On the other hand, under the more stringent standards established after 1950 and the more dynamic supervision of the Committee of 24,¹⁵⁷ some of these flaws might not have been tolerated. Subsequent referenda in Puerto Rico suggest that the outcome would have been the same, nonetheless, even had there been more formal external supervision.

The debate over political status did not end with the establishment of the Commonwealth or the General Assembly’s declaration terminating Puerto Rico’s status as a non-self-governing territory.¹⁵⁸ In fact, at the time, many Puerto Ricans understood commonwealth status as a transitional phase or a postponement of a permanent decision on status. Some of those who favored commonwealth status felt that Puerto Rico should develop further economically before finally determining its political destiny. Many political leaders, however, including Governor Muñoz-Morín, came to see commonwealth or associate status as the best political as well as economic solution—one capable of evolving to serve the needs of both parties to the compact. Other political factions continued to advocate full independence or incorporation into the United States as a component state.

Groups outside Puerto Rico also debated or challenged the status issue. In 1960, the Soviet and Cuban delegations indicted commonwealth status as merely a disguised form of colonialism. Governor Muñoz replied in a message to the United Nations that “Puerto Rico . . . has freely chosen its present relationship with the United States. The people of Puerto Rico are a self-governing people freely associated to the United States of America on the basis of mutual consent and respect.”¹⁵⁹ Muñoz also reported that Commonwealth law authorized a vote on Puerto Rico’s status whenever 10% of the voters requested one.¹⁶⁰

Continuing preoccupation with Puerto Rico’s status eventually led the U.S. Congress to establish a Status Commission, to be appointed jointly by the U.S. president and the governor of Puerto Rico. This led, in turn, to another referendum in Puerto Rico on the island’s future status. Again, a majority voted to continue the free associate arrangement. In the United Nations, however, Cuba continued to press for as-

¹⁵³ See *supra* note 150.

¹⁵⁴ See GA. Res. 748, U.N. GAOR, 8th Sess., Supp. No. 17, at 26, U.N. Doc. A/2630 (1953).

¹⁵⁵ *Nuclear Tests* (Austl. v. Fr.), 1974 I.C.J. 253, 267-72 (Dec. 20); *Legal Status of Eastern Greenland* (Nor. v. Den.), 1933 P.C.I.J. (ser. A/B) No. 53, at 71 (Apr. 5).

¹⁵⁶ *Northern Cameroons* (Cameroon v. U.K.), 1963 I.C.J. 15 (Dec. 2).

¹⁵⁷ In 1961, the General Assembly, by Resolution 1810 (XVII), created a Special Committee to make recommendations regarding the implementation of Resolution 1514 (XV). G.A. Res. 1810, U.N. GAOR, 17th Sess., Supp. No. 17, at 72, U.N. Doc. A/5217 (1962). This committee, generally referred to as “Committee of 24,” intermittently hears claims on behalf of independence-minded groups. The Committee’s attention has recently been focused on Puerto Rico as a result of the dispute over the U.S. military presence on the island of Vieques. On June 21, 2001, it adopted a resolution “urging” the United States to halt military drills on the island of Vieques. Press Release, Special Committee on Decolonization Adopts Resolution Urging United States To Halt Military Drills on Vieques Island, Puerto Rico, U.N. GAOR Special Comm. on Decolonization, 6th mtg., U.N. Doc. GA/COL/3065 (June 21, 2001).

¹⁵⁸ See generally José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 399 n.22 (1978) (noting that “[t]he subject of Puerto Rico’s status has been before the United Nations General Assembly, in one form or another, since the organization’s founding,” as well as before the House of Representatives and other domestic fora; collecting authorities).

¹⁵⁹ 1 WHITEMAN, *supra* note 119, at 403.

¹⁶⁰ *Id.*

sumption of the issue of Puerto Rico by the Committee of 24.¹⁶¹ In 1972, the Committee adopted the following resolution:

The Special Committee . . .

Having considered the question of the list of Territories to which the Declaration is applicable,

Recognizing the inalienable right of the people of Puerto Rico to self-determination and independence in accordance with General Assembly resolution 1514 (XV) of 14 December 1960,

Instructs its working Group to submit to it at an early date in 1973 a report relating specifically to the procedure to be followed by the Special Committee for the implementation of General Assembly resolution 1514 (XV) with respect to Puerto Rico.¹⁶²

The Committee adopted a similar resolution in 1973 and in 1978 criticized the United States for violations of the “national rights” of Puerto Ricans.¹⁶³ Yet two further referenda the first held on November 14, 1993, the second on December 13, 1998 failed to produce any consensus favoring a change in the status quo.¹⁶⁴ The electorate, as we have emphasized, remains deeply divided on the issue.

At least at present, despite the continuing status debate in certain fora, most of the world appears to ignore Puerto Rico, to view its situation as “acceptable,” or to view whatever problems may exist there as essentially benign.¹⁶⁵ Yet Puerto Rico remains an international issue in a number of senses, and the record reflects a certain set of international conceptions that frame the current debate:

First, under international law, the United Nations views Puerto Rico as “distinct.” The accommodation reached in 1953 stressed Puerto Rico’s existence as an international entity separate and distinct from the United States. The United Nations deemed Puerto Rico’s association with the United States under the Compact formula an adequate acquittal of its obligations because Puerto Rico’s people freely consented to that formula. Presumably, this perspective will continue unless Puerto Rico becomes a state within the United States or opts for full independence.

Second, despite the Compact and the degree of integration in certain economic sectors, the United Nations continues to view Puerto Rico as a separate national entity. Had the Puerto Rican people voted in 1953, without coercion, for statehood and integration in the U.S. federal system, this action would have extinguished Puerto Rico’s international personality and been recognized by the United Nations under the formula enunciated some years later in Resolution 1541 (XV).¹⁶⁶ In fact, Puerto Rico did not opt for integration. President Eisenhower took pains in his communication to the United Nations to emphasize the continued separate international existence of Puerto Rico and the U.S. commitment to support any future decision by Puerto Rico to change the form of its association or even opt for full independence.

Third, the general response in the United Nations appears to indicate that the effective elite and probably a majority of the membership views the free association or commonwealth arrangement between the United States and Puerto Rico as adequate under contemporary international law. Only a small minority appears to view the relationship as unlawful per se.

¹⁶¹ See, e.g., Letter dated 9 February 1972 from the Permanent Representative of Cuba to the United Nations addressed to the Chairman of the Special Committee, U.N. GAOR Special Comm. on the Situation with Regard to the Implementation of the Declaration of the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. A/AC.109/392 (1972).

¹⁶² U.N. GAOR, 27th Sess., Supp. No. 23, at 31, U.N. Doc. A/8723/Rev. 1 (1972).

¹⁶³ Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Peoples and Countries, 33 U.N. GAOR, 1133d mtg., U.N. Doc. A/AC.109/574 (1978).

¹⁶⁴ 2005 TASK FORCE REPORT, *supra* note 3, at 4. In 1993, 48.6% of the electorate voted to retain commonwealth status, while 46.3% voted for statehood and 4.4% for full independence. In 1998, the percentage favoring integration into the United States as a component state of the Union held relatively constant (46.49%), while a slight majority (50.30%) declined to specify a preference and only 2.54% voted for independence. *Id.*

¹⁶⁵ But see Rafael Hernandez Colon, *Doing Right by Puerto Rico*, 77 FOREIGN AFF. 112 (1997). For a more extreme indictment of the current situation, see, for example, PEDRO A. MALAVET, AMERICA’S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO (2004) (denouncing, from the standpoint of an *independentista*, Puerto Rico’s present political circumstances as essentially colonial and fundamentally unjust).

¹⁶⁶ An unfortunate precedent is the General Assembly’s endorsement of the West Irian *musjawarah* leading to its de jure incorporation into Indonesia. Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian), 18 U.N. GAOR Annex 1 (Agenda Item 20), U.N. Doc. A/15578 (1963). See Chen & Reisman, *supra* note 20, at 663 & n.244.

Fourth, the status of free association is never final. Because the content of the association relationship evolves and international standards change, the question of Puerto Rico's status may be revived at some later date if conditions or legal standards change such that the relationship deviates from whatever prove to be contemporary normative demands. In the meantime, several obvious flaws in the Commonwealth arrangement remain troubling. In particular, some of the powers reserved by Congress and the application of Section 9 of the PRFRA arguably fail to conform to Resolution 1541 (XV) and the relative absence of Puerto Rico as an actor in international politics is disquieting. Because of the potential for abuse in the inherently and de facto unequal relationship of any association, the United Nations will be likely to subject that relationship to continuing, if sporadic, scrutiny.

G. Participation in the International Process

Puerto Rico participates in its own capacity in a number of international organizations. It has observer status in the Caribbean Community and Common Market (Caricom); associate membership in the Economic Commission for Latin America and the Caribbean, the Food and Agriculture Organization, and the World Health Organization; and membership in the International Federation of Christian Trade Unions, the International Olympic Committee, the World Confederation of Labor, and the World Federation of Trade Unions; and it also participates in the International Criminal Police Organization (Interpol) at the sub-bureau level.¹⁶⁷ Puerto Rico has its own Department of State,¹⁶⁸ and a number of states maintain diplomatic missions in Puerto Rico, facilitating direct contacts between Puerto Rican and foreign officials. In this manner, Puerto Rico is able to participate in international processes and in particular to focus on issues and areas particularly relevant to its people, regardless of whether these mirror national priorities of the United States. Although its status in the international system falls well short of independent statehood, Puerto Rico enjoys an international personality distinguishable from, if largely bound up with, that of the United States.¹⁶⁹

III. OTHER STATES FREELY ASSOCIATED WITH THE UNITED STATES

A. The Former Trust Territory of the Pacific Islands

1. Historical Overview

The former Trust Territory of the Pacific Islands (TTPI) consists of the Caroline Islands, the Marshall Islands, and the Northern Mariana Islands, which extend east of the Philippines and northeast of Indonesia in the North Pacific Ocean. The term "Micronesia" is used both to designate the entire region and to refer to the Caroline Islands in particular; the Federated States of Micronesia comprise the Caroline Islands with the exception of Palau. Magellan made the first known Western contact with these islands during his journey around the world in 1521. But Spain took little immediate interest in governing the islands, and what interests it did ultimately take were minimal, limited to "pacification and Christianization of the indigenes, maintenance of a way station for Spanish ships, and preservation, at the lowest possible cost, of orderly government."¹⁷⁰ Germany took control of the Marshall Islands in 1885 and purchased Spain's remaining holdings in Micronesia in 1899. The hallmark of German rule was its insistence on copra production and commerce through the forced planting of coconut trees.¹⁷¹

Japanese naval forces occupied the area shortly after the outbreak of World War I. While Japan believed that the Carolines, the Marianas, and the Marshall Islands would become part of the Japanese Empire at the end of the war, in 1920, the League of Nations instead gave it a Class C mandate to administer the islands.¹⁷² In the 1930s, Japan began fortifying many of the islands in violation of its mandate; Micronesia apparently supplied the task force that bombed Pearl Harbor.¹⁷³ By the end of World War II, U.S. military forces had occupied most of the islands; U.S. planes based in the Marianas delivered the bombs dropped on Tokyo in 1944

¹⁶⁷ WORLD FACTBOOK, *supra* note 47.

¹⁶⁸ See Estado Libre Asociado de Puerto Rico, *Departamento de Estado*, at <<http://www.estado.gobierno.pr/>>.

¹⁶⁹ For a fuller review and analysis, see REISMAN, *supra* note 1, at 51-103.

¹⁷⁰ ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 485 (1989).

¹⁷¹ See *id.*

¹⁷² *Id.*; see also STANLEY K. LAUGHLIN, JR., *THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS* 39 (1995).

¹⁷³ LAUGHLIN, *supra* note 172, at 39.

and the atom bomb used against Hiroshima.¹⁷⁴ Although sensitive to evolving international norms against imperialism, after the War, the United States hesitated to surrender control of this territory, especially because it feared that the islands could again be used to launch enemy attacks. In 1947, the United Nations agreed to designate the area a “strategic trust territory” under the trusteeship of the United States, a unique arrangement that put the territory under the control of the Security Council (and hence subject to the veto of any permanent member) but allowed the trustee to use it for military purposes.¹⁷⁵

From the perspective of the United States, as Warren R. Austin, U.S. representative to the Security Council, explained, the islands “constitute an integrated strategic physical complex vital to the security of the United States.”¹⁷⁶ In fact, then-General Dwight Eisenhower remarked:

[These islands] are of very little economic value. Our sole interest in them is security So long as we have them, [aggressive nations] can’t use them, and that means to me, even in their negative denial to someone else, a tremendous step forward in the security of this country.¹⁷⁷

This strategic imperative of excluding other, potentially hostile, powers remains the paramount interest of the United States in the TTPI. Given the post-War international climate of hostility toward territorial annexation and the concern that U.S. acquisitions would fuel Soviet territorial ambitions elsewhere, the United States accepted a strategic trust that could be altered only with the approval of the Security Council, where, as noted, the United States could exercise its veto.¹⁷⁸ This trusteeship arrangement and the subsequent commonwealth and free association agreements negotiated with the islands illustrate the range of options that has been deemed to provide the United States with the required security guarantees alongside varying degrees of self-government for the islands’ inhabitants.

The 1947 Trusteeship Agreement assigned the following duties to the United States as the administering authority:

- (1) to foster the development of political institutions and local participation in government;
- (2) to promote the development of the inhabitants toward self-government or independence;
- (3) to promote the economic self-sufficiency of the TTPI inhabitants and encourage fishing development, agriculture, and industry;
- (4) to protect the inhabitants against the loss of their lands;
- (5) to promote social advancement, protecting the rights and fundamental freedoms of all without discrimination; and
- (6) to promote educational advancement.¹⁷⁹

The Agreement gave the United States, in turn, the following entitlements, to be exercised for “the maintenance of international peace and security”:

- (1) to establish naval, military and air bases and to erect fortifications in the trust territory;
- (2) to station and employ armed forces in the territory; and
- (3) to make use of volunteer forces, facilities and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for the local defense and the maintenance of law and order within the trust territory.¹⁸⁰

At first, President Truman assigned the Navy administrative responsibility for the islands.¹⁸¹ During the 1950s, this responsibility was transferred back and forth between the Department of the Interior and the Secretary of the Navy and then ul-

¹⁷⁴ LEIBOWITZ, *supra* note 170, at 487.

¹⁷⁵ See Trusteeship Agreement for the Former Japanese Mandated Islands, U.N.S.C. Res. 21, April 2, 1947, *entered into force* July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189 [hereafter TRUSTEESHIP AGREEMENT]; Trusteeship Agreement for the Trust Territory of the Pacific Islands, U.N. Sales No. 1957.VI.A.1.

¹⁷⁶ LEIBOWITZ, *supra* note 170, at 487 (quoting WEBB, MICRONESIA AND U.S. PACIFIC STRATEGY: A BLUEPRINT FOR THE 1980S 79 (1974)); see also LAUGHLIN, *supra* note 172, at 462-63.

¹⁷⁷ Statement of Gen. of the Army, Dwight D. Eisenhower, Chief of Staff, *Hearings on S.J. Res. 143 before the Sen. Comm. on Foreign Relations*, 80th Cong., 1st Sess. (1947), at 18.

¹⁷⁸ LEIBOWITZ, *supra* note 170, at 487-88; U.N. CHARTER art. 83(1).

¹⁷⁹ LEIBOWITZ, *supra* note 170, at 488; TRUSTEESHIP AGREEMENT art. 6.

¹⁸⁰ TRUSTEESHIP AGREEMENT art. 5.

¹⁸¹ Exec. Order No. 9875, 12 Fed. Reg. 4837 (1947), 3 C.F.R. 658 (1943-48 Comp.).

timately fell to the president himself.¹⁸² In 1962, President Kennedy redelegate his authority for civil administration of the entire Trust Territory to the Secretary of the Interior¹⁸³ who, in turn, delegated executive authority to the High Commissioner.¹⁸⁴ This authority covered the internal government of the TTPI, expenditure of federal funds in the TTPI, and responsibility for carrying out the international obligations of the United States.¹⁸⁵

The United States divided the TTPI into six districts: Pohnpei (including Kosrae), Truk, and Yap (which together now form the Federated States of Micronesia); the Northern Mariana Islands; the Marshall Islands; and Palau.¹⁸⁶ Each district had an administrator, a federal official reporting to the High Commissioner. Political advisory bodies were established in each district to assist the District Administrator in governing the area.¹⁸⁷ As it turned out, these bodies were instrumental in creating a sense of identity and even nationalism in each district, but this collective feeling did not extend to the TTPI as a whole.¹⁸⁸ Over time, the advisory committees acquired de facto legislative authority in their respective jurisdictions.¹⁸⁹

During the 1960s, the Kennedy administration inaugurated a program of economic and social development in Micronesia and took steps to streamline the district legislatures.¹⁹⁰ The president chartered the Congress of Micronesia in 1965¹⁹¹ with a view to the TTPI ultimately determining its future political status collectively. In 1966, the Micronesian Congress petitioned President Johnson to establish a joint status commission to study available political alternatives. Instead, he asked the U.S. Congress to appoint a presidential commission to consider the status question; the bill passed the Senate but failed in the House Interior and Insular Affairs Committee.¹⁹² The Micronesian Congress then established its own status commission. In September 1969, the United States began negotiations with the Micronesian Congress's Joint Committee on Future Status.¹⁹³

It quickly became apparent that the people of various districts did not share uniform political aspirations. In particular, the Marianas wanted to formalize a closer, more permanent relationship with the United States. Its representatives "on numerous occasions expressed both formally and informally . . . through petitions, resolutions adopted by the District Legislature and Municipal Councils, and in referenda, the strong desire that the people of the Northern Mariana Islands . . . become a part of the United States."¹⁹⁴ On November 9, 1969, the Marianas voted in favor of reintegration with Guam.¹⁹⁵ But when the United States did not accede to this request, the Mariana legislature passed a resolution threatening to secede from the Trusteeship.¹⁹⁶ In May 1972, it created its own Political

¹⁸² *People of Saipan v. Guerrero v. U.S. Dep't of Interior*, 502 F.2d 90, 98 n.10 (9th Cir. Haw. 1974), citing Exec. Order No. 10265, 16 Fed. Reg. 6419 (1951), 3 C.F.R. 766 (1949-53 Comp.); Exec. Order No. 10408, 17 Fed. Reg. 10277 (1952), 3 C.F.R. 906 (1949-53 Comp.); Exec. Order No. 10470, 18 Fed. Reg. 4231 (1953), 3 C.F.R. 951 (1949-53 Comp.); Act of June 30, 1954, ch. 423, § 1, 68 Stat. 330, as amended, 48 U.S.C. § 1681(a).

¹⁸³ Exec. Order No. 11021, 27 Fed. Reg. 4409 (1962), 3 C.F.R. 600 (1959-63 Comp.). The seat of the Trust Territory government was moved to Saipan, in the Northern Marianas.

¹⁸⁴ Dept. of Interior Order No. 2918, pt. II, § 1, 34 Fed. Reg. 157 (1969). The 1967 Congress provided that this High Commissioner be appointed by the President and confirmed by the Senate. Act of May 10, 1967, Pub. L. No. 90-16 § 2, 81 Stat. 15 (codified at 48 U.S.C. § 1681a).

¹⁸⁵ LEIBOWITZ, *supra* note 170, at 497; 48 U.S.C. § 1681, pt. II, sec. 1.

¹⁸⁶ LEIBOWITZ, *supra* note 170, at 499.

¹⁸⁷ U.S. DEPT. OF STATE, SEVENTH ANNUAL REPORT ON THE TRUST TERRITORY OF THE PACIFIC ISLANDS 27 (1954).

¹⁸⁸ See LEIBOWITZ, *supra* note 170, at 499; Leibowitz notes that "the Marshallese, in 1953, told the United Nations Visiting Mission that their culture and their district were unique and they did not want to lose themselves in an amalgamation with other Micronesians." *Id.*

¹⁸⁹ *Id.* at 500.

¹⁹⁰ LAUGHLIN, *supra* note 172, at 471.

¹⁹¹ Dept. of the Interior Order 2882, 29 F.R. 13613 (Sept. 28, 1964); see generally NORMAN MELLER, THE CONGRESS OF MICRONESIA: DEVELOPMENT OF THE LEGISLATIVE PROCESS IN THE TRUST TERRITORY OF THE PACIFIC ISLANDS (1969).

¹⁹² LEIBOWITZ, *supra* note 170, at 501.

¹⁹³ *Id.*

¹⁹⁴ LAUGHLIN, *supra* note 172, at 429 (quoting Chairman D.L.G. Pangelinana, Mariana Status Commission, at the signing of the Northern Marianas Covenant on Feb. 15, 1975, at 10); see also Howard P. Willens & Deanne C. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 GEO. L.J. 1373, 1379 (1977) (By 1972, "[t]he desire of the Northern Marianas for a permanent relationship with the United States had been a matter of public record for more than twenty-five years.").

¹⁹⁵ Guam turned down this request in a special plebiscite. LEIBOWITZ, *supra* note 170, at 504; see S. Rep. No. 433, 94th Cong., 1st Sess., at 19 (1975).

¹⁹⁶ Res. No. 30-1971, Third Marianas District Legislature (1971).

Status Commission, which entered into separate negotiations with the United States.¹⁹⁷

The United Nations strongly favored treating the TTPI as a unitary entity. Nevertheless, in 1973, a U.N. visiting mission to the TTPI stated that while the United States remained “obliged] to promote national [pan-Micronesian] unity in every way possible,” the peoples of Micronesia “must work out for themselves what kind of future links they wish to have with one another.”¹⁹⁸ Despite the Congress of Micronesia’s strong objections to the separate talks,¹⁹⁹ in 1975, the United States signed a Covenant establishing the U.S. Commonwealth of the Northern Mariana Islands.²⁰⁰ The inhabitants of the Northern Mariana Islands approved the Covenant by a 78% vote in favor of commonwealth status.²⁰¹

In July 1978, a constitution was developed for the rest of Micronesia and voted on in a referendum. But the Marshall Islands and Palau rejected it and began their own separate negotiations with the United States.²⁰² Despite the U.N. presumption against fragmentation of political entities in the context of decolonization, one scholar of the region has observed that

emphasis on the colonial territorial boundaries can lead to inequitable results for minority groups, especially when there is really no “national or territorial integrity.” Here is where the U.N. case [for treating the TTPI as a unitary whole] broke down. Micronesia is not an integrated whole *and it never was*. It is not contiguous; its people are ethnically and linguistically diverse. Its geographic dispersion was unprecedented. In such circumstances, national unity is a consummation devoutly to be wished but hardly likely of achievement.²⁰³

The various status negotiations eventually culminated in the establishment of the Commonwealth of the Northern Mariana Islands (CNMI) and the conclusion of compacts with three states freely associated with the United States: (1) the Federated States of Micronesia (Pohnpei, Truk, Yap, and Kosrae), (2) the Republic of the Marshall Islands; and (3) Republic of Palau. In 1990, the Security Council proclaimed that the CNMI, the FSM, and the Marshall Islands had become “fully self-governing.” It made the same determination for Palau in 1994.²⁰⁴

¹⁹⁷ See LAUGHLIN, *supra* note 172, at 430. These separate negotiations were criticized in the U.N. by the Soviet delegation, which claimed that the United States was following a divide and conquer policy in Micronesia. *Id.* at 430 n.36 (citing Statement of the Permanent Mission of the USSR to the United Nations, U.N. Doc. A/34/1009, S13147, at 2 (1979)).

¹⁹⁸ LAUGHLIN, *supra* note 172, at 430 (quoting Report of the U.N. Visiting Mission to the Trust Territory of the Pacific Islands at 39 (1973)); see also LEIBOWITZ, *supra* note 170, at 502 (placing greater emphasis on the U.N.’s condemnation of secession). Article 6 of the 1947 Trusteeship Agreement had given the United States the responsibility of “promot[ing] the development of the inhabitants of the trust territory toward self-government or independence, as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of the peoples concerned.” TRUSTEESHIP AGREEMENT, Art. 6. It is interesting to note the repeated use of the plural “peoples” in this context, which facilitated the argument that the “people” of the Northern Mariana Islands were entitled to a self-determination arrangement based on their own distinct preferences; see Willeps & Siemer, *supra* note 194, at 1380 n.29.

¹⁹⁹ See S.J. Res. 38, Trust Territory of the Pacific Islands (5th Cong. of Micronesia, 1st Sess., 1973); S.J. Res. 131, Trust Territory of the Pacific Islands (5th Cong. of Micronesia, 1st Spec. Sess., 1974). The 1974 Resolution began: “Whereas . . . the United States has amply demonstrated the contempt in which it holds the recommendations of the United Nations Trusteeship Council and its 1973 Visiting Mission; the primacy of its own selfish interests over those of Micronesia which it has sworn to uphold and protect; and the complete and utter disregard which it has for the wishes of the people of Micronesia, as expressed through their lawful representatives in Congress assembled . . .” *Id.*

²⁰⁰ Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, signed on Feb. 15, 1975, at Susupe, Saipan, Northern Mariana Islands.

²⁰¹ LEIBOWITZ, *supra* note 170, at 505; see S. Rep. No. 433, 94th Cong., 1st Sess. 413-14 (1975). While a U.N. mission attested to the “democratic procedure” of the referendum, Leibowitz takes issue with the phrasing of the question as requiring an affirmative vote for Commonwealth status, or a negative vote without clear status implications. *Id.*

²⁰² LEIBOWITZ, *supra* note 170, at 507.

²⁰³ *Id.* at 503 (emphasis in original).

²⁰⁴ The Trusteeship Agreement for the CNMI, the Marshall Islands, and the FSM was terminated by Security Council Resolution 683 of Dec. 22, 1990. The FSM and the Marshall Islands became U.N. members in Security Council resolutions 703 and 704 (1991), respectively; Palau’s status as a trust territory was terminated by S.C. Res. 956 (1994), and Palau became a U.N. member under S.C. Res. 963 (1994).

B. The Commonwealth of the Northern Mariana Islands

1. A Social and Economic Survey

The CNMI consists of fourteen islands in the North Pacific Ocean, about three-quarters of the way from Hawaii to the Philippines.²⁰⁵ Its total land area measures 176.5 square miles. The three developed islands are Saipan (46.5 square miles), Rota (32.8 square miles), and Tinian (39.2 square miles), all of which lie in the southern part of the archipelago. The population of the islands is approximately 74,600. It is composed of indigenous Chamorros, Carolinians, and other Micronesians, as well as immigrants from other Asian states.²⁰⁶ A 1996 census estimate put the resident population of the CNMI at 52,000 people.²⁰⁷ Well over 20,000 documented aliens lived in the CNMI in 1990.²⁰⁸ A 1997 joint U.S.-CNMI report noted that 90% of the workforce consisted of alien laborers.²⁰⁹

Most CNMI residents practice Roman Catholicism. The predominant languages are English, Chamorro, and Carolinian, although the Japanese influence remains evident. The Chamorro language and culture link the CNMI culturally and historically to Guam.²¹⁰ The Spanish policy of forced resettlement of the Chamorro people of the Northern Marianas to Guam meant that waves of immigrants from the Caroline Islands to Saipan in the nineteenth century formed the dominant community on the island; only gradually were the Chamorros permitted to return from Guam to the Northern Marianas.²¹¹ The provision in the CNMI Constitution for an Executive Assistant to the Governor for Carolinian affairs responds to the Carolinian concern that self-government for the Northern Marianas would bring discrimination at the hands of the existing Chamorro majority.²¹²

2. Toward a Commonwealth Arrangement

As noted, separate negotiations between the Marianas Political Status Commission and the United States from 1972 to 1975 culminated in the conclusion, on February 15, 1975, of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States; and the inhabitants of the Northern Marianas approved the Covenant with a 78% affirmative vote on June 17, 1975. Congress enacted the arrangement into law on March 24, 1976.²¹³

The Covenant has been characterized as “the preconstitutional act by which the people of the Northern Marianas exercised their right of self-determination and became part of the United States.”²¹⁴ Section 203 specifies the following requirements for the CNMI Constitution:

- (a) The Constitution will provide for a republican form of government with separate executive, legislative and judicial branches, and will contain a bill of rights.
- (b) The executive power of the Northern Mariana Islands will be vested in a popularly elected Governor and such other officials as the Constitution or laws of the Northern Mariana Islands may provide.
- (c) The legislative power of the Northern Mariana Islands will be vested in a popularly elected legislature and will extend to all rightful subjects of legislation. The Constitution of the Northern Mariana Islands will provide for equal representation for each of the chartered municipalities of the Northern Mariana Islands in one house of a bicameral legislature, notwithstanding other provisions of this Covenant or those provisions of the Constitution or laws of the United States applicable to the Northern Mariana Islands.
- (d) The judicial power of the Northern Mariana Islands will be vested in such courts as the Constitution or laws of the Northern Mariana Islands may provide. The Constitution or laws of the Northern Mariana Islands

²⁰⁵The southernmost island in this archipelago is Guam.

²⁰⁶An estimated 86% of the population speak a language other than English at home.

²⁰⁷U.S. Bureau of the Census, 1996 Statistical Abstract of the United States, Section 19: Outlying Areas, Table 1309, Estimated Resident Populations With Projections: 1960 to 2020 (1996), at <<http://www.census.gov/prod/2/gen/96statab/outlying.pdf>>.

²⁰⁸Robert S. Florke, Note, *Castaways on Gilligan's Island: The Plight of the Alien Worker In the Northern Mariana Islands*, 13 TEMP. INT'L & COMP. L.J. 381, 386 & n.147 (1999).

²⁰⁹*Id.* at 396 & n.148.

²¹⁰LEIBOWITZ, *supra* note 170, at 521.

²¹¹*Id.* at 523.

²¹²*Id.* at 424-25; see NORTHERN MARIANAS CONST. art. III, § 18(a).

²¹³Act of March 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, codified at 48 U.S.C. § 1801 (formerly § 1681). Proclamation No. 5564, 51 Fed. Reg. 40,399 (Nov. 4, 1986), terminated the Trusteeship.

²¹⁴Willens & Siemer, *supra* note 194, at 1381.

may vest in such courts jurisdiction over all causes in the Northern Mariana Islands over which any court established by the Constitution or laws of the United States does not have exclusive jurisdiction.²¹⁵

Within these parameters, the people of the CNMI were free to design their own political institutions. The Northern Marianas legislature authorized a constitutional convention, which the Resident Commissioner approved on August 19, 1976.²¹⁶ Less than one year later, on March 6, 1977, the inhabitants of the Northern Marianas adopted the proposed constitution by a 93% affirmative vote.²¹⁷

The capital of the CNMI is Saipan, the former seat of the U.S. Trust Territory government. The CNMI has a locally elected governor, lieutenant governor, and legislature. Its inhabitants have U.S. citizenship but do not vote in U.S. Presidential elections.²¹⁸ An elected Resident Representative serves as a non-voting member in the U.S. Congress.²¹⁹ The Commonwealth has its own trial and appeals courts,²²⁰ as well as a U.S. federal district court.²²¹ The U.S. federal courts, and in particular the Ninth Circuit Court of Appeals, have been called upon on numerous occasions to interpret the applicability of U.S. laws and constitutional provisions to the Northern Marianas.

3. *Legal Relationship to the United States under American Law*

The Covenant establishes a federal relationship between the Northern Marianas and the United States that lies “somewhere on the spectrum between that of a state and a territory.”²²² It stipulates that the CNMI will be “a self-governing commonwealth . . . in political union with and under the sovereignty of the United States of America,”²²³ that the Covenant, together with applicable provisions of the U.S. Constitution and treaties and laws applicable to the CNMI, will be the supreme law;²²⁴ that the people of the Northern Marianas will have the right to local self-government and control over internal affairs;²²⁵ that the United States will

²¹⁵ 48 U.S.C. § 1801.

²¹⁶ Northern Marianas Dist. Law No. 4-205 (1976); see Willens & Siemer, *supra* note 194, at 1384.

²¹⁷ Willens & Siemer, *supra* note 194, at 1373. President Carter approved the constitution in October 1977, see Proclamation No. 4534, Fed. Reg. 56,593 (1977), and it entered into force on January 1, 1978. The people of the CNMI elected their first government under the constitution on Dec. 12, 1977, and its officials took office on January 9, 1978. LAUGHLIN, *supra* note 172, at 435.

²¹⁸ Section 8 of the “Schedule on Transitional Matters” attached to the 1976 constitution provided the following “Interim Definition of Citizenship”:

For the period from the approval of the Constitution by the people of the Northern Mariana Islands to the termination of the Trusteeship Agreement, the term United States citizen or United States national as used in the Constitution includes those persons who, on the date of the approval of the Constitution by the people of the Northern Mariana Islands, do not owe allegiance to any foreign state and who qualify under one of the following criteria:

a) persons who were born in the Northern Mariana Islands, who are citizens of the Trust Territory of the Pacific Islands on the date of the approval of the Constitution by the people of the Northern Mariana Islands, and who on that date are domiciled in the Northern Mariana Islands or in the United States or any territory or possession thereof;

b) persons who are citizens of the Trust Territory of the Pacific Islands on the date of the approval of the Constitution by the people of the Northern Mariana Islands, who have been domiciled continuously in the Northern Mariana Islands for at least five years immediately prior to that date, and who, unless under age, registered to vote in elections for the Mariana Islands District Legislature or for any municipal election in the Northern Mariana Islands prior to January 1, 1975; or

c) persons domiciled in the Northern Mariana Islands on the date of the approval of the Constitution by the people of the Northern Mariana Islands who, although not citizens of the Trust Territory of the Pacific Islands, on that date have been domiciled continuously in the Northern Mariana Islands beginning prior to January 1, 1974.

NORTHERN MARIANAS CONST. art. III, § 18(a).

²¹⁹ Covenant art. IX; see NORTHERN MARIANAS CONST. art. V (as amended by Const. Amend. 24 of 1985).

²²⁰ These are the Superior Court and Supreme Court, respectively. See Commonwealth Judicial Reorganization Act of 1989 § 3102 (1989).

²²¹ Covenant art. IV; see NORTHERN MARIANAS CONST. art. IV (as revised by House Legislative Initiative 10-3 of 1997). The district court is not a true Article III court, in part because the U.S. district court judge for the CNMI is appointed for a term of years rather than having life tenure, but it has the same jurisdiction as an Article III court. LAUGHLIN, *supra* note 172, at 450.

²²² Marybeth Herald, *The Northern Mariana Islands; A Change in Course Under Its Covenant with the United States*, 71 OR. L. REV. 127, 135 (1992).

²²³ Covenant § 101 (1975).

²²⁴ *Id.* § 102; the scope of applicable laws is further defined in art. 5.

²²⁵ *Id.* § 103.

have complete responsibility and authority with respect to foreign affairs and defense;²²⁶ and that the United States may enact legislation applicable to the CNMI in accordance with certain guidelines.²²⁷ This last provision has proved contentious. Some CNMI residents argue for a narrow reading of the combined provisions to limit the legislative power of the United States in the CNMI exclusively to foreign affairs and defense matters.²²⁸

The United States, however, claims plenary power to govern the Commonwealth under the Territorial Clause of the U.S. Constitution.²²⁹ The relevant Senate committee's remarks before adoption of the Covenant foreshadowed this assertion: "Although described as a commonwealth, the relationship is territorial in nature with full sovereignty vested in the United States, and the plenary legislative authority vested in the United States Congress."²³⁰ This language is not, however, dispositive. Some argue that the Senate deliberately inserted "legislative history protective of its own authority,"²³¹ and therefore that such statements should be discounted accordingly. The Marianas Legislature, by contrast, issued a joint resolution and a major report while the Covenant was before the United Nations in 1986 entitled *Self-Determination Realized*, arguing, contrary to the language of the Covenant, that the Territorial Clause did not apply at all and that the mutual consent provision applied to the entire Covenant.²³² "Neither Congress nor any other branch or agency of the United States Government may utilize the Territorial Clause or any other source of power, for that-matter, to supersede the sovereign power of the CNMI to control and regulate matters of local concern."²³³

A more plausible characterization lies somewhere between these two views:

As used in connection with insular political communities affiliated with the United States, the concept of a "commonwealth" anticipates a substantial amount of self-government (over internal matters) and some degree of autonomy on the part of the entity so designated. The commonwealth derives its authority not only from the United States Congress, but also by the consent of the citizens of the entity. The commonwealth concept is a flexible one designed to allow both the entity and the United States to adjust the relationship as appropriate over time.²³⁴

The unique legal status of the CNMI is reflected in its land alienation restrictions, which have been upheld as exempt from challenge under the federal Equal Protection Clause,²³⁵ as well as in Commonwealth control over immigration.²³⁶ Addition-

²²⁶ *Id.* § 104.

²²⁷ "The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands." *Id.* § 105.

²²⁸ See LAUGHLIN, *supra* note 172, at 432-33.

²²⁹ Elizabeth A. McKibben, *The Political Relationship Between the United States and the Pacific Islands Entities: The Path to Self Government in the Northern Mariana Islands, Palau, and Guam*, 31 HARV. INT'L L.J. 257, 280 (1990); see also Brief of Appellee (United States), *United States ex rel Richards v. Sablan*, No. 89-16404 (9th Cir. Mar. 1990); Jon M. Van Dyke, *The Evolving Legal Relationship Between the United States and Its Affiliated U.S.-Flag Island*, 14 U. HAW. L. REV. 445, 483-84 (1992).

²³⁰ Senate Comm. on Interior and Insular Affairs, Section-By-Section Analysis of the Covenant, S. Rep. No. 94-433, 94th Cong., 1st Sess., S. Rep. No. 94-433, at 15 (1975).

²³¹ LEIBOWITZ, *supra* note 170, at 543.

²³² T3Id. at. 544-45; see also Van Dyke, *supra* note 229, at 482-83.

²³³ CNMI LEGISLATURE, SELF-DETERMINATION REALIZED 24-25 (1986). More recently, "[t]here have been attempts to adopt an analysis of § 502 requiring each law to be tested against an additional standard—whether it is consistent with the United States' guarantee to the Commonwealth of the right of local self-government. This reflects a recent political movement in the Commonwealth to assert more NMI 'sovereignty' than is recognized by the United States or reflected in court opinions interpreting the covenant." Herald, *supra* note 222, at 136 n.49; see also McKibben, *supra* note 229, at 282-87.

²³⁴ Van Dyke, *supra* note 229, at 451.

²³⁵ See, e.g., *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. N. Mariana I. 1992) (land alienation restrictions in Article XII of CNMI Constitution, implementing § 805 of the Covenant, validly exempted from federal equal protection review under Covenant § 501(b) because the right of equal access to long-term interests in Commonwealth real estate is not "fundamental in the international sense").

²³⁶ Covenant § 503(a) (federal immigration laws presently inapplicable to the TTPI "will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable

Continued

ally, CNMI courts rely on Chamorro and Carolinian custom and culture in interpreting local law,²³⁷ helping to foster a legal culture distinct from that found on the mainland United States.²³⁸

4. Foreign Affairs

Section 104 of the Covenant provides: "The United States will have complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands." This constitutes one of the principal differences between the Covenant and the Compacts of Free Association with the other islands of the former TTPI,²³⁹ for the latter enjoy authority to conduct foreign affairs in their own name and right.²⁴⁰

5. Legal Status under International Law

In 1987, representatives of the CNMI Task Force on the Termination of the Trusteeship presented a Commonwealth joint resolution to the U.N. Trusteeship Council asking that any agreement terminating the trusteeship include a resolution declaring that the United States has no authority to govern internal affairs under the Territorial Clause.²⁴¹ Security Council Resolution 683 of 1990 terminated the Trusteeship Agreement for the CNMI, the Republic of the Marshall Islands, and the Federated States of Micronesia, but it declined this invitation and did not offer details about the parameters of internal governance for any of the former territories:

Satisfied that the peoples of the Federated States of Micronesia, the Marshall Islands and the Northern Mariana Islands have freely exercised their right to self-determination in approving their respective new status arrangements in plebiscites observed by visiting missions of the Trusteeship Council and that, in addition to these plebiscites, the duly constituted legislatures of these entities have adopted resolutions approving the respective new status agreements, thereby freely expressing their wish to terminate the status of these entities as parts of the Trust Territory . . .²⁴²

The CNMI is not a fully independent state, but it remains a subject of international concern because of its former status as a trust territory. It has been suggested that interpretations of the Covenant that would subject the CNMI to the Territorial Clause "would directly contradict the United Nations's charge to effect self government, independence, or integration with the administering authority."²⁴³ While the United Nations terminated the trusteeship by Security Council Resolution 683, the contours of the relationship between the CNMI and its former administering authority continue to evolve. For now, they have essentially been left to local and federal courts to work out in the absence of international scrutiny.

6. Participation in the International Process

The CNMI has associate membership in the Economic and Social Commission for Asia and the Pacific and membership in the South Pacific Commission, and it is involved with the International Criminal Police Organization (Interpol) at the sub-bureau level. This formal involvement in international organizations, though limited,

to them by the Congress by law after termination of the Trusteeship Agreement"). Note that this provision has given rise to tension between the CNMI garment industry and U.S. labor leaders, who object to the use of the "made in the U.S.A." label on goods produced outside the constraints of federal minimum wage law and other federal labor standards. LAUGHLIN, *supra* note 172, at 434; *see also* Herald, *supra* note 222, at 147-73; Florke, *supra* note 208.

²³⁷ LAUGHLIN, *supra* note 172, at 458-59.

²³⁸ "Micronesian customary law de-emphasizes (compared to the U.S. legal system) notions of individual guilt, and individual rights and responsibility, and places greater stress on the groups to which the accused and victims belong: families, clans and community groups. It emphasizes forgiveness to prevent further violence and conflict, to soothe wounded feelings, and to ease the intense emotions of those most directly involved. Customary settlement by social process (apology and restitution) disposed entirely of the rights and responsibilities of the disputants." LEIBOWITZ, *supra* note 170, at 498.

²³⁹ McKibben, *supra* note 229, at 275.

²⁴⁰ *See* Compacts of Free Association: Federated States of Micronesia and Republic of the Marshall Islands, 48 U.S.C. § 1901-121; Compact of Free Association: The Government of Palau, 48 U.S.C. § 1931-121.

²⁴¹ 54 U.N. TCOR (1627th mtg.) at 2-42, U.N. Doc. T/PV. 1627, Annex T/1908/Add. 1 (1987). Lizabeth McKibben notes of this meeting: "Mr. Pedro Atalig analogized the Northern Marianas' grant of sovereignty in the areas of military and foreign affairs to the following language in *Challoner v. Day & Zimmerman, Inc.*, 512 F.2d 77 (5th Cir. 1975): 'A nation is understood to cede a portion of [its] territorial jurisdiction when [it] allows the troops of a foreign nation to pass through [its] dominions.' *Id.* at 81 (quoting *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 139 (1812))." McKibben, *supra* note 229, at 281 n.129.

²⁴² S.C. Res. 683, ITN SCOR, 45th Sess., U.N. Doc. S/RES/683 (1990).

²⁴³ McKibben, *supra* note 229, at 286-87.

provides opportunities for useful contacts and relationships with foreign states, especially in the Pacific region. But unlike Puerto Rico, the CNMI does not have the equivalent of a state department to manage its relations with foreign states.

C. *The Republic of the Marshall Islands (RMI), the Federated States of Micronesia (FSM), and the Republic of Palau*

1. *A Social and Economic Survey of the RMI*

The Marshall Islands form the easternmost part of the former TTPI. The RMI encompasses twenty-nine coral atolls and five small low-lying islands, with a total land surface area of 181.3 square kilometers. Its population is approximately 70,800. Residents universally speak English, the official language, but two major Marshallese dialects from the Malayo-Polynesian language family remain in use, as does Japanese. Most RMI residents practice Protestantism.

Traditional society in the RMI is organized around matrilineal kin groups. Like most of Micronesia, it has historically been stratified, with land and other communal resources under the control of chiefs.²⁴⁴ The RMI's primary motivation for choosing to be politically separate from the rest of Micronesia may not, then, have been cultural but rather economic, namely, reluctance to share revenues obtained from the United States for the use of Kwajalein Lagoon as a testing ground for intercontinental ballistic missiles (ICBMs).²⁴⁵ The RMI economy relies primarily on U.S. government assistance, which amounts to about \$65 million annually, although it has made efforts to bolster tourism and other local industries. The currency is the U.S. dollar. The RMI has no military forces, although it does have a police force and the option of establishing a coast guard.

The RMI acknowledges that it "faces formidable challenges in the form of environmental degradation, rapid population growth, accelerated sea-level rise, and the legacy of nuclear testing, among others."²⁴⁶ Major ongoing issues in its relationship with the United States concern U.S. use of Kwajalein Atoll as a missile testing ground and bitterness about U.S. nuclear testing at Bikini and Enewetak Atolls from 1946 to 1958, despite the inclusion of reparations provisions in the Free Association Compact.²⁴⁷

2. *A Social and Economic Survey of the FSM*

The Federated States of Micronesia comprise four major island groups totaling 607 islands, including Pohnpei (Ponape), the Truk (Chuuk) Islands, the Yap Islands, and Kosrae. The islands encompass a total land area of 702 square kilometers, spread over three million square miles of ocean.²⁴⁸ A population of 134,600, comprised of nine Micronesian and Polynesian ethnic groups, inhabits the islands. About half of them practice Roman Catholicism, and the other half practices Protestantism. English is the official and common language, but Trukese, Pohnpeian, Yapese, and Kosraean are also spoken in the respective states.

The FSM Constitution incorporates a bill of rights, but it also recognizes the importance of protecting custom. If a court finds that challenged national, state, or municipal legislation conflicts with the declaration of rights, the Constitution specifies that "protection of Micronesian tradition shall be considered a compelling social purpose warranting such governmental action."²⁴⁹ Among the states, only Yap has given its traditional chiefs a formal governmental role.²⁵⁰

The FSM economy consists primarily of subsistence agriculture and fishing. Geographic isolation and a poorly developed infrastructure pose major obstacles to industries such as tourism that could contribute to long-term growth. The currency is the U.S. dollar. The 1986 Compact of Free Association provided for fifteen years of financial and technical assistance from the United States. In 1999, the termination of this assistance caused a severe economic depression, and the FSM remains economically fragile. To give one example of the lack of economic diversity and development: two-thirds of the FSM labor force are government employees.

²⁴⁴ LAUGHLIN, *supra* note 172, at 479.

²⁴⁵ *Id.* at 480; *see generally* Daniel C. Smith, *The Marshall Islands, Tradition and Dependence*, in *POLITICS IN MICRONESIA* 56 (1983).

²⁴⁶ *RMI Online*, at <<http://www.rmiembassyus.org/>>.

²⁴⁷ *See* LEIBOWITZ, *supra* note 170, at 601-04. Supplemental Agreements to the Compact dealt specifically with these issues.

²⁴⁸ LEIBOWITZ, *supra* note 170, at 615.

²⁴⁹ FSM CONST. Art. 5 § 2; *see generally* Alan B. Burdick, *The Constitution of the Federated States of Micronesia*, 8 U. HAW. L. REV. 451 (1986).

²⁵⁰ LEIBOWITZ, *supra* note 170, at 616.

3. *A Social and Economic Survey of Palau*

Palau (or “Belau,” as it is referred to locally) consists of more than 200 islands in the Caroline Island chain, only eight of which are permanently inhabited. It has a total land area of 458 square kilometers and a population of about 19,000. The inhabitants practice a variety of forms of Christianity (they include Catholics, Seventh-Day Adventists, Jehovah’s Witnesses, the Assembly of God, the Liebenzell Mission, and Latter-Day Saints); and one-third of the population observes the indigenous Ngara Modekngai (United Sect) religion. The ethnic composition of the islands is also quite diverse: it has been estimated at 70% Palauan (Micronesian with Malayan and Melanesian admixtures), 28% Asian (mainly Filipinos, followed by Chinese, Taiwanese, and Vietnamese), and 2% white. English and Palauan are the official languages in all states except Sonsoral, Tobi, and Angaur, where, respectively, Sonsorolese, Tobi, and Angaur and Japanese. are also official languages.

The economy consists primarily of subsistence agriculture and fishing, with a growing tourism industry. The government is the major employer of the work force, and the per capita income in Palau compares very favorably with that of the Philippines and the other parts of Micronesia. Because Palau did not ratify its Compact with the United States until 1994, it continues at present to benefit from a high level of U.S. aid in return for furnishing military facilities. Like the other Freely Associated States, Palau uses the U.S. dollar.²⁵¹

In addition to its unique level of practice of indigenous religion, Palau has consistently maintained an identity and self perception distinct from that of the rest of Micronesia:

Belauan nationalism has its roots in a strong sense of cultural identity born of centuries of relative isolation and self-reliance. Anthropologists believe that Belau, which is made up mostly of high islands of volcanic origin, was settled by migrations from the Indonesian-Philippine archipelago. But Belauan legends view the islands as a universe unto itself.²⁵²

Salient elements of Palauan culture have been described as follows:

Palau’s social organization is highly complex and competitive. The race for money, prestige and power, the main thrust of which used to be for political power within a clan or village, was the focus from which most events occurred, such as sports competitions and wars.

Palauan villages were, and still are, organized around 10 clans reckoned matrilineally. A council of chiefs from the 10 ranking clans governed the village, and a parallel council of their female counterparts held a significant advisory role in the control and division of land and money.

Men and women had strictly defined roles to play in the continuity of the village. The sea was the domain of men who braved its fury to harvest the fish necessary to sustain the village and wage battle. Inter-village wars were common, so men spent a lot of time in the men’s meeting houses mastering techniques of canoe building and refining their skills with weapons. Women, on the other hand, held sway in the home. They cultivated vegetables and harvested shellfish and sea cucumbers from the shallow reefs

Even today, despite the influence of generations of explorers, traders, soldiers and administrators from several nations, Palauans still maintain the cultural traditions that make it unique in the Pacific.²⁵³

The reputed “aggressiveness” of Palauan society has been emphasized by commentators.²⁵⁴ It has also been observed, however, that “[t]oday the strong group relationship which characterized traditional Palau society has changed considerably, to an individual or personal, orientation.”²⁵⁵ As in many societies in transition, the breakdown in traditional sources of social support seems to be correlated with a rise in societal problems such as crime and alcohol abuse.²⁵⁶

4. *Toward Free Association: The RMI and the FSM*

The Marshall Islands adopted a Constitution on December 21, 1978, which became effective on May 1, 1979. The parliamentary system of government includes

²⁵¹ *Id.*

²⁵² Frank Quimby & Gwenda L. Iyechad, *Belau, Superport, Fortress or Identity?*, in *POLITICS IN MICRONESIA* 101, 108 (1983).

²⁵³ *Palauan Culture*, at <<http://www.palauet.com/html/culture.html>>; see also Quimby & Iyechad, *supra* note 252.

²⁵⁴ *E.g.* LEIBOWITZ, *supra* note 170, at 622, 633.

²⁵⁵ *Id.* at 634.

²⁵⁶ *See id.* at 631.

a Council of Iroij that may request reconsideration of any bill affecting customary law or traditional practice.²⁵⁷ The Marshall Islands and the United States signed the Compact of Free Association on June 25, 1983, and the people of the Marshall Islands approved the Compact in a U.N.-supervised plebiscite on September 7, 1983. The U.S. Congress subsequently approved the Compact with minor modifications and enacted it into law on January 14, 1986. Public Law 99-239 entered into force on October 21, 1986. The United Nations recognized the Republic of the Marshall Islands as “fully self-governing in free Association with the United States” in Security Council Resolution 683 of December 22, 1990.

The debate over ratification of the Marshall Islands Compact illustrates the range of political interests and perspectives that can lead to support for closer political ties to the former trustee:

Opposition to the Compact came from three principal groups: first, those southern Marshallese atolls committed to Commonwealth, rather than FAS status and politically opposed to the current Marshallese leadership; second, those Kwajalein landowners dissatisfied with the terms in the Compact of the land use agreement for Kwajalein Missile Range; and third, those people affected by the U.S. atomic tests who were dissatisfied with their compensation under the Compact. All of these groups desired to maintain either strong financial or political ties with the U.S. government.²⁵⁸

A central issue of concern during the negotiations over the Compact and the subsequent ratification process was the question of compensation for U.S nuclear testing in the islands. Section 177(a) of the Compact of Free Association states:

The Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands, or the Federated States of Micronesia (or Palau) for loss or damage to property and person of the citizens of the Marshall Islands, or the Federated States of Micronesia, resulting from the nuclear testing program which the Government of the United States. conducted in the Northern Marshall Islands between June 30, 1946, and August 18, 1958.²⁵⁹

A separate agreement provides for the Marshall Islands Government’s espousal of its citizens’ claims and removes such claims from the jurisdiction of U.S. courts.²⁶⁰ The Section 177 Agreement created the Marshall Islands Nuclear Claims Tribunal, established in 1988, with jurisdiction to “render final determination upon all claims past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based on, arise out of, or are in any way related to the Nuclear Testing Program.”²⁶¹ Also, under the Agreement, the United States agreed to provide a compensation fund of \$150 million for those injured by the nuclear tests, part of which was earmarked for the Claims Tribunal. Nevertheless, the Tribunal has reported that “[w]ith only \$45.75 million available for actual payment of awards made by the Tribunal, it has become clear that the original terms of the settlement agreement are manifestly inadequate.”²⁶²

Despite the failed attempt to promote political unity throughout the former TTPI, four states (Chuuk, Pohnpei, Yap, and Kosrae) ratified the Constitution of the Federated States of Micronesia in a U.N.-monitored referendum on July 12, 1978, and it entered into force on May 10, 1979. The FSM negotiated a Compact of Free Association with the United States substantially similar to that between the United States and the Marshall Islands, and the FSM signed it on October 1, 1982. On June 21, 1983, the FSM electorate voted on the Compact. Although it failed by a vote of 51% on Pohnpei, the rest of the federation approved it, thereby binding

²⁵⁷ See *id.* at 613; MARSHALL ISLANDS CONST. art. III, sec. 2(b).

²⁵⁸ LEIBOWITZ, *supra* note 170, at 611.

²⁵⁹ See Compacts of Free Association: Federated States of Micronesia and Republic of the Marshall Islands. Act Jan. 14, 1986, Pub. L. No. 99-239, Title II, § 201, 99 Stat. 1800; Oct. 22, 1986, Pub. L. No. 99-514, § 2, 100 Stat. 2095; Act Nov. 14, 1986, Pub. L. No. 99-658, Title I, §§ 103, 100 Stat. 3675.

²⁶⁰ LEIBOWITZ, *supra* note 170, at 604 n.28 (citing Agreement for the Implementation of Section 177 of the Compact of Free Association, June 25, 1983, United States-Marshall Islands, Arts. X, XII). This agreement, and the other subsidiary agreements reached between the U.S. and the RMI, can be found in COMPACTS OF FREE ASSOCIATION: PACIFIC ISLANDS TREATIES AND AGREEMENTS WITH THE UNITED STATES, VOL. II: THE REPUBLIC OF THE MARSHALL ISLANDS (Igor I. Kavass ed., 1998).

²⁶¹ Nuclear Claims Tribunal, Republic of the Marshall Islands, at <<http://www.tribunal-mh.org/>>.

²⁶² *Id.*

Pohnpei.²⁶³ The Compact became effective on November 3, 1986 and, as with the RMI, the United Nations recognized the FSM as “fully self-governing in free Association with the United States” in Security Council Resolution 683 of December 22, 1990.²⁶⁴

Title 48 U.S.C. § 1901-111 affirms the self-governing status of the RMI and the FSM: “The peoples of the Marshall Islands and the Federated States of Micronesia, acting through the Governments established under their respective Constitutions, are self-governing.” The terms of self-government include certain continuing ties to the United States, particularly with respect to national defense. Nevertheless, the electorate clearly perceived the status of free association as an alternative distinct from—and, for a majority of the voters in the RMI and the FSM, preferable to—that of a Commonwealth, under which political and economic ties to the United States would have been stronger and more durable.

5. *Toward Free Association: Palau*

Palauans participated in the July 1978 referendum on the constitution of the Federated States of Micronesia, and they rejected joining the FSM by a 55% to 45% margin.²⁶⁵ Laughlin notes that “Palauans saw this referendum as essentially a choice between joining an all-Micronesia legal system or negotiating a separate relationship with the United States.”²⁶⁶ Palau adopted its own constitution on July 9, 1979, which entered into force on January 1, 1981.

The Constitution of Palau provides that 75% of registered voters must approve any bilateral agreement that authorizes the “use, testing, storage or disposal of nuclear, toxic chemical, gas, or biological weapons intended for use in warfare” within Palau.²⁶⁷ In *Gibbons v. Salii*, the Supreme Court of Palau stated that the words “use, test, store or dispose of” in the Constitution’s nuclear control provisions import “a general prohibition against the introduction of nuclear substances into Palau. Accordingly, these four verbs prohibit transit of nuclear powered vessels or vessels equipped with nuclear material.”²⁶⁸ This interpretation meant, in effect, that the Compact itself had to be approved by 75% of registered voters, for the United States insisted on the right of nuclear transit as essential to its defense obligations.²⁶⁹

The story of the ratification of the Palau Covenant is one of repeated referenda in which approval fell just short of the required 75%. A constitutional amendment adopted in 1987 provided that only a simple majority, rather than a 75% majority, would be required to overrule the anti-nuclear materials provision in the Constitution, but the Palauan Supreme Court annulled it.²⁷⁰ In 1992, a similar amendment was introduced and adopted, and on November 9, 1993, Palauan voters approved the Compact by 68% to 32% in the eighth plebiscite on the issue.²⁷¹

Several factors contributed to the ultimate approval of the Compact, including frustration with the deadlock, fear that foreign investors were avoiding Palau because of the uncertainty of the islands’ future political status, and decreased fear of war with the removal of the Soviet threat in the area.²⁷² The Covenant became effective on October 1, 1994. Title 48 U.S.C. § 1931-111 provides: “The people of Palau, acting through their duly elected government established under their constitution, are self-governing.” Security Council Resolution 956 of November 10, 1994,

²⁶³ See LAUGHLIN, *supra* note 172, at 521. Leibowitz writes: “The centrifugal forces in the FSM may be seen in the differing attitudes toward the Compact. Pohnpei voted against it, while Yap, Truk and Kosrae voted in favor. . . . [T]he Pohnpei vote was in large measure a vote for a separate identity.” LEIBOWITZ, *supra* note 170, at 617.

²⁶⁴ One unresolved issue is the status of Wake Island or Wake Atoll, a U.S. territory claimed by the Marshall Islands that also has its own constitution and aspiration to political independence under the name “Eneen-Kio.” At this juncture, it is unclear when or how this dispute will be settled.

²⁶⁵ LAUGHLIN, *supra* note 172, at 506.

²⁶⁶ *Id.* at 505; on Palau’s move toward separate negotiations and its ultimate rejection of the FSM Constitution, see NORMAN MELLER, CONSTITUTIONALISM IN MICRONESIA 175-91 (1985).

²⁶⁷ PALAU CONST. art. II, § 3; see McKibben, *supra* note 229, at 277 n.108.

²⁶⁸ *Gibbons v. Salii*, 1 ROP Intrm. 333 (Palau Sup. Ct. App. Div. 335, 1986); see LEIBOWITZ, *supra* note 170, at 625-27.

²⁶⁹ See McKibben, *supra* note 229, at 278.

²⁷⁰ *Gibbons v. Salii*, No. 8-86, at 2 (Sup. Ct. Palau, App. Div. Sept. 17, 1986).

²⁷¹ LAUGHLIN, *supra* note 172, at 507. Laughlin recounts: “So familiar to the voters were the issues, that when a member of the Palau Political Status Education Committee explained to a particular village for the eighth time in 10 years what the issues would be at the November 9th vote, and then asked them if they had any questions, one man answered ‘Just bring the ballot boxes. We’ll do the rest.’” *Id.*

²⁷² *Id.*

affirmed this, and shortly thereafter, as for the other free associated states, approved its membership in the United Nations.²⁷³

6. Foreign Affairs

Each FAS has control over its internal affairs and foreign relations. This arrangement is based on the 1978 Hilo Principles, developed during the negotiations over free association. These principles allocate foreign affairs authority to the Micronesian governments, subject to the over-riding security authority of the United States (later dubbed the “defense veto”).²⁷⁴

The Compact of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands provides:

(a) The Governments of the Marshall Islands and the Federated States of Micronesia have the capacity to conduct foreign affairs and shall do so in their own name and right, except as otherwise provided in this Compact.

(b) The foreign affairs capacity of the Governments of the Marshall Islands and the Federated States of Micronesia includes: (1) the conduct of foreign affairs relating to law of the sea and marine resources matters, including the harvesting, conservation, exploration or exploitation of living and non-living resources from the sea, seabed or subsoil to the full extent recognized under international law; (2) the conduct of their commercial, diplomatic, consular, economic, trade, banking, postal, civil aviation, communications, and cultural relations, including negotiations for the receipt of developmental loans and grants and the conclusion of arrangements with other governments and international and intergovernmental organizations, including any matters specially benefiting their individual citizens

(d) In the conduct of their foreign affairs, the Governments of the Marshall Islands and the Federated States of Micronesia confirm that they shall act in accordance with principles of international law and shall settle their international disputes by peaceful means.²⁷⁵

Corresponding provisions can be found in the Compact of Free Association with the Republic of Palau.²⁷⁶ Unlike Puerto Rico or the CNMI, the FAS are responsible for their own foreign affairs, even though the United States has authority over their security and defense matters. For this reason, coordination is particularly important when these spheres of responsibility have the potential to overlap. The Compacts provide:

(a) In recognition of the authority and responsibility of the Government of the United States under Title Three [concerning security and defense], the Governments of the Marshall Islands and the Federated States of Micronesia shall consult, in the conduct of their foreign affairs, with the Government of the United States.

(b) In recognition of the respective foreign affairs capacities of the Governments of the Marshall Islands and the Federated States of Micronesia, the Government of the United States, in the conduct of its foreign affairs, shall consult with the Government of the Marshall Islands or the Federated States of Micronesia on matters which the Government of the United States regards as relating to or affecting any such Government.²⁷⁷

The Compacts also allow for the possibility of U.S. assistance or action on behalf of the FAS governments in the area of foreign affairs “as may be requested and mutually agreed from time to time.”²⁷⁸ In addition, the United States agrees, at the request of the FAS and subject to the consent of the receiving state, to extend consular assistance to citizens of the FAS for travel outside the United States and the FAS on the same basis as it does to U.S. citizens.²⁷⁹

²⁷³ S.C. Res. 963 of Nov. 29, 1994 (Palau); S.C. Res. 703 of Aug. 9, 1991 (FSM); S.C. Res. 704 of Aug. 9, 1991 (RMI).

²⁷⁴ LEIBOWITZ, *supra* note 170, at 674; *see also id.* at 648 n.48. For the “Hilo Principles,” *see* OMSN, Summary Record of the Second Round of Renewed Political Status Negotiations Between the United States of America and the Palau Political Status Comm., the Comm. on Future Political Status and Transition, the Marshall Islands Political Status Comm., Sept. 23-Oct. 1, 1978, Saipan, No. Mariana Islands, at D-1-1, D-1-2 (1980).

²⁷⁵ 48 U.S.C. § 1901-121 (FSM and RMI).

²⁷⁶ 48 U.S.C. § 1931-121 & § 1931-124(a).

²⁷⁷ U.S.C. § 1901-123 (RMI and FSM); *see also* 48 U.S.C. § 1931-123 (Palau).

²⁷⁸ *See* 48 U.S.C. § 1901-124 & § 1901-125 (RMI and FSM); 48 U.S.C. § 1931-127 & § 1931-126 (Palau).

²⁷⁹ 48 U.S.C. § 1901-126 (RMI and FSM); 48 U.S.C. § 1931-128 (Palau).

7. *Status Under International Law and Military Servitudes*

Despite the flexible idea of statehood under modern international law, between the signing of the Compacts of Free Association with the FAS and the Security Council's termination of their status as Trust territories, the question arose whether they "ha[d] sufficient international personality to be accorded the status of a nation-state in international law."²⁸⁰ In fact, they present a hybrid model: each, for example, issues its own travel documents but employs the U.S. dollar as its currency. Although the Compacts initially provided otherwise, the representatives exchanged between the FAS and the United States enjoy the rank of ambassador.²⁸¹ The principal obstacle to considering the FAS independent, pace the Security Council's resolutions, lies in their security and defense arrangements with the United States, some of which would persist beyond the termination of the Compacts. The Compacts and their Subsidiary Agreements "provide for a U.S. defense umbrella during the life of free association and indefinite exclusion of third-country military forces *even if any FAS opts for independence.*"²⁸²

The reconciliation of U.S. security needs with the sovereign status and independence of the FAS is of both theoretical and practical concern. The United States, today as in the past, attaches substantial military and strategic importance to these islands, which explains its continued interest in access to them for military purposes and insistence on the exclusion of troops or military installations of other states. These may be referred to, respectively, as the "use" and "denial" components of U.S. strategic interest in the FAS. The potential tensions caused by the conflict between this interest and full political independence have frequently been noted. With respect to the Marshall Islands negotiations, for example, Laughlin writes:

Part of the concern over the status of free association had to do with the duties and responsibilities of the United States. The United States is obligated under the Compact of Free Association to defend the Marshall Islands as if they were part of the United States. In return for this commitment, the United States retains certain military rights in the Marshall Islands and, even more controversially, maintains a veto over actions taken by the Marshall Island[s] government which the United States considers inconsistent with its own obligation to defend the Marshalls.²⁸³

Aside from the lease of Kwajalein Atoll as a U.S. missile testing site, the issue of a strong U.S. military presence in the FAS has to date been largely hypothetical.²⁸⁴ But the theoretical issue remains of international interest. The "use" provisions of the Compacts resemble those contained in other international arrangements for the use of foreign military installations; and in these circumstances, it remains a matter of international concern whether the terms of a treaty, despite exhibiting "reciprocity in form and law," do not provide "reciprocity in fact."²⁸⁵ John Woodliffe notes that "[a] typical situation where extra legal influences are much in evidence is where a newly independent state grants to the former colonial or administering power, military base rights or similar facilities pursuant to a treaty concluded contemporaneously with or shortly after accession to statehood."²⁸⁶ A review of contemporary state practice in this area suggests that (1) the existence of such treaties does not per se undermine the status of former colonies or trust territories as independent states; and (2) as long as the newly independent state does strongly

²⁸⁰ LEIBOWITZ, *supra* note 170, at 596.

²⁸¹ *See id.* at 600.

²⁸² LEIBOWITZ, *supra* note 170, at 595-96 (emphasis added); *see also id.* at 685. For more on the Subsidiary Agreements, *see* Arthur John Armstrong & Howard Loomis Hills, *The Negotiation for the Political Status of Micronesia (1980-1984)*, 78 AM. J. INT'L L. 484 (1985).

²⁸³ LAUGHLIN, *supra* note 172, at 483.

²⁸⁴ *See, e.g.*, LEIBOWITZ, *supra* note 170, at 617 ("The Compact of Free Association with the FSM is unique in that no active military role is envisaged anywhere in the FSM. The United States has not requested any land options in the FSM, nor does the U.S. foresee any need for military bases or installations on the islands."); *id.* at 637 ("How important Palau really is to the United States from a military point of view is a subject of debate, much of it related to contingency planning if the United States loses its bases in the Philippines. Absent that, some regard the nuclear option as extremely unlikely. Palau's military role more likely hinges in supplying logistical support services in a conventional Pacific-wide war and the advantage of its deep-water port.")

²⁸⁵ JOHN WOODLIFFE, *THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW* 67 (1992) (referring in corresponding footnote to *Austro-German Customs Union*, 1931 P.C.I.J. (ser. A/B), No. 41, at 52).

²⁸⁶ WOODLIFFE, *supra* note 285, at 67; *see generally id.* at 67-77.

oppose such arrangements, the treaties do not qualify as “unequal” in the sense that their validity may be impeached on ethical, if not strictly legal, grounds.²⁸⁷

Title Three of each Compact contains the basic security and defense provisions, which the corresponding Supplemental Agreements elaborate.²⁸⁸ Section 311 of the FSM and RMI Compact provides:

(a) The Government of the United States has full authority and responsibility for security and defense matters in or relating to the Marshall Islands and the Federated States of Micronesia.

(b) This authority and responsibility includes:

(1) the obligation to defend the Marshall Islands and the Federated States of Micronesia and their peoples from attack or threats thereof as the United States and its citizens are defended;

(2) the option to foreclose access to or use of the Marshall Islands and the Federated States of Micronesia by military personnel or for the military purposes of any third country; and

(3) the option to establish and use military areas and facilities in the Marshall Islands and the Federated States of Micronesia, subject to the terms of the [subsidiary agreements].²⁸⁹

Section 316 prohibits the transfer or assignment of this authority and responsibility. Section 331 provides:

Subject to the terms of this Compact and its related agreements, the Government of the United States, exclusively, shall assume and enjoy, as to the Marshall Islands and the Federated States of Micronesia, all obligations, responsibilities, rights and benefits of:

(a) Any defense treaty or other international security agreement applied by the Government of the United States as Administering Authority of the Trust Territory of the Pacific Islands as of the day preceding the effective date of this Compact.

(b) Any defense treaty or other international security agreement to which the Government of the United States is or may become a party which it determines to be applicable in the Marshall Islands and the Federated States of Micronesia.

Such a determination by the Government of the United States shall be preceded by appropriate consultation with the Government of the Marshall Islands or the Federated States of Micronesia.²⁹⁰

Section 341 permits the voluntary service of FAS citizens in the U.S. armed forces but protects them from involuntary induction.²⁹¹ Section 352, finally, codifies the responsibility of the United States to exercise its Title Three powers with “due respect [for] the authority and responsibility of the Governments of the Marshall Islands and the Federated States of Micronesia under Titles One, Two and Four and [for] their responsibility to assure the well-being of their peoples.”²⁹²

²⁸⁷ See *id.* at 70, 77; see also INGRID DETTER DELUPIS, *INTERNATIONAL LAW AND THE INDEPENDENT STATE* 195-219 (2d ed. 1987); KYPROS CHRYSOSTOMIDES, *THE REPUBLIC OF CYPRUS: A STUDY IN INTERNATIONAL LAW* 72 (2000).

²⁸⁸ See *COMPACTS OF FREE ASSOCIATION: PACIFIC ISLANDS TREATIES AND AGREEMENTS WITH THE UNITED STATES, VOL. I: THE FEDERATED STATES OF MICRONESIA AND PALAU* (Igor I. Kavass ed., 1998) (security and defense provisions at FSM §§ 80, 90, 100; Palau §§ 90, 100); *COMPACTS OF FREE ASSOCIATION: PACIFIC ISLANDS TREATIES AND AGREEMENTS WITH THE UNITED STATES, VOL. II: THE REPUBLIC OF THE MARSHALL ISLANDS* (Igor I. Kavass ed., 1998) (security and defense provisions at §§ 130, 140, 150).

²⁸⁹ 48 U.S.C. § 1901-311. The parallel provision for Palau is codified at 48 U.S.C. § 1931-312.

²⁹⁰ 48 U.S.C. § 1901-331. The parallel provision for Palau is codified at 48 U.S.C. § 1931-331.

²⁹¹ 48 U.S.C. § 1901-341. The parallel provision for Palau is codified at 48 U.S.C. § 1931-341.

²⁹² 48 U.S.C. § 1901-352. The parallel, but slightly broader, provision for Palau is codified at 48 U.S.C. § 1931-352:

In the exercise of its authority and responsibility under this Compact, the Government of the United States shall accord due respect to the authority and responsibility of the Government of Palau under this Compact and to the responsibility of the Government of Palau to assure the well-being of Palau and its people. The Government of the United States and the Government of Palau agree that the authority and responsibility of the United States set forth in this Title are exercised for the mutual security and benefit of Palau and the United States, and that any attack on Palau would constitute a threat to the peace and security of the entire region and a danger to the United States. In the event of such an attack, or threat thereof, the Govern-

Continued

Nothing in this arrangement seems per se objectionable: in exchange for security and protection, the FAS agree to give the United States strategic discretion and exclusivity with respect to the potential military activities of third states. That certain provisions of this arrangement under Article V survive termination of the respective Compacts seems more problematic.²⁹³ Section 453(a) of the Palau Compact states: “The provisions of Section 311, even if Title Three should terminate, are binding and shall remain in effect for a period of 50 years and thereafter until terminated or otherwise amended by mutual consent.” Section 311, in turn, specifies: “The territorial jurisdiction of the Republic of Palau shall be completely foreclosed to the military forces and personnel or for the military purposes of any nation except the United States of America, and as provided for in Section 312.” U.S. consent, in other words, would be required to terminate the exclusivity or “denial” provisions even after either side terminates the Compact.²⁹⁴ This does not negate the independent status of the FAS under international law, but it does mark a key difference between the FAS and other sovereign states—one that should not be underestimated in a review of the implications of free association arrangements.

D. Conclusion: Free Association with the United States

Free association, as an international legal concept, subsumes a range of possible relationships between the associate and the principal—from the commonwealth arrangements that characterize Puerto Rico and the CNMI to the explicit compacts of free association establishing the RMI, the FSM, and Palau (collectively, the FAS). All of these entities, however, enjoy international legal personality, even if their relationship to the United States perforce qualifies their capacity to exercise their sovereignty, especially as to matters of national defense, in ways that traditionally might have been viewed as incompatible with the idea of sovereign statehood. Under classical international law, even protectorates were deemed to retain their sovereignty despite the allocation of critical sovereign competence to the protecting power. Given economic, military, and other disparities in the global arena, moreover, many states that are in no sense protectorates experience de facto limits on their sovereignty. Genuine compacts of free association, however, enshrine certain de jure limits that contemporary international law deems compatible with the right to self-determination and, indeed, with sovereign statehood. By admitting the FAS as member states, the Security Council affirmed their international legal status as states.²⁹⁵

Yet, as noted at the outset, the word “state” has been and continues to be used to refer to a range of territorial phenomena, not all of which satisfy every one of the formal criteria for statehood set out in the Montevideo Convention. “State” does not, that is, denote a single phenomenon but a range of entities on a spectrum—between the polar categories of statehood and non-statehood—encompassing a variety of territorial and political arrangements. At one end lie those entities that clearly fulfill the Montevideo criteria and also enjoy economic, political, and military power sufficient to act (or, more often, imagine that they act) largely, if seldom entirely, independently of the will of other individual states or the international collectivity. In the middle of the spectrum exist entities that enjoy a high degree of formal independence and control over their internal, and even foreign, affairs but that nonetheless remain subordinate to other states with respect to matters traditionally deemed integral to sovereignty. It is here, though still on the statehood side of the spectrum, that arrangements enshrined in the compacts of free association governing the FAS should be located. Further toward the non-statehood side of the spectrum lie commonwealth arrangements such as those of the CNMI and Puerto

ment of the United States would take action to meet the danger to the United States and Palau in accordance with its constitutional processes.

²⁹³ See 48 U.S.C. § 1901-452(a)(3) & § 1901-453(a)(2) (RMI and FSM); 48 U.S.C. § 1931-452(b) & § 1931-453(a) (Palau).

²⁹⁴ The 1946 Constitution of Japan offers an interesting comparison. It provides:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish th[is] aim . . . , land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

JAPAN CONST. art. 9. Note, however, that while Japan may amend its Constitution unilaterally, the mechanisms for treaty renunciation relative to the security and defense provisions of the FAS require bilateral action and mutual consent.

²⁹⁵ As a formal matter, note that the FAS all satisfy the criteria for statehood set out in the Montevideo Convention. Each has (a) a permanent population, (b) a defined territory, (c) a government, and (d) the capacity to enter into relations with the other states. Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19.

Rico—and even further in that direction the constituent states of the United States,²⁹⁶ or the components of other federated states.²⁹⁷

IV. FREE ASSOCIATION AND THE U.S. CONSTITUTION

Parts II and III surveyed, respectively, the status of Puerto Rico and the former TTPI, which now consists of the FAS (the FSM, RMI, and Palau) and the CNMI. All of these entities, as Part I explained, can be characterized broadly under contemporary *international* law as freely associated states, although the CNMI and Puerto Rico may more precisely be denominated commonwealths because of the higher degree of their—the associates—subordination to the relevant principal, here, the United States of America. But as the FAS (which achieved their current legal status later in the twentieth century than did Puerto Rico) demonstrate, the concept of freely associated states in the U.S. law and practice, like many other inherited concepts in contemporary international law, has evolved over time to include arrangements that manifest more of the characteristics and powers of complete sovereign statehood.

Because it can only respond to actual cases and controversies brought before it, it is unsurprising that U.S. constitutional law has not, for the most part, evolved in tandem with international law. Despite the advent of international human rights law brought about by the twentieth-century shift in international law's historic fulcrum—from the rights of sovereigns to the rights of people²⁹⁸—and international law's consequent adoption of a relatively robust and universalized right of peoples to self-determination, the leading U.S. constitutional cases relevant to certain forms of freely associated statehood (one way to realize that international right) continue to use the language, concepts, and milieu of the late nineteenth and early twentieth centuries. The very longevity of this antiquated case law has perversely become a reason not to disturb it.²⁹⁹ Justice Holmes's well-known aphorism aptly describes the current state of U.S. law in this regard: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."³⁰⁰ We might add that it is still more revolting where the United States has long espoused entirely different doctrines and principles at the international level.

Longstanding U.S. constitutional doctrines relevant to freely associated states—in particular, a crude dichotomy that recognizes and accommodates only states and territories (but nothing, in between) and the doctrine of Congress's plenary power over the latter—reflect nineteenth- and early twentieth-century ideas about sovereignty that international law has long since abandoned and an anachronistic vision of the United States as a beneficent imperial power bringing civilization to unenlightened peoples.³⁰¹ The failure of U.S. constitutional law in this area to evolve to meet the normative demands of modern international law is ironic, for it originated, as a number of scholars have demonstrated, in appeals to the international law prevailing in the late nineteenth and early twentieth centuries.³⁰²

Yet in the late twentieth and early twenty-first century, all three branches of the U.S. federal government maintain legal positions on Puerto Rico rooted firmly in a

²⁹⁶ Reference should also be made in this context to the U.S. Virgin Islands, Guam, and American Samoa, which remain territories of the United States.

²⁹⁷ Note, however, that both Ukraine and Belarus were charter members of the United Nations despite their status as units within a very effective federation.

²⁹⁸ W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 239, 250 (Gregory H. Fox & Brad R. Roth eds., 2000).

²⁹⁹ T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 5 (2002) (noting that the "cases remain largely untouched," and "their longevity is now cited against assertions that they ought to be reconsidered").

³⁰⁰ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

³⁰¹ See generally ALEINIKOFF, *supra* note 299, at 11-38.

³⁰² See *id.* at 14 (noting that Justice "Field's conception of the state [in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)] as a sovereign exercising jurisdiction over territory" originated in "an international law paradigm that had dominated American jurisprudence at least from the time of John Marshall"); Sarah Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, (2002); Sarah Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127, 1154 (1999) (concluding that "the late nineteenth century saw the doctrine of congressional authority over territories evolve from a concept rooted in the Territory and Treaty Clauses of the Constitution, and limited by the Constitution's terms, to a power derived from international law concepts of discovery and sovereignty, which were relatively unhinged from judicial or constitutional constraint").

nineteenth-century paradigm of international law, particularly its rules of territorial acquisition and governance. The understanding of the Constitution that still prevails in the twenty-first century,³⁰³ expressed by Attorney General Richard Thornburgh in testimony before the Senate in 1991, essentially distills the idea, as Aleinikoff succinctly puts it, that “the United States Constitution knows only the mutually exclusive categories of ‘State’ and ‘Territory.’”³⁰⁴ States must be treated in accordance with the relevant provisions of the Constitution and the complex jurisprudence of federalism developed by the courts; territories, by sharp contrast, remain subject to the plenary power of Congress first articulated in the *Chinese Exclusion Case*.³⁰⁵ This binary division, which some regard as regrettable but nonetheless constitutionally correct,³⁰⁶ is, in fact, anachronistic: It neither accurately reflects nor properly accommodates the diverse political arrangements embodied in the freely associated states of Puerto Rico, the CMNI, and the FAS. Legally created at a later date, those arrangements better represent current law. Analysis of the progressive recognition and treatment of various forms of freely associated statehood in U.S. constitutional practice thus discloses potential options for Puerto Rico in the modern era.

A. Introduction: *The Insular Cases*: States and Territories

Any analysis of free association and the U.S. Constitution must begin, as it did historically, with the Territorial Clause, which provides: “The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.”³⁰⁷ In the early twentieth century, in a well-known series of decisions designated the *Insular Cases*,³⁰⁸ the Supreme Court established the Territorial Clause as “the source of congressional power over U.S. possessions acquired by purchase, conquest, treaty, or war.”³⁰⁹ (It is no coincidence that all of the states freely associated with the United States—the FAS, Puerto Rico, and the CNMI—originated in “conquest, treaty, or war,” most significantly, the Spanish-American War of 1898 and World War II.) In *Downes v. Bidwell*,³¹⁰ one of the most significant of the *Insular Cases*, the Court concluded that Puerto Rico should be deemed “a territory appurtenant and belonging to the United States, but not a part of the United States,” for “the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States shall receive its inhabitants, and what their status shall be.”³¹¹

International law on territorial discovery, acquisition, and governance therefore drove the logic of the *Insular Cases*, which fashioned a novel distinction between “incorporated” and “unincorporated” territories and held that the Constitution as a whole applied only to the former:

To Justice White [concurring in *Downes v. Bidwell*, 182 U.S. 244, 287-344] it was clear that the power of a government to acquire territories by discovery, treaty, or conquest must also bring with it the power to determine the status of the acquired territory. Automatic incorporation and extension of the Constitution would mean that this power did not exist nor would the acquiring power have the right to dispose of a territory with conditions. . . . To incorporated territories the Constitution applies fully; to an unincorporated territory, only the fundamental provisions of the Constitution applied, “the general prohibitions . . . in favor of the liberty and

³⁰³ See 2005 TASK FORCE REPORT, *supra* note 3.

³⁰⁴ ALEINIKOFF, *supra* note 299, at 90; see also *id.* at 240 (citing Hearings on S. 244 before the Senate Comm. on Energy and Natural Resources, 102d Cong., 1st Sess., 193-94 (1991) (statement of Hon. Richard Thornburgh, Attorney General)).

³⁰⁵ See *id.* at 90; *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

³⁰⁶ See, e.g., Juan R. Torruella, *One Hundred Years of Solitude: Puerto Rico's American Century*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 241 (Christina Duffy Burnett & Burke Marshall eds. 2001) (arguing that the Constitution does not recognize commonwealth status or permit one Congress to bind a future Congress to respect that status); Gerald L. Neuman, *Constitutionalism and Individual Rights*, in FOREIGN IN A DOMESTIC SENSE, *supra*, at 182, 196 (describing the problem as a “fundamental republican defect” in the Constitution).

³⁰⁷ U.S. CONST. art. IV, § 3, cl.2.

³⁰⁸ *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901).

³⁰⁹ ALEINIKOFF, *supra* note 299, at 76.

³¹⁰ 182 U.S. 244 (1901).

³¹¹ *Id.* at 287.

property of the citizen . . . which are an absolute denial of authority . . . to do particular acts.”³¹²

In short, the *Insular Cases* ratified a state of affairs in which the residents of unincorporated territories, such as Puerto Rico, could be denied the full panoply of rights, privileges, and immunities enjoyed by U.S. citizens despite their nominal citizenship; hence the oddity, which persists to this day, that resident aliens physically located within a state of the United States may enjoy greater benefits and rights under federal law than Puerto Rican citizens of the United States.³¹³ Yet those same citizens, simply by exercising their right to relocate to a state of the United States, can thereby acquire “every right of any other citizen of the United States, civil, social, and political.”³¹⁴

B. Puerto Rico: Constitutional Rights and political Authority

In 1952, as noted, the United Nations removed Puerto Rico from its list of non-self-governing territories based on representations from both the United States and Puerto Rico. General Assembly Resolution 748 (VIII), recognized that “the people of the Commonwealth of Puerto Rico, by expressing their will in a free and democratic way, have achieved a new constitutional status” and that “in the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self government attained by the Puerto Rican people as that, of an autonomous political entity.”³¹⁵

In theory, Puerto Rico thereafter attained a new status not only under international law, but also under U.S. constitutional law. No longer could it be treated as an unincorporated territory subject to the plenary power of Congress (limited only by the poorly defined doctrine of “fundamental” rights) under the Territorial Clause. Congresswoman Frances P. Bolton, it will be recalled, represented to the General Assembly that, henceforth, “[t]he relationships previously established also by a law of the Congress, which only Congress could amend, have now become provisions of a compact of a bilateral nature whose terms may be changed only by common consent.”³¹⁶

In fact, some actors in and officials of the political branches of the U.S. federal government continue to maintain that Puerto Rico remains subject to the plenary authority of the federal government under the Territorial Clause.³¹⁷ On this view, the United States, notwithstanding the adoption of Public Law 600 “in the nature of a compact,” still enjoys “the absolute and undisputed power of governing and legislating for [Puerto Rico].”³¹⁸ The inherent tension between the Compact and the continuing vitality of case law that treats Puerto Rico as an unincorporated territory within the meaning of the *Insular Cases* manifests itself in a *sui generis*, and at times incoherent, constitutional jurisprudence. This jurisprudence, in our view, is certainly in conflict with contemporary international law.

³¹²Leibowitz, *supra* note 128, at 241-42 (quoting *Downes v. Bidwell*, 182 U.S. 244, 294 (1901) (White, J., concurring)).

³¹³*See, e.g., Harris v. Rosario*, 446 U.S. 651 (1980) (Congress may provide lesser benefits to Puerto Ricans under the federal Aid to Families with Dependent Children program and, in general, treat Puerto Rico differently from the states if it has a “rational basis” for doing so); *Califano v. Torres*, 435 U.S. 1 (1978) (Congress may offer lower Social Security benefits to the elderly in Puerto Rico).

³¹⁴*Balzac v. Puerto Rico*, 258 U.S. 298, 308 (1922); *see also* Leibowitz, *supra* note 128, at 244-45.

³¹⁵G.A. Res. 748, U.N. GAOR, 8th Sess., Supp. No. 17, at 25, U.N. Doc. A12630 (1953).

³¹⁶Frances P. Bolton, *Nov. 3 Statement by Mrs. Bolton*, DEP’T ST. BULL., Dec. 1953, at 804; *see also* 1 WHITEMAN, *supra* note 119, at 400 (stating that the laws enacted by Puerto Rico, as well as its association with the United States, cannot be altered without Puerto Rico’s consent).

³¹⁷In 1998, the House of Representatives found, in a bill that died in the Senate, that “[t]he Commonwealth [of Puerto Rico] remains an unincorporated territory and does not have the status of ‘free association’ with the United States as that status is defined under United States law or international practice.” United States-Puerto Rico Political Status Act, H.R. 856, 105th Cong. §2(4) (1998). The December 2005 Report of the President’s Task Force takes the same position, *see, e.g., 2005 TASK FORCE REPORT, supra* note 3, at 5 (referring to Puerto Rico as a territory subject to the Constitution’s Territory Clause and Congress’s virtually plenary authority), as do, with some exceptions, the courts, *see, e.g., Igartúa de la Rosa v. United States*, 229 F.3d 80, 88 (Torruella, J., concurring) (noting that the Supreme Court has supported Congress’s assertion of plenary power). *See also* José Trias Monge, *Injustice According to Law, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 226, 233 (Christina Duffy Burnett & Burke Marshall eds. 2001).

³¹⁸*Sere and Laralde v. Pilot*, 10 U.S. (6 Cranch) 332, 337 (1810).

1. Political Autonomy

After Congress's enactment of Public Law 600, as noted, Puerto Rico should be deemed to have *at least* as much autonomy and authority, both internally and with respect to foreign affairs, as a component state of the Union. Yet the Supreme Court continues to apply to Puerto Rico a doctrine analogous to that articulated in *Cincinnati Soap Co. v. United States*,³¹⁹ where, despite the enactment of the Philippine Independence Act creating the Commonwealth of the Philippine Islands,³²⁰ it held that relative to the Commonwealth, Congress "is not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union."³²¹

The Supreme Court has avoided explicit comment on whether Puerto Rico remains an unincorporated territory notwithstanding the Compact. In 1955, in *Granville-Smith v. Granville-Smith*,³²² a divorce action challenging a local statute of the U.S. Virgin Islands, the Supreme Court characterized only "pre-Commonwealth Puerto Rico" as an unincorporated territory, arguably implying that its status changed after Public Law 600.³²³ And in *Katzenbach v. Morgan*,³²⁴ the Court applied Section Five of the Fourteenth Amendment to sustain the Voting Rights Act of 1965 against a challenge that would have denied the vote to Puerto Ricans who had moved to New York State, thereby rendering it unnecessary to decide whether the Act could be sustained in the alternative under the Territorial Clause.³²⁵

Several lower-court cases have suggested that the Compact did affect Congress's formerly plenary power over Puerto Rico.³²⁶ In *United States v. Quinones*, for example, the United States Court of Appeals for the First Circuit said explicitly that "[u]nder the compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally, and the government of Puerto Rico is no longer a federal government agency exercising delegated power."³²⁷ But in *United States v. Lopez Andino*, Judge Torruella, the author of a well-regarded book on the subject,³²⁸ concluded that, at least as a matter of constitutional law, Puerto Rico remains a territory subject to Congress's plenary power.³²⁹ The Eleventh Circuit agreed and put the matter quite bluntly: "Congress may unilaterally repeal the Puerto Rican Constitution or the Puerto Rican Federal Relations Act and replace them with any rules or regulations of its choice."³³⁰

Though controversial, the weight of authority, however ill-considered, supports this view, at least insofar as the United States government *itself* understands its relationship to Puerto Rico.³³¹ In *Harris v. Rosario*, the Supreme Court held that Congress may discriminate against Puerto Ricans in the administration of the federal Aid to Families with Dependent Children program, and in so holding, cited the Territorial Clause for the broad proposition that Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions."³³² Two years earlier, in *Califano v. Torres*, it had reached a similar conclusion with respect to social security benefits.³³³ In both *Harris* and *Califano*, the Court cited the same three reasons in support of its conclusion that Congress's decision to discriminate against Puerto Rican residents passed the rational-basis test: (1) "the unique tax status of Puerto Rico," i.e., "its residents do not contribute to the public treasury"; (2) the high cost of including Puerto Rico in the federal program at issue; and (3) the potential disruption to the Puerto Rico's economy.³³⁴ Helfeld argues persuasively that

³¹⁹ 301 U.S. 308 (1937).

³²⁰ Act of March 24, 1934, c. 84, 48 Stat. 456.

³²¹ *Cincinnati Soap*, 301 U.S. at 323.

³²² 349 U.S. 1 (1955).

³²³ *See id.* at 6.

³²⁴ 384 U.S. 641 (1966).

³²⁵ *Id.* at 646 n.5.

³²⁶ ALEINIKOFF, *supra* note 299, at 77 & 240 n.17 (collecting cases).

³²⁷ 758 F.2d 40, 42 (1st Cir. 1985) (citing *Mora v. Mejias*, 206 F.2d 377, 386-88 (1st Cir. 1953)); *see also* *United States v. Vega Figueroa*, 984 F. Supp. 71, 78 (D.P.R. 1997) (emphasizing that through the Compact "Congress expressly . . . relinquished its plenary powers over areas of local sovereignty").

³²⁸ *See* JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985).

³²⁹ 831 F.2d 1164, 1173-76 (1st Cir. 1987) (Torruella, J., concurring).

³³⁰ *United States v. Sanchez*, 992 F.2d 1143, 1152-53 (11th Cir. 1993).

³³¹ *See* ALEINIKOFF, *supra* note 299, at 77 & 240 n.18 (collecting authorities).

³³² 446 U.S. 651, 652 (1980) (per curiam).

³³³ 435 U.S. 1 (1978) (per curiam).

³³⁴ *Califano*, 435 U.S. at 5 n.7; *compare Harris*, 446 U.S. at 651-52 (same).

If the three reasons accepted in *Califano* and *Harris* are rational, it is difficult to imagine any law assigning federal funds discriminatorily against Puerto Rico which would not be considered rational. The ‘rational basis’ test is the equivalent of a blank check because in practice any reason will satisfy the Court. After *Harris* Congress is on notice that under the territorial clause it has discretion to exclude totally, or to apply partially to Puerto Rico any program based on federal funds, without violating the principle of the equal protection of the laws. In constitutional terms *Harris* eliminated equal protection as a limit on the power of Congress to distribute federal funds to Puerto Rico. Henceforth there are no limits, only the discretionary authority of the Congress under the territorial clause.³³⁵

The Supreme Court’s 1979 opinion in *Torres v. Puerto Rico* likewise affirmed the continuing vitality of the *Insular Cases* and *Balzac v. Puerto Rico*,³³⁶ although Justice Brennan’s concurrence implied that those cases might profitably be reconsidered at this stage in history.³³⁷

Moreover, both Congress and the Executive branch have asserted in no uncertain terms that Congress continues to exercise plenary authority over Puerto Rico under the Territorial Clause. In 1998, the House of Representatives found, in a bill that died in the Senate, that “[t]he Commonwealth [of Puerto Rico] remains an unincorporated territory and does not have the status of ‘free association’ with the United States as that status is defined under United States law or international practice.”³³⁸ The 2005 Presidential Task Force Report goes further. Not only does it affirm the continuing status of Puerto Rico as an “unincorporated” territory within the *Insular Cases* doctrine;³³⁹ it argues that free association would be unconstitutional: “The Federal Government may relinquish United States sovereignty by granting independence or ceding the territory to another nation; or it may, as the Constitution provides, admit the territory as a State, thus making the Territorial Clause inapplicable. But the U.S. Constitution does not allow other options.”³⁴⁰

This position, while controversial as a matter of constitutional law,³⁴¹ is important to appreciate from a political standpoint, for under this view, the illusion that Puerto Rico enjoys greater autonomy than it does is made possible only by Congress’s decision, thus far, not to exercise the plenary power that it (believes it) retains. This, in turn, contributes to maintenance of the status quo rather than to an ultimate resolution of Puerto Rico’s political status in accordance with freely expressed wishes of its people. That uncertainty may be preferred by certain groups on the island and the mainland.

³³⁵David M. Helfeld, *Applicability of the United States Constitution and Federal Laws to the Commonwealth of Puerto Rico*, 110 F.R.D. 449, 462 (1985); cf. ALEINIKOFF, *supra* note 299, at 79 (“Even assuming that the justifications provided by Congress [in *Harris*] are ‘rational’ (as we understand that term in constitutional analysis), what is not explained is why they are permissible. The distinction drawn by Congress is one based simply on residence in a territory; it is grounded, when all is said and done, not on different facts, but on status of place.”).

³³⁶*Torres v. Puerto Rico*, 442 U.S. 467, 468-69 (1979); see also *United States v. Lopez Andino*, 831 F.2d 1164, 1175 (1st Cir. 1987) (Torruella, J., concurring); *Rayphand v. Sablan*, 95 F. Supp. 2d 1133, 1139 n.14 (D. N. Mar. I. 1999) (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990)).

³³⁷*Torres*, 442 U.S. at 475 (Brennan, J., concurring); see also *Harris v. Rosario*, 446 U.S. 651, 652-56 (1980) (Marshall, J., dissenting) (noting that the “present validity” of the *Insular Cases* and *Balzac v. Porto Rico*, 258 U.S. 298 (1922), “is questionable”).

³³⁸United States-Puerto Rico Political Status Act, H.R. 856, 105th Cong. § 2(4) (1998).

³³⁹2005 POLITICAL TASK FORCE REPORT, *supra* note 3, at 7.

³⁴⁰*Id.* at 6. The only authority cited for this view is the 1879 decision of the Supreme Court in *First National Bank v. Yankton County*, 101 U.S. 129, 133 (1879), where the Court stated that “[41 territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress.” See also ALEINIKOFF, *supra* note 299, at 89-90 (quoting Hearings on S. 244 before the Senate Comm. on Energy and Natural Resources, 102d Cong., 1st Sess., 193-94 (1991) (statement of Hon. Richard Thornburgh, Attorney General)); Torruella, *supra* note 306, at 241 (arguing that the Constitution does not recognize commonwealth status or permit one Congress to bind a future Congress to respect that status).

³⁴¹*Compare, e.g.*, ALEINIKOFF, *supra* note 299, at 90-93, with Torruella, *supra* note 306, at 245-46, and Neuman, *supra* note 306, at 195-97.

2. Fundamental Rights

While the *Insular Cases* have been limited in dicta,³⁴² they remain, so far as the Supreme Court has indicated, good law.³⁴³ *Balzac v. Porto Rico*,³⁴⁴ which held the Sixth Amendment right to trial by jury inapplicable to Puerto Rico, reaffirmed that only an undefined subset of constitutional rights deemed “fundamental” apply to such unincorporated territories,³⁴⁵ and that decision, too, so far as the Supreme Court has indicated, remains good law.³⁴⁶ In retrospect, it is remarkable that the right to a jury trial would not be deemed “fundamental.” Even more remarkable is the Court’s conclusion that Congress’s express conferral of U.S. citizenship on Puerto Ricans did not alter the *Insular Cases* doctrine whereby a person’s rights depend, not on citizenship, but on the status of the territory in which he or she lives.³⁴⁷

Despite the formal state of the law, however, the continuing vitality of *Balzac*, as several Supreme Court justices have suggested, suspect. The Supreme Court has since held that the right to a jury trial in criminal cases qualifies as “fundamental,” albeit in a distinct context.³⁴⁸ *Balzac*, several scholars speculate, would likely be overruled but for the fact that Puerto Rican legislation guarantees the right to a jury trial in any event, obviating the potential for a challenge.³⁴⁹ Indeed, the trend since 1952 has been to expand the category of rights applicable to Puerto Rico. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, the Court held that the requirements of due process apply to Puerto Rico, though it declined to specify whether due process applies by virtue of the Fifth or the Fourteenth Amendment.³⁵⁰ In *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, the Court struck down, as a violation of equal protection, alienage restrictions on civil engineers residing in Puerto Rico, again declining to say “whether it is the Fifth Amendment or the Fourteenth which provides the protection.”³⁵¹ In *Califano v. Torres*, while affirming that Congress may discriminate against Puerto Rico provided the discrimination has a rational basis, the Supreme Court “assumed without deciding that the

³⁴² *Reid v. Covert*, 354 U.S. 1, 14 (1957) (holding that the Sixth Amendment right to trial by jury protects the wife of an American service member serving abroad and stating that “neither the [*Insular Cases*] nor their reasoning should be given any further expansion”); see also *Torres v. Puerto Rico*, 442 U.S. 465, 476 (1979) (Brennan, J., concurring). As Gerald R. Neuman notes: “Juxtaposing *Reid v. Covert* with the *Insular Cases* produces bizarre results. For example, a U.S. citizen prosecuted by the federal government has a constitutional right to jury trial in Japan, but not in Puerto Rico.” Neuman, *supra* note 306, at 191.

³⁴³ See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-69 (1990) (treating the *Insular Cases* as binding precedent).

³⁴⁴ 258 U.S. 298 (1922).

³⁴⁵ *Id.* at 304-06, 312-13; see also *Don v. United States*, 195 U.S. 138, 149 (1904) (concluding with respect to the Philippines “that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in article 4, §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”).

³⁴⁶ See *Fournier v. Gonzalez*, 269 F.2d 26, 28-29 (1st Cir. 1959) (“So far as concerns the guaranty of Art. III, §2, and that of the Sixth Amendment of the Federal Constitution, it is clear that we could not hold that they are applicable to the present situation without a determination that *Balzac v. People of Porto Rico*, 1922, 258 U.S. 298 (1922), is no longer law; and certainly *Reid v. Covert*, 1957, 354 U.S. 1, did not overrule *Balzac v. People of Porto Rico*.”).

³⁴⁷ *Balzac*, 258 U.S. at 309 (“It is the locality that is determinative of the application of the Constitution in such matters as judicial procedure, and not the status of the people who live in it.”).

³⁴⁸ *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Whether a right is “fundamental” such that it must be applied to the states through the Fourteenth Amendment incorporation doctrine is a distinct question from whether it is “fundamental” within the meaning of the *Insular Cases*. See *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 689 (9th Cir. 1984) (“To focus on the label ‘fundamental rights,’ overlooks the fact that the doctrine of incorporation for purposes of applying the Bill of Rights to the states serves one end while the doctrine of territorial incorporation serves a related but distinctly different one. The former serves to fix our basic federal structure; the latter is designed to limit the power of Congress to administer territories under Article IV of the Constitution.”); see also *id.* at 690 (“In identifying ‘fundamental rights’ for purposes of territorial incorporation, the Court considered whether the asserted right was one of ‘those fundamental limitations in favor of personal rights’ which are ‘the basis of all free government.’”) (quoting *Dorr v. United States*, 195 U.S. 138, 146, 47 (1904)).

³⁴⁹ Helfeld, *supra* note 335, at 458 & n.25; see also ALEINIKOFF, *supra* note 299, at 83.

³⁵⁰ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668-69 n.5 (1974). Helfeld speculates, quite plausibly, “that the Court wished to avoid the implications of grounding its decision on either the Fifth or Fourteenth Amendments” because “[i]f it had relied on the former, it might have given the impression that Puerto Rico continues to be a territory,” whereas, had it relied on the Fourteenth Amendment, “that could have been interpreted as the equivalent of defining Puerto Rico as a state of the union.” Helfeld, *supra* note 335, at 456.

³⁵¹ 426 U.S. 572, 601 (1976).

constitutional right to travel extends to the Commonwealth.”³⁵² And in *Torres v. Puerto Rico*, the Court held that the Fourth Amendment applied to Puerto Rico, preempting local Puerto Rican legislation that would have permitted the challenged search;³⁵³ once again, the Court chose to elide the question “whether the Fourth Amendment applies to Puerto Rico directly or by operation of the Fourteenth Amendment.”³⁵⁴ Puerto Ricans also can and do regularly bring actions under 42 U.S.C. § 1983 for violations of, inter alia, political discrimination and the rights of prisoners and the mentally ill.³⁵⁵ At the Proceedings of the First Circuit Judicial Conference in 1985, David M. Helfeld thus suggested the following general rule: “if a state can do it constitutionally, Puerto Rico can do it, and vice versa.”³⁵⁶ In fact, “the only ‘fundamental’ right which remains in doubt is trial by jury in criminal cases.”³⁵⁷

It should be noted, however, that so long as the *Insular Cases* remain good law, the “citizenship” enjoyed by Puerto Ricans is something of a misnomer. Puerto Ricans clearly do not enjoy the full panoply of rights and privileges associated with U.S. citizenship. Most significantly, so long as they reside in Puerto Rico,³⁵⁸ they lack the democratic representation in the federal government that state citizens enjoy and that is fundamental to the protection of their rights and interests. They may not vote in federal presidential elections;³⁵⁹ and except for the resident commissioner, who enjoys only an advisory role (not a vote), they lack representation in the Congress. Judge Torruella, concurring in *Igartúa de la Rosa v. United States*, observed:

Although persons born in Puerto Rico are citizens of the United States at birth, and thereby owe allegiance to the United States, . . . while residing in Puerto Rico they enjoy fewer rights than citizens of the United States that reside in the fifty States, . . . or even in foreign countries Undoubtedly the most glaring evidence of this egregious disparity is the fact that they do not elect a single voting representative to a federal government that exercises almost absolute power over them.³⁶⁰

Puerto Ricans, then, as Judge José A. Cabranes has suggested, might more accurately be denominated “nationals” of the United States, where “national” means “a person who, though not a citizen, owes permanent allegiance to the state and is entitled to its protection.”³⁶¹

3. Federalism

Puerto Rico, though not a state,³⁶² is treated like one for most purposes of U.S. federalism. *Calero-Toledo v. Pearson Yacht Leasing Co.* treated Puerto Rico as a

³⁵² *Torres v. Puerto Rico*, 442 U.S. 465, 470 (1979) (citing *Califano v. Tones*, 435 U.S. 1, 4 n.6 (1978) (per curiam)).

³⁵³ 442 U.S. 465 (1979).

³⁵⁴ *Id.* at 471.

³⁵⁵ See Helfeld, *supra* note 335, at 471 & nn.82-87.

³⁵⁶ *Id.* at 457.

³⁵⁷ *Id.* at 457-58.

³⁵⁸ See *Balzac v. Porto Rico*, 258 U.S. 298, 308 (1922) (affirming that Puerto Ricans, though enjoying only “fundamental” rights while resident in Puerto Rico, may “move into the continental United States and . . . there . . . enjoy every right of any other citizen of the United States, civil, social and political”); see also *Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001) (dismissing challenge to the constitutionality of the Uniformed and Overseas Citizens Absentee Voting Act as applied to a Puerto Rican formerly domiciled in New York State who sought an overseas ballot to vote in the 2000 presidential election).

³⁵⁹ *Igartúa de la Rosa v. United States*, 229 F.3d 80 (1st Cir. 2000). The First Circuit recently reheard this case for the fourth time, en banc, and concluded that neither the U.S. Constitution nor U.S. treaty obligations require that U.S. citizens resident in Puerto Rico be given the constitutional right to vote in presidential elections. *Igartúa de la Rosa v. United States*, 417 F.3d 145, 146-47 (1st Cir. 2005) (en banc).

³⁶⁰ *Igartúa de la Rosa v. United States*, 229 F.3d 80, 85-86 (1st Cir. 2000) (Torruella, J. concurring) (footnotes, alterations, and internal citations omitted); see also José A. Cabranes, *Puerto Rico and the Constitution*, 110 F.R.D. 475, 480 (1985) (“[N]o word other than ‘colonialism’ adequately describes the relationship between a powerful metropolitan state and an impoverished overseas dependency disenfranchised from the formal lawmaking processes that shape its people’s daily lives.”).

³⁶¹ G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 1 (1942); see José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 396 n.12 (1978); see also T. Alexander Aleinikoff, *Citizenship Talk: A Revisionist Narrative*, 69 FORDHAM L. REV. 1689, 1692 (2001). Note that residents of American Samoa, which remains a territory, are explicitly nationals rather than citizens.

³⁶² See, e.g., *Mora v. Torres*, 113 F. Supp. 309 (D.P.R. 1953), *aff’d* 206 F.2d 377 (1st Cir. 1953).

state for purposes of the Three-Judge Court Act.³⁶³ In *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, the Supreme Court held that Puerto Rico should be treated as a state for purposes of 28 U.S.C. § 1343(3), which vests the federal district courts with jurisdiction over civil actions alleging the deprivation of rights “under color of any State law,” and the corresponding right of action supplied by 42 U.S.C. § 1983.³⁶⁴ The First Circuit has also held that Puerto Rico should be deemed a state for purposes of the Full Faith and Credit Clause and its statutory analogue, 28 U.S.C. § 1738.³⁶⁵

A circuit split exists, however, on the question whether Puerto Rico and the United States are “dual sovereigns” for purposes of the Double Jeopardy Clause. The First Circuit concluded in the affirmative in *United States v. Lopez Andino*, emphasizing that Puerto Rico, like the several states of the Union, enacts its own criminal laws, which “emanate from a different source than the federal laws.”³⁶⁶ The Eleventh Circuit, following the reasoning of Judge Torruella’s concurrence in *Lopez Andino*, held that Puerto Rico is not a state for purposes of the prohibition on double jeopardy in criminal cases because, unlike component states of the Union or even the Indian tribes, its prosecutorial authority derives from the same sovereign source as that of the United States.³⁶⁷ As Judge Torruella wrote in *Lopez Andino*,

[because Puerto Rico, notwithstanding P.L. 600, is still constitutionally a territory, *Puerto Rico v. Shell Co.* [302 U.S. 258 (1937)] prevents the application of the “dual sovereignty” doctrine. That principle is only applicable where separate political entities which derive their power from different sources are involved. . . . In *Shell Co.*, the Court held that territory derived its authority from Congress and therefore was not a sovereign for double jeopardy purposes.³⁶⁸

Resolution of this circuit split would thus require the Supreme Court to decide squarely the question it has carefully avoided to date: whether, at least as a matter of U.S. law, the Compact altered Puerto Rico’s former status as an unincorporated territory under the *Insular Cases* doctrine. Other than double jeopardy, the most significant exception to Puerto Rico’s constitutional treatment as a state for federalism purposes is, again, its utter disenfranchisement from national politics.³⁶⁹

C. The CNMI: Constitutional Rights and Political Authority

Thanks in part to the unsatisfactory character of the arrangement with Puerto Rico, the constitutional status of the CNMI and the rights of its people were clarified in more explicit terms during the negotiation process with the United States. The Territorial Clause, for example, clearly applies to the CNMI—but subject to critical limitations.³⁷⁰ In particular,

The Covenant contains two limitations on Federal legislative authority: a procedural requisite that Federal legislation specifically mention the Northern Marianas if it is to be applicable to the commonwealth and the substantive requisite that the prior consent of the commonwealth be acquired before the implementation of Federal law with respect to some critical areas.³⁷¹

The Covenant explicitly sets out which constitutional provisions shall apply to it,³⁷² obviating in many instances the question whether a right is “fundamental”

³⁶³ 416 U.S. 671, 675 (1974).

³⁶⁴ 426 U.S. 573 (1976); *but see* *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (construing the word “state” in 28 U.S.C. § 1254(2), another jurisdictional statute, to exclude Puerto Rico).

³⁶⁵ *Cruz v. Melecio*, 204 F.3d 14, 18 (1st Cir. 2000); *Medina v. Chase Manhattan Bank*, 737 F.2d 140, 142 (1st Cir. 1984).

³⁶⁶ *United States v. Lopez Andino*, 831 F.2d 1164, 11.68 (1st Cir. 1987).

³⁶⁷ *United States v. Sanchez*, 992 F.2d 1143, 1149-53 (11th Cir. 1993); *compare Lopez Andino*, 831 F.3d at 1172-77 (Torruella, J., concurring). Judge Torruella argued that the majority need not have reached the question of Puerto Rico’s status for purposes of the double-jeopardy bar to successive prosecutions for the same offense, for the case involved distinct Puerto Rican and federal offenses in any event. *See id.* at 1172.

³⁶⁸ *Lopez Andino*, 831 F.3d at 1175 (citations omitted; emphasis in original).

³⁶⁹ Helfeld, *supra* note 335, at 468.

³⁷⁰ *See* LEIBOWITZ, *supra* note 170, at 539-40.

³⁷¹ *Id.* at 542.

³⁷² Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, 90 Stat. 263 (codified at 48 U.S.C. § 1801 note), § 501 [hereafter CNMI Covenant]. Similarly, the Covenant contains presumptions about which federal laws shall apply to it. LEIBOWITZ, *supra* note 170, at 553.

under the *Insular Cases* framework. Many of these cases have thus been readily resolved by the CNMI's Supreme Court.³⁷³

In *Northern Mariana Islands v. Atalig*, however, the Ninth Circuit nevertheless applied the *Insular Cases* doctrine to sustain, as consistent with the Sixth Amendment, a statute of the CNMI limiting the right to trial by jury to criminal cases punishable by more than five years' imprisonment.³⁷⁴ Despite the unfortunate application of the *Insular Cases* doctrine in the context of the CNMI, the court also remarked:

The NMI argues that its political status is distinct from that of unincorporated territories such as Puerto Rico. This argument is credible. Under the trusteeship agreement, the United States does not possess sovereignty over the NMI. As a commonwealth, the NMI will enjoy a right to self-government guaranteed by the mutual consent provisions of the Covenant No similar guarantees have been made to Puerto Rico or any other territory.

Thus, there is merit to the argument that the NMI is different from areas previously treated as unincorporated territories. We need not decide this issue because the independent force of the Constitution is certainly no greater in the NMI than in an unincorporated territory.³⁷⁵

This statement, while dicta, implies, contrary to the views of the U.S. political branches and some commentary, that the Constitution can accommodate political arrangements that lie on the spectrum between "state" and "territory."

Indeed, in subsequent cases, the Ninth Circuit has resisted relying on the Territorial Clause as a basis for examining the scope of U.S. federal power in the CNMI, affirming repeatedly that "the authority of the United States towards the CNMI arises solely under the Covenant."³⁷⁶ In *United States ex rel Richards v. Guerrero*, the Ninth Circuit held that self-government under the Covenant does not preclude federal legislation that affects the internal affairs of the CNMI, but it does require weighing the federal interest served by the legislation at issue against its degree of intrusion into those internal affairs.³⁷⁷ Furthermore, the Court found "unpersuasive the Inspector General's reliance on the Territorial Clause," because "[e]ven if the Territorial Clause provides the constitutional basis for Congress' legislative authority in the Commonwealth, it is solely by the Covenant that we measure the limits of Congress's legislative power."³⁷⁸

Relative to the CNMI, the Ninth Circuit has therefore drawn an important distinction between, on the one hand, the basis for Congress's authority, and on the other, its limits; the Territorial Clause can, the Ninth Circuit seems to suggest, supply the former without eviscerating the latter. In this regard the CNMI both evinces a development in the constitutional law governing freely associated states and, again, casts doubt on the view that the Constitution recognizes only the mutually exclusive categories of state and territory.

³⁷³ *E.g.*, Santos v. Nansay Micronesia, Inc., 4 N.M.I. 155 (1994), *appeal dismissed*, 76 F.3d 299 (9th Cir. 1996) (jury trial); Commonwealth v. Oden, 3 N.M.I. 186 (1992), *aff'd mem.*, 19 F.3d 26 (9th Cir. 1994) (double jeopardy); Commonwealth v. Hanada, 2 N.M.I. 343 (1991) (Sixth Amendment); In re "C.T.M.," 1 N.M.I. 171 (1990) (Fourteenth Amendment).

³⁷⁴ 723 F.2d 682 (9th Cir. N. Mariana I. 1984); *see also* Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir. N. Mariana I. 1992) (land alienation restrictions in Article XII of NMI Constitution, implementing § 805 of the Covenant, validly exempted from federal equal protection review under Covenant § 501(b) because the right of equal access to long-term interests in Commonwealth real estate is not "fundamental in the international sense").

³⁷⁵ *Id.* at 691 n.28.

³⁷⁶ Commonwealth of the Northern Mariana Islands v. United States, 399 F.3d 1057, 1062 (9th Cir. 2005) (citations and internal quotation marks omitted); *United States ex rel Richards v. Guerrero*, 4 F.3d 749, 754-55 (9th Cir. 1993) (quoting Hillblom v. United States, 896 F.2d 426, 429 (9th Cir. 1990)).

³⁷⁷ *Guerrero*, 4 F.3d at 755; *see also Decision: Self-Government of Former U.N. Trust Territory*, 88 AM. J. INT'L L. 337 (1994).

³⁷⁸ *Guerrero*, 4 F.3d at 754 (emphasis added). Note, however, that in a relatively recent decision of the District Court for the Northern Mariana Islands, which the U.S. Supreme Court summarily affirmed, the district court again applied the *Insular Cases* doctrine of fundamental rights to decide "that Congress' endorsement of the NMI negotiators' request that the voters of Saipan be denied the fundamental United States constitutional guarantee of 'one person-one vote' in regards to the composition of the CNMI Senate does not offend the United States Constitution." Rayphand v. Sablan, 95 F. Supp. 2d 1133, 1139 (D. N. Mar. I. 1999), *aff'd sub nom.*, Torres v. Sablan, 528 U.S. 1110 (2000). The Court reasoned that "one person-one vote" could not be deemed "a right that is the 'basis of all free government'" and therefore that "it need not be applied in and to an unincorporated territory such as the Commonwealth." Rayphand, 95 F. Supp. 2d at 1140 (quoting Wabol v. Villacrusis, 958 F.2d 1450, 1460 (9th Cir. 1990)).

D. The FAS: Constitutional Rights and Political Authority

In constitutional terms the FAS—the RMI, the FSM, and Palau—have a status quite distinct from that of the CNMI and Puerto Rico; they “are in essence independent nations and recognized as such by the international community.”³⁷⁹ Without question, the Territorial Clause therefore has no application to them. Indeed, outside of the provisions in the Compacts and the subsidiary agreements, the United States renounced “all obligations, responsibilities, rights and benefits of the Government of the United States as Administering Authority which have resulted from the application pursuant to the Trusteeship Agreement of any treaty or other international agreement to the Trust Territory of the Pacific Islands.”³⁸⁰ The FAS cannot juridically be characterized as part of the United States, and the Constitutions of each FAS enjoy supremacy within their respective territories.³⁸¹ Consequently, the parameters of the relationship between the United States and the FAS, unlike those of Puerto Rico and the CNMI, generally will be defined through negotiation and other diplomatic channels rather than in response to privately initiated litigation. Nevertheless, from time to time cases implicating the constitutional status of the FAS reach the federal appellate courts.

The constitutional status of the islands was a subject of debate during and immediately following the ratification of the Compacts because it was unclear whether Security Council action was required to terminate the trusteeship or whether unilateral action by the United States sufficed.³⁸² In *Juda v. United States*, the Claims Court held that “[t]he President’s signature completes enactment of the Compact Act [for the RMI] as a Congressional-Executive Agreement, a matter of domestic law,” even if its international legal effect with respect to the Trusteeship Agreement between the United States and the U.N. Security Council remained undetermined.³⁸³ This issue became irrelevant following the adoption of resolutions by the Security Council formally terminating the Trusteeship.

Before the Compact by which Palau became a freely associated state, that is, while it remained a Trust Territory, the U.S. Court of Appeals for the Second Circuit held that Palau did not qualify as a “foreign state” within the meaning of the Foreign Sovereign Immunities Act.³⁸⁴ Similarly, the Ninth Circuit held that its courts, at that time, were not foreign.³⁸⁵ In *Bank of Hawaii v. Balos*, however, the district court found that after the United States concluded the RMI Compact as a matter of domestic law, “notwithstanding that the RMI technically retains membership in the TTPI, it has *de facto* become a foreign state” for purposes of diversity jurisdiction under 28 U.S.C. § 1332.³⁸⁶ That conclusion clearly applies to each of the FAS today, for the Trusteeship has been terminated formally and the FAS recognized as foreign states.³⁸⁷

E. Toward an Enhanced Commonwealth Status for Puerto Rico?

The experience of the CNMI and the FAS show that the idea of a freely associated state is not static in U.S. constitutional law. The official views of the Executive and the Congress quoted earlier—to the effect that the Constitution knows only the mutually exclusive categories of territory and state—may not be reconcilable with the free association relationships into which the United States has in fact entered. FAS status might be undesirable for Puerto Rico in view of its strong social, legal, economic, and political ties to and reliance upon the United States. But a genuine com-

³⁷⁹ LAUGHLIN, *supra* note 172, at 509.

³⁸⁰ 48 U.S.C. § 1901-127 (RMI and FSM); 48 U.S.C. § 1931-125 (Palau). “It has been suggested that there is a slight theoretical possibility that a U.S. court might find the federal Constitution applicable to a free association state because of the intimate relationship that the free association states have with the United States, and because of the control that the United States has over some of the sovereign aspects of the free association states. However, the exertion of that kind of jurisdiction seems unlikely.” LAUGHLIN, *supra* note 172, at 509-10.

³⁸¹ See, e.g., LAUGHLIN, *supra* note 172, Oct. 1997 Cumulative Supp., at 77 (“In the Republic of the Marshall Islands, the Marshall Islands Constitution is the supreme law of the land. Hence, the Marshall Islands government and its officials cannot act contrary to it in exercising or discharging rights or obligations under the Compact.”).

³⁸² See generally LEIBOWITZ, *supra* note 170, at 596-98.

³⁸³ *Juda v. U.S.*, 13 Cl. Ct. 667, 682 (1987). The court continued: “[T]he Trusteeship Agreement and the Compact are two separate documents that involve different parties and raise differing legal issues. The Trusteeship Agreement is between the United States and the UNSC; the Compact is between the United States and the RMI. Trusteeship termination and Compact implementation are two separate issues.” *Id.* at 678.

³⁸⁴ *Morgan Guaranty Trust Co. v. Republic of Palau*, 924 F.2d 1237 (2d Cir. 1991).

³⁸⁵ *In re Complaint of Bowoon Sangsa Co.*, 720 F.2d 595, 601 (9th Cir. 1983).

³⁸⁶ 701 F. Supp. 744, 745 (D. Haw. 1988).

³⁸⁷ *Cf. Theo H. Davies & Co. v. Republic of the Marshall Islands*, 174 F.3d 969, 971-72 (9th Cir. 1999) (RMI as a “sovereign nation”).

fact of free association not unlike that of the CNMI offers one viable option for enhanced commonwealth status should the people of Puerto Rico collectively determine that to be in their long-term political interest.

The most recent plebiscite held in Puerto Rico, in which a bare majority of the voters chose “none of the above”³⁸⁸ may indicate, as Aleinikoff argues, not “political nihilism,” but a sense that “the options crafted by the ruling pro-statehood party did not adequately reflect their preferences. . . . Rather, they seek an ‘enhanced’ commonwealth status that would increase Puerto Rican autonomy vis-à-vis the federal government.”³⁸⁹ Contrary to the federal government’s suggestion, the Constitution need not be read to forbid such an arrangement,³⁹⁰ though it admittedly constrains the potential forms that enhanced commonwealth status may take. For example, despite the manifest injustice inherent in a national government exercising allegedly plenary power over a people who lack any representation in or a right to vote for that government, Article II of the Constitution specifies that the president shall be elected by state electors, which would, at least at first blush,³⁹¹ operate to preclude enfranchising residents of the CNMI or Puerto Rico in this regard absent a constitutional amendment;³⁹² the First Circuit recently issued a strongly worded en banc opinion to this effect.³⁹³ Equally, “it would be hard to make a persuasive argument that Congress could give territories representation in the Senate.”³⁹⁴

But enhanced commonwealth status need not, as the CNMI precedent shows, violate the Constitution. Rather, it could, as proposed legislation in the early 1990s did, effectively “make Puerto Rican home rule similar to that of states of the Union (including a guarantee—currently applicable to the states—that that status could not change without consent of the people of Puerto Rico).”³⁹⁵ Neuman and others argue that “the pursuit of enhanced commonwealth meets obstacles both in the federal government’s unwillingness to make such commitments and in the uncertainty over whether the federal government has the power to do so,” for the Constitution contains a “fundamental republican defect, that [it] restricts national representation to the states while giving the national organs governing power over the territories.”³⁹⁶

If that is correct, and enfranchisement could be accomplished only by constitutional amendment,³⁹⁷ then enhanced commonwealth status requires in the alternative that those national organs bind *themselves* not to do what they would otherwise be constitutionally empowered to do. The CNMI offers a blueprint for how this might be done, although the legality of Congress’s effort to constrain its own future power has not been challenged, and hence its constitutionality remains uncertain. That said, it has received at least limited judicial validation from the Ninth Circuit, which, as noted, held that “[e]ven if the Territorial Clause provides the constitutional basis for Congress’ legislative authority in the Commonwealth, *it is solely by*

³⁸⁸ 2005 TASK FORCE REPORT, *supra* note 3, at 4.

³⁸⁹ ALEINIKOFF, *supra* note 299, at 87 (footnote omitted).

³⁹⁰ *See id.* at 87-94; JOSE TRIAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 125-35, 189-91 (1997); Van Dyke, *supra* note 229, at 499-502.

³⁹¹ *But see* Romeu v. Cohen, 265 F.3d 118, 127-31 (2d Cir. 2001) (Leval, J.) (arguing that “if Congress is within its powers in requiring a State to accept the votes of nonresidents in order to cure the problems of disqualifying former residents of a State who move outside the United States or who move their residence to another State without time to qualify to vote in that State’s election, I can see no reason why Congress would exceed its powers in requiring States to accept a proportionate share of the presidential votes of citizens of the territories to cure the presidential disenfranchisement of a substantial segment of the citizenry of the United States”).

³⁹² *Cf.* U.S. CONST. amend. XXIII (giving residents of the District of Columbia the right to vote in presidential elections).

³⁹³ *Igartúa de la Rosa v. United States*, 417 F.3d 145, 147-48 (1st Cir. 2005) (en banc); *see also* Romeu, 265 F.3d at 122-24; Attorney General of the Territory of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984); *but cf.* *Igartúa de la Rosa*, *supra*, at 158-84 (Torruella, J., dissenting) (arguing that the court should issue a declaratory judgment to the effect that the United States “has taken no steps to meet its obligations under the ICCPR and customary international law to grant equal voting rights to all citizens in the election of the President and Vice President of the United States”).

³⁹⁴ ALEINIKOFF, *supra* note 299, at 90.

³⁹⁵ *Id.* at 88-89; *but see* Neuman, *supra* note 306, at 195-97 (arguing that “the pursuit of enhanced commonwealth meets obstacles both in the federal government’s unwillingness to make such commitments and in the uncertainty over whether the federal government has the power to do so,” for the Constitution contains a “fundamental republican defect, that [it] restricts national representation to the states while giving the national organs governing power over the territories”).

³⁹⁶ Neuman, *supra* note 306, at 195-97.

³⁹⁷ *But see* Romeu v. Cohen, 265 F.3d 118, 127-31 (2d Cir. 2001) (Leval, J.).

the *Covenant that we measure the limits of Congress' legislative power.*"³⁹⁸ The notion that "a sitting Congress may not bind a future Congress" is not "an absolute rule," and some precedents for such an arrangement exist in the law governing federal Indian tribes.³⁹⁹

José Trias Monge quotes Justice Frankfurter, then a clerk in the Bureau of Insular Affairs of the War Department, for the vital, if controversial, proposition that "[t]he form of the relationship between the United States and unincorporated territory is solely a problem of statesmanship;" and that "[o]ne of the great demands upon inventive statesmanship is to help evolve new kinds of relationship so as to combine the advantages of local self-government with those of a confederated union. Luckily, our Constitution has left this field of invention open."⁴⁰⁰ In the final analysis, the obstacles to an enhanced commonwealth status for Puerto Rico remain more political than legal. To date, the Supreme Court has cautiously avoided a definitive statement on Puerto Rico's post-1952 status. It seems likely that, whatever constitutional barriers may arguably exist, as a practical matter, the Court would not interfere with an arrangement ratified by the political branches and the people of Puerto Rico. Innovative solutions to (real or perceived) constitutional barriers, such as that proposed by Judge Leval,⁴⁰¹ can be developed; the real issues are of statesmanship and political will.

V. THE RIGHT TO SELF-DETERMINATION UNDER CONTEMPORARY INTERNATIONAL LAW

The right to self-determination—the right of all “peoples” freely to “determine their political status and freely pursue their economic, social and cultural development”⁴⁰²—remains, in the twenty-first century, a bedrock principle of contemporary international law. But it has evolved significantly in the past century. Initially associated with Wilsonian idealism and the Treaty of Versailles peace process that redrew the map of Europe in the wake of the First World War, self-determination in the interwar period emerged not as a positive “right” but as a political principle: “that the new borders of Europe would, to the extent possible, be drawn along national lines.”⁴⁰³ Before the U.N. Charter regime and the advent of international human rights law, it emphatically did not mean that the imperial powers of Europe would permit the peoples of colonized territories to determine their political destinies.⁴⁰⁴

Following World War II, however, in part because Germany and others abused the idea of self-determination and related minority-rights regimes as a pretext for aggression, international law fundamentally reconceptualized self-determination such that it came to embody an unequivocal international right to be free from colonial domination.⁴⁰⁵ The U.N. Charter, as noted in Part I, cites as one of its four principal purposes to “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,” and Article 77 sets out the obligation of metropolitan, imperial states progressively to promote self-government and political independence among formerly subjugated peoples and colo-

³⁹⁸United States *ex rel* Richards v. Guerrero, 4 F.3d 749, 754 (9th Cir. 1993) (emphasis supplied).

³⁹⁹ALEINIKOFF, *supra* note 299, at 90.

⁴⁰⁰Trias Monge, *supra* note 317, at 235.

⁴⁰¹Romeu v. Cohen, 265 F.3d 118,127-31 (2d Cir. 2001) (Leval, J.).

⁴⁰²International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, art. 1, Dec. 16, 1966, 9993 U.N.T.S. 3.

⁴⁰³Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1, 33 (1998). The Aaland Islands affair is frequently cited as evidence that positive international law did not at that time recognize self-determination as a right, particularly in the form of secessionist claims. See *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, LEAGUE OF NATIONS O.J. Spec. Supp. 3, at 5 (1920); *The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations Doc. B7.21/68/106, at 27-28 (1921). Frederic L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304, 304 (1994); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 54 (1992).

⁴⁰⁴Orentlicher, *supra* note 403, at 39.

⁴⁰⁵Kirgis, *supra* note 403., at 305, 307-308; see also Orentlicher, *supra* note 403, at 40-41 (“The ‘principle of self-determination of peoples’ was a natural banner for the decolonization movement that swept the globe in the early decades of the United Nations’s life, and it took little time for this principle, previously associated with the right of subject nationalities to form their own state, to metamorphose into a right of colonial territories to break free of the metropolitan state.”).

nies.⁴⁰⁶ A series of General Assembly resolutions followed, establishing the general framework for the process of decolonization.⁴⁰⁷

In 1975, in response to General Assembly Resolution 3292 (XXIX),⁴⁰⁸ the ICJ issued its advisory opinion in *Western Sahara*, which, inter alia, affirmed the right of self-determination in the context of decolonization.⁴⁰⁹ The General Assembly asked the Court to decide whether the Western Sahara, at the time of its colonization by Spain, was *terra nullius*, and if not, what legal ties existed “between this territory and the Kingdom of Morocco and the Maritanian entity.”⁴¹⁰ As a preliminary inquiry, the Court appraised the basic policies governing decolonization that animated and provided the “context” for Resolution 3292.⁴¹¹ It recalled its prior pronouncement in its advisory opinion in the *Namibia* case: that “the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them,”⁴¹² and reviewed General Assembly Resolutions 1514 and 2625.

“The validity of the principle of self determination,” the ICJ concluded, “defined as the need to pay regard to the freely expressed will of peoples,”⁴¹³ required that it resolve the questions posed by the General Assembly on the assumption that the people of Western Sahara enjoy a *right* “to determine their future political status by their own freely expressed will.”⁴¹⁴ At the same time, the Court reaffirmed that the realization of this right can take diverse forms; international law “leaves the General Assembly with a measure of discretion with respect to the forms and procedures by which that right is to be realized.”⁴¹⁵ Those forms include, as the General Assembly stated in Resolution 1514, full sovereign statehood, free association, and integration.⁴¹⁶ Two decades later, in the *East Timor* case, the Court characterized the right to self-determination, as expounded in *Western Sahara* and *Namibia*, as *erga omnes*.⁴¹⁷

The process of decolonization peaked during the 1960s and 1970s and wound down in the 1980s, after Palau’s establishment as a freely associated state in 1994, the Trusteeship Council of the United Nations suspended its operations: But the contours of the right to self-determination re-emerged as a major issue in the post-Cold War era because of the dissolution of old states (e.g., the former Yugoslavia, Czechoslovakia, and the Soviet Union), the emergence of new ones (e.g., Croatia, Slovenia, Bosnia-Herzegovina, the Czech Republic, the Slovak Republic, Georgia, Eritrea, and so forth), and the (regrettably often related) brutal ethnic conflicts within nation-states that had been held together in the past by iron-fisted rule or Cold War geopolitical forces. The question therefore arose—or, more accurately, re-emerged from its dormancy since the interwar period—whether and, if so, under what conditions, the right to self-determination obtains in the context of state succession and dissolution, or of disaffection by national or ethnic minorities.⁴¹⁸

One of the most recent and extensive analyses of the right to self-determination in contemporary international law appears in a decision of the Supreme Court of

⁴⁰⁶ U.N. CHARTER arts. 1, 77.

⁴⁰⁷ G.A. Res. 421, U.N. GAOR, 5th Sess., Supp. No. 20, at 42, U.N. Doc. A/1775 (1950); G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); G.A. Res. 2621, U.N. GAOR, 25th Sess., Supp. No. 28, at 2, U.N. Doc. A/8028 (1970); G.A. Res. 2878, U.N. GAOR, 26th Sess., Supp. No. 29, at 16, U.N. Doc. A/8429 (1971).

⁴⁰⁸ G.A. Res. 3292, U.N. GAOR, 29th Sess., Supp. No. 31, at 103-04, U.N. Doc. A/9631 (1974).

⁴⁰⁹ 1975 I.C.J. 12 (Oct. 16).

⁴¹⁰ *Id.* at 14.

⁴¹¹ *Id.* at 31.

⁴¹² *Id.* at 31 (quoting Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 31 (June 21)).

⁴¹³ *Id.* at 33.

⁴¹⁴ *Id.* at 36; see also Reference re Secession of Quebec, [1998] S.C.R. 217, 37 I.L.M. 1340 (1998), para. 114 (“The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond ‘convention’ and is considered a general principle of international law.”); Martti Koskenniemi, *National Self Determination Today: Problems of Legal Theory and Practice*, 43 INT’L & COMP. L.Q. 241, 242 (1994) (noting that “by the end of the 1970s most textbooks addressed self-determination in terms of a legal principle or a right of positive international law”).

⁴¹⁵ *Western Sahara*, 1975 I.C.J. 12, 36 (Oct. 16).

⁴¹⁶ *Id.* at 32 (quoting G.A. Res. 1514 (XV) (1960)).

⁴¹⁷ *East Timor* (Port. v. Austl.), 1995 I.C.J. 90, 102 (June 30).

⁴¹⁸ Koskenniemi, *supra* note 414, at 243; see, e.g., Opinions on Questions Arising From the Dissolution of Yugoslavia, 31 I.L.M. 1488 (1992).

Canada, *Reference re Secession of Quebec*.⁴¹⁹ There, the Court considered the following question:

Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec unilaterally?⁴²⁰

The Court emphasized at the outset that notwithstanding the right to self-determination recognized by contemporary international law,⁴²¹ that law contains a strong presumption against unilateral secession.⁴²² In general, in the modern era, the right to self-determination must be exercised within a framework that respects the territorial integrity of sovereign states.⁴²³ The Court, following terminology introduced by a number of commentators, referred to this as “*internal* self-determination—a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state.”⁴²⁴

By contrast, an *external* right to self-determination—that is to say, the right of a people to choose independence, free association or integration in accordance with Principle VI of the Annex to General Assembly Resolution 1541 (XV)—arises “only in the most extreme cases and, even then, under carefully defined circumstances.”⁴²⁵ The Court specified three contexts in which international law recognizes (or may recognize) an external right to self-determination: *first*, in the context of decolonization, a right the Court described as “now undisputed”; *second*, “where a people is subject to alien subjugation, domination or exploitation outside the colonial context”; and *third*, “as a last resort,” where “a people is blocked from the meaningful exercise of its right to self-determination internally,” or put differently, “where a definable group is denied *meaningful access to government* to pursue their political, economic, social and cultural development.”⁴²⁶ Quebec, the Court concluded, clearly did not fall within either of the first two categories. Nor could it be contended that Quebec fell into the third category, for the people of Quebec could not

plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions.⁴²⁷

In short, contemporary international law continues to embrace a robust right to self-determination in the context of decolonization. That right has been characterized as a general principle of international law, “undisputed,” “*erga omnes*,” and even, at times, as “*jus cogens*.” Outside of the context of decolonization, however, international law presumes that self-determination will be fulfilled internally, through the political channels available in states; and, if necessary, by affording special protections to national minorities.⁴²⁸

In the *Quebec* decision, the Supreme Court of Canada confronted (and predicated its decision on) Quebec’s status as an integrated province within a federation. Hence, strict application of the *Quebec* precedent to the circumstances of Puerto Rico—an external, unintegrated island, acquired by conquest—is doubtful. But for Puerto Rico, two important conclusions emerge from this general review of the conditions for self-determination: First, because the right to self-determination is at its

⁴¹⁹[1998] S.C.R. 217, 37 I.L.M. 1340 (1998).

⁴²⁰*Id.*, para. 2.

⁴²¹*Id.*, paras. 114-21 (canvassing relevant provisions of the U.N. Charter, General Assembly resolutions, and other documents affirming the right to self-determination).

⁴²²*Id.*, paras. 111-12; *see also id.* at para. 131 (“[T]he general state of international law with respect to the right to self-determination is that the right operates within the overriding protection granted to the territorial integrity of ‘parent’ states.”).

⁴²³*Id.* paras. 122, 131.

⁴²⁴*Id.*, para. 126 (emphasis supplied).

⁴²⁵*Id.*

⁴²⁶*Id.*, paras. 132-34, 138 (emphasis supplied).

⁴²⁷*Id.*, para. 136.

⁴²⁸International Covenant on Civil and Political Rights, art. 27, Dec. 16, 1966, 999 U.N.T.S. 171; *see* Franck, *supra* note 403, at 58 (observing that the Covenant “makes an important distinction between [the] right of each nation’s collective *polis* [‘to determine their collective political status through democratic means’] and the rights of minorities within each state,” which enjoy a more limited “right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”).

strongest in the context of decolonization, Puerto Rico's colonial origins validate its continuing right to *external* self-determination. The right to self-determination for a colonized people is a continuing one; it does not terminate with the first act of collective political expression. Hence, for example, Eritrea, which originated as an Italian colony in the late nineteenth century, became, in 1950, an autonomous unit federated with Ethiopia pursuant to General Assembly Resolution 390A (V); in 1962, reunified with Ethiopia; and in 1993, declared its independence and seceded to form an independent state.⁴²⁹ The clear lesson is that if the arrangement initially adopted by a former colony proves unsatisfactory, its people enjoy the right to opt for a new status—be it independence, free association or integration into an existing state.⁴³⁰

Second, the Canadian Supreme Court correctly observed that the status of the third “extreme circumstance” potentially justifying external self-determination—where a people lacks meaningful access to government, an indispensable political tool for realizing self-determination internally—remains unresolved under international law. But insofar as meaningful access to the national government constitutes an essential feature of genuine self-determination by either free association or integration, it is intolerable that Puerto Rico continues to lack representation in the federal government of the United States, even though the political branches of that government, as explained in Part IV, *legally* recognize no limits on their asserted plenary power over Puerto Rico.

These two circumstances—Puerto Rico's colonial origins and its lack of legal access to a national government that exercises total authority over it—establish an extremely strong case in favor of Puerto Rico's continuing right to external self-determination under contemporary international law.

VI. THE RIGHT TO SELF-DETERMINATION UNDER U.S. LAW

The right to self-determination, as understood in international law, is not part of U.S. constitutional jurisprudence. The term appears in federal Indian law.⁴³¹ But the federal Indian tribes enjoy a *sui generis* status based on the Constitution's text and a long constitutional tradition that singles them out for special treatment as “wards” of the federal government.⁴³² The extension of analogous principles to Puerto Rico would be unlikely.⁴³³ And while the United States has ratified the International Covenant on Civil and Political Rights, Article 1 of which guarantees the right to self-determination, it did so subject to a declaration that the treaty is non-self-executing.⁴³⁴

Nevertheless, politically, historically, and culturally, self-determination lies at the foundation of the United States government. The Declaration of Independence, after all, reflects one of the earliest assertions or antecedents of this right.⁴³⁵ Of course, the United States has not always been true to these founding principles; it engaged in imperial adventures and colonialism in the nineteenth and early twentieth centuries, in one of which it acquired Puerto Rico. But in the modern era, the United States recognizes the right of self-government as axiomatic. It is virtually unimagi-

⁴²⁹ For an overview, see generally Minasse Haile, *Legality of Secessions: The Case of Eritrea*, 8 EMORY INT'L L. REV. 479 (1994).

⁴³⁰ Hence, for example, the FAS may terminate their compacts with the United States with six months' notice, provided they follow specified procedures, although certain elements of the compacts persist beyond termination (notably the security and defense arrangements).

⁴³¹ See, e.g., *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974) (sustaining employment preference for Indians against an equal protection challenge because it furthers the rational goal of promoting Indian self-governance); see *id.* at 544 n.15 (referring to Congress's desire “to promote economic and political self-determination for the Indian”) (internal quotation marks and citation omitted).

⁴³² U.S. CONST. art. I, § 8, cl. 3; see *Morton*, 417 U.S. at 551-52 (“The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.”).

⁴³³ Cf. *Rice v. Cayetano*, 528 U.S. 495, 519-20 (2000) (rejecting the analogy between Native Hawaiians and the federal Indian tribes in the equal protection context).

⁴³⁴ 138 Cong. Rec. S4781, 24784 (Apr. 2, 1992); see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004). But see U.N. Human Rights Committee, General Comment No. 24: On Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, para. 21, CCPR/C/21/Rev.1/Add.6 (1994), 34 I.L.M. 839 (1995) (taking the position that general reservations of this sort, would be incompatible with the object and purpose of the ICCPR and therefore impermissible as a matter of international law, and hence “reservations should not systematically reduce the obligations undertaken [by a state party] only to the present existing and less demanding standards of domestic law”).

⁴³⁵ ALFRED COBBAN, *THE NATION STATE AND NATIONAL SELF-DETERMINATION* 114 (1969).

nable that were the people of Puerto Rico to express a clear desire for independence and full sovereign statehood, the United States would stand in the way. Indeed, as Senate Bill 2304 of 2006, the “Puerto Rico Self Determination Act of 2006,” suggests, the United States, by all indications, appears ready actively to support ultimate resolution of Puerto Rico’s status,⁴³⁶ though it will not, it seems, take the initiative in the absence of a clear popular mandate from the Puerto Rican people.

VII. POTENTIAL FORA FOR VINDICATING THE RIGHT TO SELF-DETERMINATION

Assuming clear popular support for self-determination and a refusal by the United States to accommodate Puerto Rico’s wishes, what options would be available to Puerto Rico should it wish to pursue its right to self-determination through international processes?⁴³⁷

A. *Organization of American States: The Inter-American Commission on Human Rights*

The United States is a party to the 1948 Charter of the Organization of American States (OAS),⁴³⁸ which, simultaneous with its establishment, adopted the American Declaration of the Rights and Duties of Man, which may be taken as an authoritative explication of the human rights provisions of the OAS Charter.⁴³⁹ As relevant here, Article II guarantees to all persons equality before the law “without distinction as to race, sex, language, creed or any other factor,” and Article XX of the American Declaration affirms that “[e]very person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.”⁴⁴⁰ The United States has also signed, but not ratified, the American Convention on Human Rights, which likewise guarantees the rights to equal protection and meaningful participation in government, including the right to vote.⁴⁴¹

Relative to OAS member states not party to the American Convention, the Statute of the Inter-American Commission on Human Rights vests it with jurisdiction

to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights . . .⁴⁴²

Because jurisdiction under Article 18 of the Statute does not require that the communication be from another state party to the OAS Charter, Puerto Rico, as a collective entity, or individual Puerto Ricans would be able to submit a petition alleging violation of the rights set forth in the American Declaration based on either or both its disenfranchisement from national politics in the United States and the asserted power to treat Puerto Ricans differently under the Constitution based on their residence.⁴⁴³ While the American Declaration does not contain explicit reference to the right to self determination, it may plausibly be argued that the customary nature of this right in the decolonization context renders it within the Commission’s man-

⁴³⁶S. 2304, 109th Cong., 2d Sess. (2006).

⁴³⁷We assume that claims to self-determination by individuals, while a majority of the population manifestly and freely prefers the status quo, would not have traction in international processes. Individuals would, however, have standing if they could demonstrate the denial of individual human rights, such as the franchise.

⁴³⁸Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.

⁴³⁹American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, Ninth Int’l Conf. of Am. States, OEA/Ser. L./V/I.4, rev. (1965) (adopted Mar. 30-May 2, 1948).

⁴⁴⁰*Id.*, arts. II, XX.

⁴⁴¹American Convention on Human Rights (Pact of San José), Nov. 22, 1969, arts. 23-24, 1144 U.N.T.S. 123, O.A.S. T.S. No. 36.

⁴⁴²Statute of the Inter-American Commission on Human Rights, art. 20(b), O.A.S. Res. 447, 9th Sess., OAS/Ser.L/VII.4, rev. 8 (1979); see also *id.*, art. 18 (setting forth the powers of the Commission relative to member states of the OAS, including the power to make inquiries to governments, prepare recommendations, and undertake studies on human rights); *id.*, art. 1 (instructing the Commission to understand “human rights” in relation to states not party to the American Convention as those “rights set forth in the American Declaration”).

⁴⁴³See ALEINIKOFF, *supra* note 229, at 79 (noting that the distinction drawn by Congress in *Harris v. Rosario*, 446 U.S. 651 (1980), which sustained the disparate treatment of Puerto Ricans under the federal Aid to Families with Dependent Children program, “is one based simply on residence in a territory; it is grounded, when all is said and done, not on different facts but on status of place”).

date to examine insofar as it addresses violations of Article XX on the right to participate meaningfully in government.

B. *The International Court of Justice*

The International Court of Justice (ICJ) has contentious jurisdiction only over states parties to the statute,⁴⁴⁴ except in the unlikely event of a Security Council referral.⁴⁴⁵ Even then, only states may be parties to cases.⁴⁴⁶ Even assuming these hurdles could be overcome, however, the Court would likely lack jurisdiction, for the ICJ can only adjudicate contentious cases based on state consent, either by special agreement or through a prior declaration in a treaty referring disputes to the Court. In short, Puerto Rico would lack standing to pursue its right to self-determination through the ICJ, and the Court would in any event lack jurisdiction over the United States in the absence of its consent. No treaty to which the United States is party would furnish grounds for jurisdiction.

The Statute also vests the ICJ with jurisdiction to “give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”⁴⁴⁷ The U.N. Charter, in turn, expressly gives the General Assembly and the Security Council the right to request advisory opinions from the Court, and “[i]t is . . . a precondition of the Court’s competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ.”⁴⁴⁸ While possible, as a practical matter, Puerto Rico would likely find it difficult to mobilize the political support required for the General Assembly to request an advisory opinion.

C. *U.N. General Assembly: Espousal by Another State*

Puerto Rico may, however, be able to raise its grievances in the General Assembly if it can convince a member state to espouse its cause. This has, as noted above, happened in the past even without Puerto Rico’s initiative, partially because of Soviet and Cuban agitation during the Cold War era. The Committee of 24 adopted resolutions critical of U.S. treatment of Puerto Rico in 1972, 1973, and 1978.⁴⁴⁹ Because the United Nations views Puerto Rico as a distinct entity and, as a former trust territory, a subject of ongoing and legitimate international concern, the General Assembly may well be receptive to allegations that the Compact, notwithstanding previous representations of the United States, has failed in practice to provide the Puerto Rican people with genuine self-determination.

D. *The Human Rights Committee and the ICCPR*

A final option would be for Puerto Ricans to seek to intervene before the Human Rights Committee, the human rights treaty-body established by the ICCPR.⁴⁵⁰ The ICCPR contains several provisions relevant to Puerto Rico’s circumstances, foremost

⁴⁴⁴ Statute of the International Court of Justice, June 26, 1945, arts. 35(1) [hereafter ICJ Statute].

⁴⁴⁵ *Id.*, art. 35(2).

⁴⁴⁶ *Id.*, art. 34(1). Puerto Rico may seek to become a party to the Statute in the future, although the success of its application remains uncertain, see REISMAN, *supra* note 1, at 68-79, and in any event, “[u]nder international precedents, a Puerto Rican (who is perform a citizen of both Puerto Rico and the U.S.) could not sue the United States in the I.C.J. through the mediation of Puerto Rico.” *Id.* at 79. The United States would also be certain to oppose Puerto Rico’s membership application were that application for the express purpose of bringing suit against it in the ICJ.

⁴⁴⁷ ICJ Statute, art. 65(1).

⁴⁴⁸ U.N. CHART. art. 96(1); see, e.g., Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, 1982 I.C.J. 325, 333-34 (July 20) (“It is . . . a precondition of the Court’s competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ.”).

⁴⁴⁹ See, e.g., Letter dated 9 February 1972 from the Permanent Representative of Cuba to the United Nations addressed to the Chairman of the Special Committee, U.N. GAOR Special Comm. on the Situation with Regard to the Implementation of the Declaration of the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. AIAC.109/392 (1972); U.N. GAOR, 27th Sess., Supp. No. 23, at 31, U.N. Doc. A18723/Rev. 1.(1972), see also José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 399 n.22 (1978) (noting that “[t]he subject of Puerto Rico’s status has been before the United Nations General Assembly, in one form or another, since the organization’s founding,” as well as before the House of Representatives and other domestic fora; collecting authorities).

⁴⁵⁰ See ICCPR, Pt. IV.

among them, (1) the right to self determination;⁴⁵¹ (2) the right to participate meaningfully “in the conduct of public affairs, directly or through freely chosen representatives,” which includes the right to vote;⁴⁵² and (3) the right to equal protection before the law without discrimination.⁴⁵³

Because the United States has not made a declaration under Article 41 recognizing the Committee’s competence to receive communications from another state or ratified the First Optional Protocol to the ICCPR, which permits individuals to bring complaints,⁴⁵⁴ Puerto Rico’s sole option would be to submit an intervention or “shadow report” to the Human Rights Committee when it next considers the United States’s periodic report on compliance and implementation. All parties to the ICCPR, including the United States, must submit periodic reports “on the measures they have adopted which give effect to the rights recognized [in the Covenant] and on the progress made in the enjoyment of those rights,” as well as “the factors and difficulties, if any, affecting the implementation of the . . . Covenant.”⁴⁵⁵ The Committee studies these reports, hears from and questions representatives of the states parties, as well as non-governmental organizations and other accredited persons or entities,⁴⁵⁶ and subsequently issues reports and recommendations. While the Committee cannot issue binding “judgments” that would require the United States to take certain actions, its “general comments” and “concluding observations” can be an effective means to mobilize political constituencies or draw attention to neglected human rights issues.

While the United States ratified the ICCPR subject to a declaration purporting to render the substantive provisions of the ICCPR non-self-executing i.e., without force or effect as a matter of domestic law unless and until Congress implements the Covenant obligations by statute—the Human Rights Committee has suggested that such a declaration cannot be permitted, for it contravenes the object and purpose of the Convention.⁴⁵⁷ Note also that in *Igartúa de la Rosa v. United States*, two respected judges of the First Circuit agreed that the Senate’s non-self-executing declaration should not bind the courts, which must make an independent judgment on the issue.⁴⁵⁸ And as Judge Torruella emphasized, even were the non-self-executing declaration deemed lawful,

it is an undisputed fact that, contrary to the requirements of Article 2, Paragraph 2 of the ICCPR, the United States has taken no steps, to date, to implement the obligations undertaken therein. More directly on point, the United States has not enacted any legislation, passed any constitutional provision, or even put in motion any process directed at nationally enfranchising the nearly four million United States citizens residing in Puerto Rico, notwithstanding its ratification of the ICCPR and the Senate’s acknowledgment “[t]hat the United States understands that this Covenant *shall be implemented* by the Federal Government.” 138 Cong. Rec. S4781, S4784 (emphasis added). Accordingly, the United States is not in cots Dliance with the binding obligations it undertook by signing and ratifying the ICCPR.⁴⁵⁹

Whatever the ultimate conclusion of the federal courts on this issue,⁴⁶⁰ the Human Rights Committee would surely be receptive to such an argument.

⁴⁵¹ *Id.*, art. 1.

⁴⁵² *Id.*, art. 25.

⁴⁵³ *Id.*, art. 26.

⁴⁵⁴ See *id.*, art. 41; Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302.

⁴⁵⁵ *Id.*, art. 40.

⁴⁵⁶ For information on the logistics of intervention before the Human Rights Committee, see Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, at <http://www.ohchr.org/english/bodies/hrc/>.

⁴⁵⁷ U.N. Human Rights Committee, General Comment No. 24: On Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, CCPR/C/21/Rev.1/Add.6 (1994), 34 I.L.M. 839 (1995).

⁴⁵⁸ *Igartúa de la Rosa v. United States*, 417 F.3d 145, 173-74 (1st Cir. 2005) (Torruella, J., dissenting); *id.* at 184 (Howard, J., dissenting).

⁴⁵⁹ *Id.* at 175 (Torruella, J., dissenting).

⁴⁶⁰ As noted above, Judge Torruella, but not the majority, would have reversed the district court’s decision and remanded the case “for the entry of a declaratory judgment to the effect that the United States has taken no steps to meet its obligations under the ICCPR and customary international law to grant equal voting rights to all citizens in the election of the President and Vice President of the United States.” *Id.* at 184.

CONCLUSION

As a matter of international law, since 1952, Puerto Rico has ostensibly existed as a state freely associated with the United States of America. Yet the government of the United States, particularly the political branches but also the judiciary, continues to treat the Compact as legally non-binding and to assert that Congress retains plenary power to govern Puerto Rico, subject only to a nebulous constraint of “fundamental” rights, as an “unincorporated territory” under the doctrine of the *In-sular Cases*. Because Congress has, for the most part, not interfered overly in the local governance of Puerto Rico, the status quo strikes many as acceptable.

But Puerto Ricans did not opt to remain a colony of the United States; they elected free association as defined by Public Law 600 “adopted in the nature of a compact.” Because the Puerto Rican people’s right to self-determination originated in the context of decolonization (rather than succession, dissolution or the asserted right of an ethnic or national minority to secede), it remains a robust and undisputed right under international law.

Moreover, as a continuing right, it did not terminate simply by virtue of the Compact, particularly insofar as the United States can be said to have failed to implement its obligations under that Compact and pursuant to unilateral declarations made on behalf of President Eisenhower at the time the United Nations removed Puerto Rico from its list of non-self-governing territories.

International law continues to protect the Puerto Rican people’s right to self-determination, and international processes, while limited, may aid in restoring the question of Puerto Rico’s ultimate status to the global or U.S. agenda. That said, the ultimate resolution of Puerto Rico’s future status, especially in view of the United States’s apparent willingness to accede to whatever political arrangement the Puerto Rican people adopt in a free and fair electoral process, will be achieved through negotiations between Puerto Rico and the United States based on a formal or de facto plebiscite.⁴⁶¹

Should Puerto Rico decide that an “enhanced” commonwealth status best serves its long-term interests, U.S. constitutional law, in our view, would likely be able to accommodate that arrangement—whether by a more detailed and explicit compact modeled on that of the CNMI or by legislative action or constitutional amendment to enfranchise the Puerto Rican people vis-à-vis the national government; the barriers to enhanced commonwealth status are more political than legal. Mobilizing a clear majority in Puerto Rico in favor of another self-determination option therefore remains a likely prerequisite to any modification of the status quo.

○

⁴⁶¹S. 2304 §3, 109th Cong., 2d Sess. (2006) (authorizing a constitutional convention for the purpose of proposing to Congress (1) “a new or amended compact of association”; (2) “the admission of the Commonwealth as a State in the United States”; or (3) “the declaration of the Commonwealth as an independent country”).