Committee on Resources

Witness Statement

STATEMENT OF
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OF THE UNITED STATES
ON H.R.4751
BEFORE
THE COMMITTEE ON RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES
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11:00 A.M.

The commonwealth status formula presented in H.R.4751 substantively is the same document as the proposal for development of commonwealth adopted by the Popular Democratic Party of Puerto Rico on October 15, 1998. This formula suggests there is a form of permanent union under the U.S. Constitution other than statehood, and that there is a status under the U.S. Constitution other than statehood that is not territorial.

There is a fallacy at the heart of this formula. The fallacy is that there is a third path to a non-territorial status other than statehood or independence that can be achieved within the framework of our federal system of national government under the U.S. Constitution. Let me be direct and make it very clear. Under U.S. constitutional law and our system of federalism as a form of domestic government, there is no third path to a non-territorial status. There is statehood and there is territorial status.

Congress can be creative in how it administers a territory, and Congress can grant significant levels of autonomy to a territory. However, Congress does not have the power by statute to create a new form of permanent union or political status within the union that is binding on a future Congress.

In addition, make no mistake about it, this enhanced commonwealth formula for autonomy is a program for separatism that will tend to prevent further integration of Puerto Rico into the U.S. national economic and political system. However, it does not lead to a permanent non-territorial status or lead to resolution of the ultimate status question. Thus, even if this formula for autonomy could be implemented legally, it would create economic and political distance between Puerto Rico and the U.S. that would favor separate nationhood as an ultimate status. What I am telling you is that this formula by its nature is far more likely to become a backdoor entry to associated republic status or even full independence, than a path to permanent political union and economic integration the rest of our nation.

Those who suggest that Congress could somehow just bestow this new status on Puerto Rico out of good will are wrong. To believe that the difficult choice between territorial status, statehood and independence can be avoided through gimmicks is folly that leaves the destiny of Puerto Rico to chance and the will of a

Congress in which U.S. citizens in Puerto Rico are not represented by voting members. To believe that political husbandry of a hybrid species of statehood and independence is the best Puerto Rico can do is to succumb to the hopelessness of a colonial mentality.

Simply put, Congress does not have the power to implement this formula, or any formula based on the central elements of this proposal, because it defines a status that is not available under the U.S. Constitution. To mislead people to believe the only barrier to implementation of this formula is the attitude of Congress, when the rule of law precludes it, merely perpetuates the colonial mentality about status options and self-determination.

Under international law, free association is a third path to decolonization and an alternative to independence or statehood. However, what Puerto Rico has now and what is proposed in this formula is not free association as it is defined in international law. Real free association would be a treaty-based relationship that would end U.S. sovereignty, nationality and citizenship in the Puerto Rico in favor of separate sovereignty, nationality and citizenship for Puerto Rico.

In the contrast to political union in the U.S. constitutional system of federalism, real free association is the same ultimate status as independence. While a close association by treaty can be negotiated, free association is terminable at will by either party consistent with the right of both parties to national independence. Otherwise the association would not be free. If it were to be unalterable without mutual consent that would mean each party would be able to deny the right of independence to the other. That would be continuation of a colonial and territorial status by another name.

Thus, as a matter of U.S. and international law, the only way this proposal could be implemented by Congress would be through an amendment to the U.S. Constitution creating a new form of permanent political union under our federal system other than statehood. Even if that were accomplished, it would not solve the problem of disenfranchisement for the U.S. citizens of Puerto Rico unless the constitutional amendment also gave Puerto Rico proportional voting representation the House, two members of the Senate and voting rights in national elections for the President and Vice President.

That is the truth, that is what the people of Puerto Rico need to know to have informed self-determination for the first time, and that is why Congress must reject the central provisions of this formula. For we can negotiate forever, but the central elements of the enhanced commonwealth formula are unconstitutional and therefore non-negotiable.

The central provisions which are constitutionally unavailable include permanent union other than statehood, guaranteed U.S. citizenship in the future without statehood, binding Congress to the terms of this formula as an unalterable pact, government-to- government consent to changes in statutory policy or application of federal laws, exemption of Puerto Rico from the territorial clause without statehood, and exemption of Puerto Rico form the supremacy of federal law in all matters. Trying to make these central provisions acceptable legally or politically, without changing their meaning to conform to territorial status, would be a waste of time of Puerto Rico and Congress.

Explanation of Proposed Status Formula

In order to understand the legal and political implications of H.R.4751, it is important for Congress, the Administration and the American public in Puerto Rico and the rest of the nation to be reminded of a few fundamental principles of our constitutional democracy.

First, while the laws and treaties of the United States are part of the supreme law of our land under article IV of the U.S. Constitution, the Constitution itself is the only permanent supreme law. The Constitution can be amended only as provided in the Constitution itself, and it can not be amended by statute or treaty.

The union of states and the political status of statehood as defined in the Constitution represent the only form of permanent union that exists in the federal system created under the Constitution.

The Constitution also recognizes the political status of territories, and provides in article IV, section 3, clause 2 that territories are to be governed by Congress in accordance with applicable federal law. In addition to the status of Puerto Rico as prescribed in federal statutes enacted pursuant to the territorial power, federal law applicable to Puerto Rico includes the 1922 U.S. Supreme Court ruling in the case of Balzac v. Puerto Rico that fundamental rights such as due process of law apply in Puerto Rico and other areas where the U.S. exercises the powers of sovereignty.

Before the 14th Amendment to the Constitution conferred U.S. national and state citizenship based on birth or naturalization in a state of the union, Congress defined all categories of U.S. citizenship by statute. Congress still defines by statute all categories of citizenship it chooses to confer with respect to persons who do not acquire U.S. citizenship by operation of the 14th Amendment. This includes persons born overseas to U.S. citizen parents and people born in most U.S. territories. Persons born in Puerto Rico do not acquire U.S. citizenship by operation of the U.S. Constitution. Instead, since 1917 persons born in Puerto Rico have acquires U.S. citizenship at birth under a federal statutory policy enacted by Congress. Congress does not have the power to guarantee that a future Congress will not amend or repeal this statutory policy.

While no one has tried to suggest that repeal of the current statutory policy is presently anticipated, the citizenship provisions of the proposed formula to develop commonwealth misinform people in Puerto Rico into believing they have a constitutionally guaranteed right to U.S. citizenship in perpetuity that is beyond the reach of Congress, as it is in the states. To tell people to base their self-determination process on the belief that they have rights which the law of the land does not secure is the worst form of political deception. The pillars of this proposed union are a nation-to-nation bilateral pact of permanent union and the guarantee that all persons born in Puerto Rico now and in the future will have a constitutionally protected right to acquisition of U.S. citizenship at birth. Puerto Rico also would be recognized as a nation with its own separate sovereignty, nationality and citizenship.

Under this formula Puerto Rico would have a power of specific consent to the application of federal law in Puerto Rico, and so federal supremacy would stop at the borders of the Puerto Rican nation. This power of consent is the lynchpin of the proposed status formula, because it supposedly rectifies the problem of permanent disenfranchisement for a very large U.S. citizen population in Puerto Rico.

In an apparent attempt to give the proposed "free associated state" status Puerto Rico would have under this formula some form of sovereignty and political equivalency with both independence and statehood, the entire government-to-government relationship would be established through a delegation of government powers and functions from a sovereign Puerto Rico to the United States. Puerto Rico also would have the authority to conduct international relations in its own name and right, subject to compatibility of its foreign policy with U.S. authority and responsibility to defend Puerto Rico.

In addition to these pillars of the proposed status formula necessary to make it "non-territorial" and "non-colonial", the status proposal presented in H.R.4751 contains a veritable shopping list of proposed policies that would provide benefits to Puerto Rico and further define the permanent political union that would be

established under this formula. This unprecedented status is proposed in lieu of either statehood or independence, the two historic constitutional models for territorial status resolution.

Constitutional and Legal Issues

Recently, one prominent pro-commonwealth leader in Puerto Rico was reported to have described statehood and independence as merely "orthodox" options to resolve the status of the territory. According to this line of argument, approval by Congress of the "unorthodox" formula for a "non-territorial" commonwealth status is simply a matter of political will and not a legal or constitutional question.

This kind of thinking concerns me, because in the U.S. we must work our political will within rule of law and the limits of government power set forth in the U.S. Constitution. The Constitution does not give Congress the power to amend the Constitution by statute or treaty, which is what the result would be if the so-called "non-territorial" commonwealth status formula could be implemented as it has been proposed.

As an act of political will within the disciplines of the U.S. Constitution, Congress could authorize as non-binding statutory policy for Puerto Rico to have greater autonomy as proposed in H.R.4751 while remaining a territorial commonwealth. Similarly, if Puerto Rico were to choose to become a free associated state in more than name only, and as a separate sovereign nation enter into a treaty of association, as an act of political will we could agree to a government-to-government delegation of powers as proposed in H.R.4751. These kinds of measures are legally possible as an act of political will, and require only agreement of the parties within the framework of law.

However, the measures proposed in H.R.4751 that are possible as an act of political will under territorial status or a treaty based free association do not include permanent union and U.S. citizenship guaranteed under the U.S. Constitution. Nor does Congress have the power to bind a future Congress to a mechanism for specific consent to application of federal law in an area under U.S. jurisdiction. As long as Puerto Rico remains within the sovereignty of the United States federal law will remain supreme in all matters, and local self-government will remain limited to what is consistent with federal law.

The autonomy that Puerto Rico has as a territorial commonwealth is permissive as authorized by Congress, and limited to matters not otherwise governed by federal law. Federal law can and will change, and even if federal court opinions occasionally include language friendly to the provisional autonomy granted by Congress, in the end no local law promulgated under the local constitution can stand if it is inconsistent with a federal law, particularly in the federal law alters the commonwealth formula as it is allowed to exist under prior federal law.

In short, Congress cannot legislate away its authority and responsibility under the territorial clause, and a territory cannot be converted into a non-territorial status by statute. Puerto Rico is a territory. Congress can treat it like a state or like a foreign nation as a matter of political will under statutory policy, but Congress can not by statute give effect to a status formula based on permanent union and U.S. citizenship guaranteed in perpetuity under the U.S. Constitution.

Thus, we need to be honest about the fact that there are constitutional and legal reasons why the commonwealth formula in H.R.4751 cannot be implemented as proposed. We also need to be honest about the fact that no status that can be implemented as an act of political will within the limits of the U.S. Constitution can include a binding alternative form of government by consent that solve the problem of permanent disenfranchisement of the U.S. citizens of Puerto Rico.

A statutory policy and procedure for consent to federal law is not a substitute for equal voting rights and representation in Congress, or for true sovereign nationhood. If there is to be informed self-determination in Puerto Rico we need to be honest about the fact that the measures available to the federal government and the local government in Puerto Rico that can be implemented as an act of political will within the U.S. constitutional system can not resolve the ultimate political status of Puerto Rico.

Only if we accept the legal limitations of the present status can we have an informed discussion of what might be possible with respect to improving the current status as an act of political will implemented through the instrumentalities of the federal and local governments. But all such improvements are in the nature of statutory policies established by Congress in the exercise of its powers under the territorial clause in article IV, section 3, clause 2 of the U.S. Constitution.

As a result of the introduction of H.R. 4157, Congress is waking up to the fact that the proposed commonwealth formula is nothing less than the creation of a new form of statehood under the federal system. Instead of the union that exists between the sovereign states, this would be union between the U.S. and another nation. This new form of union would give that nation and its U.S. citizen population special rights that U.S. citizens in the states don't have, in order to make U.S. citizens in Puerto Rico whole due to the rights denied to resident of the commonwealth because Puerto Rico is not a state.

First and foremost, these ideas raise very real constitutional and legal problems, rather than questions of political will. That does not mean people should be limited in what they propose, but under the Constitution we have states, we have territories and we have foreign nations, as well as the seat of government. There are no other political status options that can be made permanent by statute or treaty. So if the formula that has been proposed will require a constitutional amendment, we need to so advise the people of Puerto Rico so that they can act in their own self- interest and have informed self-determination.

In the end, there is a sense in which this may come down to an issue of political will. For we may be facing a question of whether Congress, the nation and the residents of Puerto Rico have the political will to try to amend the U.S. Constitution so that a choice between the orthodox options of statehood or separate nationhood can be avoided. Historically, we as a nation have rejected confederation and doctrines of nullification to accommodate a scheme of political autonomy. Instead, our system is based on equal rights and responsibilities, and enfranchisement for all citizens subject to the supreme law of the land. The idea that we would exercise our political will and change our national system of federalism to meet the demands of the pro-commonwealth separatists in Puerto Rico strikes me as far fetched. That is why this entire matter of status resolution for Puerto Rico needs to be understood by Congress if we are to make an intelligent judgment about proposals such as those embodied in this bill.

Citizenship Issue and The Commonwealth of the Philippines:

Still, some advocates of the proposal to develop commonwealth look at the Philippines model for succession from the commonwealth territorial model to nationhood, and based on a hopelessly confused comparison argue that Congress could create "dual citizenship" for Puerto Rico. This is based on the erroneous view that persons in the Philippines with U.S. citizenship were exempted from the loss of U.S. nationality that resulted in alien status for the Philippine people upon recognition of separate nationality sovereignty. This is really grasping at straws.

In fact, the reason the Supreme Court upheld the exemption of U.S. citizens from federal law converting the Philippine people from U.S. nationality to alien status (Rabang v. Boyd, 353 U.S. 427, 1957) appears to be

that Congress had never extended statutory U.S. citizenship to the Philippines. This meant that people born in the Philippines had U.S. nationality but not U.S. citizenship during the commonwealth period. In turn, it followed that most persons in the Philippines who were U.S. citizens had acquired it by birth or naturalization in a state of the union under the 14th Amendment to the U.S. Constitution, or otherwise under federal naturalization law.

Clearly, if Congress had granted statutory U.S. citizenship at birth in the Philippines as it has in Puerto Rico, that class of statutory U.S. citizenship would have ended on the same terms as U.S. nationality when the Philippines became a sovereign nation. In the U.S. law of nationality and citizenship, it is often said that all citizens are nationals but not all nationals are citizens. This means that U.S. citizenship is a subset of U.S. nationality. When nationality is lost, all forms of citizenship based on that nationality are lost as well.

That is why the oath renouncing U.S. status taken by a pro- independence activist at the U.S. Embassy in Venezuela back in 1995 referred to U.S. "nationality" and not U.S. "citizenship". Once the State Department realized this was a prank by a person who never intended to live in Puerto Rico under U.S. sovereignty as an alien, it revoked his certificate of loss of nationality and denied certification of a copy-cat renunciation by another pro-independence advocate. Those actions by the State Department have been upheld by the federal courts, proving that you can confuse the issues of sovereignty, nationality and citizenship through street theater and ideological mischief, but in the end in this nation you are either an alien or you have nationality -- without or without statutory citizenship.

The 14th Amendment to the U.S. Constitution uses the term "citizenship" instead of "nationality" because it refers to both national and state citizenship. Obviously, there is no state "nationality", just as there is no territorial "nationality". The ability to define and confer nationality is something that comes with separate sovereignty. The U.S. allows other countries to confer their nationality on U.S. citizens creating dual nationality, but the U.S. has never created dual nationality or "mutual-sovereignty" by operation of federal law, and anyone in Puerto Rico who thinks the U.S. will change more than 200 years of constitutional practice to vindicate the commonwealth formula is presuming a great deal.

Why Do We Need To Resolve the Status of Puerto Rico?

There is more at stake for the nation in how this problem is resolved than most Americans realize. There are nearly 4 million U.S. citizens in Puerto Rico, a population larger than half the states of the union. After a century in political limbo and decades of frustrating failure to resolve the status question through local plebiscites, it is clear that a permanent status solution must be found. Both Governor Bush and Vice President Gore have recognized that the next president will have to provide leadership and work with Congress to establish a self- determination process to resolve the ultimate status of the territory in a manner consistent with the U.S. Constitution. That means statehood, independence or continued territorial status. Our national leaders can no longer duck the question of what the response from Washington should be if our fellow citizens in Puerto Rico vote for statehood, independence or a policy to continue the current status under federal statute. This is the context and the real story behind the recent controversy about Navy target practice in the territory, as well as the furor over a presidential pardon for Puerto Rican born perpetrators of domestic political violence in the 1970's.

The Puerto Rico status problem arises from the fact that U.S. citizens in Puerto Rico do not vote in national elections or have voting representation in Congress. This condition of disenfranchisement cannot be justified by the fact that Congress has exempted Puerto Rico from federal personal income taxes and granted other special rights. While some may argue that disenfranchisement is tolerable because residents of the territory

get significant benefits of statehood without the same burdens as citizens in the mainland, permanent disenfranchisement should never be acceptable in America.

Moreover, the status quo is a bad deal for U.S. taxpayers. It costs $12 billion each year for the federal government to subsidize Puerto Rico's territorial regime. The General Accounting Office estimates statehood would produce a net gain to the federal treasury of $1-4 billion, even without a managed transition over a period of years and assuming a lower growth rate than economists predict based on experience in other territories upon admission to the union.

We must support self-determination for Puerto Rico as a matter of principle. Since statehood is one of the possible outcomes of self-determination, it would be a contradiction to support self- determination but not the possibility of statehood. That is one of the reasons why both Presidents Reagan and Bush favored statehood outright, and both Presidents Carter and Clinton pledged to support any constitutionally legitimate option chosen by the voters, including statehood.

Of course, none of these presidents ever suggested that statehood be imposed or granted unconditionally. The constitutionally correct process is for Congress to prescribe the terms for statehood, continuation of the status quo, or a move to independence, and to sponsor a vote based on a definition of each option Congress recognizes as constitutionally valid.

As a freedom-loving nation we cannot become comfortable with the exercise by Congress in perpetuity of federal supremacy over U.S. citizens who cannot participate and compete in the American system on the basis of equality. Thus, we need to make a clear policy commitment to resolution of the territory's status through self-determination, as well to embrace the people of Puerto Rico as full citizens if statehood is the outcome.

This is the only approach to Puerto Rico's status that can be implemented by Congress on a bipartisan basis. Because this is an issue of national importance, I hope the press, and ultimately the voters, demand that both parties live up to the unambiguous position in the two party platforms for 2000 regarding Puerto Rico's right to self-determination.

I have attached for the record my most recent observations and analysis of self-determination issues facing the federal government and the nation regarding the political status of our fellow U.S. citizens in Puerto Rico.

Dick Thornburgh, a former two-term Governor of Pennsylvania, was Attorney General of the United States under Presidents Reagan and Bush. He now advises the Citizens Educational Foundation of Puerto Rico regarding self-determination and constitutional law.

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