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To the U.S. House of Representatives Natural Resources Committee, Subcommittee on
Insular Affairs Hearing on H.R. 900 the Puerto Rico Democracy Act of 2007 and H.R. 1230
the Puerto Rico Self Determination Act of 2007

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I. Puerto Rico and the Doctrine of Annexed but Unincorporated Territory

Before addressing the constitutional and policy principles implicated by H.R. 900 and H.R. 1230, I would like to direct the Subcommittee's attention to what I believe is at the heart of the Puerto Rico status issue. It is that the interpretation and application of Article IV, Section 3, Clause 2 of the Constitution (the "Territorial Clause"), has resulted in the current problem in which a population of U.S. citizens in Puerto Rico larger than that of half the states in the Union is being governed by Congress indefinitely without a full and equal national citizenship, or access to a democratic process to attain one. As such, the residents of Puerto Rico are, in effect, a disenfranchised subclass of American citizens, without, among other things, equal civil rights or legal status under law, a direct voice in U.S. policy, or voting rights in the election of U.S. national leaders.

I believe this outcome would be a surprise to the Framers of our Constitution. The Framers, it must be recalled, were familiar only with the model of territorial incorporation embodied in the Northwest Ordinance of 1787. For this reason we would have to explain to the Framers that:

- Over the course of the 19th century the U.S. became a global power and by the dawn of the 20th century the U.S. had acquired sovereignty over remote island realms with large non-citizen populations; and
- In a series of decisions in the first quarter of the 20th century, referred to as the "*Insular Cases*," the Supreme Court created the unincorporated territory doctrine and ruled that Congress could govern such overseas possessions under the Territorial Clause as it had all earlier American territories, but without following the historical model of political status resolution through incorporation and without applying the Constitution to the unincorporated territories in the same manner as it had with prior territories; and

- The unincorporated territory doctrine of the *Insular Cases* meant that the Constitution did not “follow the flag” to the annexed but unincorporated territories with non-citizen populations; and
- Consistent with the *Insular Cases*, U.S. citizenship was withheld from the citizens of the Philippines as a step toward that island nation’s independence, and the conferral of U.S. citizenship for Alaska and Hawaii was part of the process of incorporation leading to statehood for those territories; and
- In contrast to those precedents, the Supreme Court’s 1922 decision in *Balzac v. Porto Rico* interpreted the conferral of U.S. citizenship on the residents of Puerto Rico as neither putting Puerto Rico on the path toward incorporation nor extending to its residents the rights and protections of the Constitution that came with citizenship in incorporated territories on the path to statehood.

As a result of these and other events, Congress now presides over Puerto Rico as an annexed but unincorporated territory populated by four million disenfranchised U.S. citizens who possess, essentially, the same constitutional status as aliens under the original *Insular Cases* doctrine. As discussed below, certain “fundamental rights” have been extended on an *ad hoc* basis by statutory policy and court decisions, but not by direct application of the Constitution. This reality – over one hundred years after the annexation of Puerto Rico and approximately nine decades after U.S. citizenship was conferred on the residents of Puerto Rico – is, arguably, a byproduct of legislative inaction and would concern the Framers, just as it concerns, among others, the sponsors of H.R. 900, H.R. 1230, and the members of the Subcommittee.

II. The Importance of Resolving the Political Status of Puerto Rico

It is in the historical context of the *Insular Cases* and the *Balzac* decision that this Subcommittee must address the constitutional and policy implications of H.R. 900 and H.R. 1230.

In combination these two bills present a question to Congress – Can the present dilemma regarding Puerto Rico’s political status be resolved through: (1) a status resolution process initiated at the local level like the one outlined in H.R. 1230; (2) a federally sponsored process based on status options and procedures defined by Congress as set forth in H.R. 900; or (3) a process that combines elements of (1) and (2)? It is my conclusion that the record on the Puerto Rico status question before the Natural Resources Committee is clear that Congress possesses the responsibility and exclusive constitutional power to determine the appropriate status resolution. I have further concluded that, although both bills raise important issues about the substance and process of status policy, H.R. 900 is the measure that can best accomplish the imperative of redeeming government by consent for the people of Puerto Rico based on legally valid options under applicable federal law and policy.

A. H.R. 1230 – Puerto Rico Self-Determination Act of 2007

H.R. 1230 seeks to enact a resolution process initiated at the local level via local constitutional convention. Contrary to the language of H.R. 1230, as residents of an annexed but unincorporated territory under the Territory Clause, the people of Puerto Rico do not have “inherent” or “natural” rights of sovereignty recognized by Congress or the Supreme Court under the Constitution. Instead, Article I of the local territorial constitution, which empowers the local government of Puerto Rico to implement the will of the people, is limited to local territorial administration within the scope of powers of the territorial government instituted under federal law. While the considerable degree of self-government that the Puerto Rico territory has achieved under its local territorial constitution and the commonwealth system for administration of internal civil affairs of the territory is an impressive tribute to American democratization, the powers of the local government do not extend to affairs of national sovereignty or to the political status of Puerto Rico. Those powers are expressly reserved to and vested in Congress under the Territorial Clause, as expressly recognized in Article IX of the Treaty of Peace ceding Puerto Rico to the United States, which records that the “civil rights and political status” of Puerto Rico shall be determined by Congress.

While I am convinced that only Congress has the authority to resolve the political status of Puerto Rico, I am not aware of any constitutional limitation that would preclude a local constitutional convention from being a part of a federally authorized status resolution process, particularly once Congress has defined the options and the procedural mechanism for status resolution. To the extent Congress elects to recognize such a convention within the status resolution process, I offer the following suggestions to minimize the risk of confusion and misinterpretation:

- The inclusion of any local constitutional convention should be predicated on a clear recognition that: (1) the current commonwealth system of local government in Puerto Rico, while also adopted at the local level, was created by federal powers as a form for territorial government; and (2) the commonwealth system does not define Puerto Rico’s political status.
- To the extent a local constitutional convention is recognized as a means to facilitate local democratic participation in the status resolution process, the participants should recognize that any proposed changes to the local territorial constitution that would purport to change Puerto Rico’s political status can be given legal meaning and effect only pursuant to federal statute, based on a federal status resolution policy and process, with options defined or accepted by Congress as compatible with federal law.
- Any provisions in an act of Congress relating to a local constitutional convention should be based on the understanding that such a convention will operate subject

to the supremacy of federal law and may not impair the local constitutional process with respect to other initiatives and measures meant to address the political status issue.

- Unless otherwise explicitly agreed and intended, Congress should require that any such local convention operate in a manner compatible with the local territorial constitution and laws of Puerto Rico, so that the federal enabling act is not construed as a unilateral federal amendment of the local constitution as approved by Congress and the people in 1952.

I suggest the foregoing caveats merely as a means to avoid creating any false expectation by the residents of Puerto Rico of congressional recognition of inherent rights or powers not granted to non-state territories by the Constitution or otherwise. Without similar protections, the inclusion of a local constitutional convention risks harming the status process from a political and constitutional perspective. A consequence of which would be to stymie the status process and invite re-submission to Congress of a proposal to give Puerto Rico a status combining features of statehood and sovereign independence – commonly referred to as enhanced commonwealth status – that does not exist under the Constitution and, notably, has never been endorsed by Congress as constitutionally or politically viable. In addition, the foregoing caveats will make clear that the adoption of the 1952 local territorial constitution simply created a system of limited local government and did not establish a constitutionally defined political status.

B. Congress is Obligated to Provide a Lawful Political Status Resolution

As noted above, the power to resolve the political status of Puerto Rico is vested exclusively in Congress and the local constitutional process must operate within any framework created by Congress. By accepting the unincorporated territory doctrine of the *Insular Cases*, however, Congress has acquiesced in prolonging a political status for Puerto Rico in which the sovereignty of its people is held in abeyance and residual sovereignty is retained by Congress by operation of the Territorial Clause. Pursuant to the unincorporated territory doctrine, Congress and the federal courts can, and indeed have, extended fundamental rights by statute or court decision, but this is essentially permissive and/or discretionary and can be modified or even reversed through subsequent statutes or court rulings. For example, the federal court decisions in *Examining Board v. Flores de Otero*, *Mora v. Mejias*, and *Rodriguez v. Popular Democratic Party* appear to create a body of federal statutory policy and decisional jurisprudence that extend such fundamental rights as due process and equal protection to certain actions by the federal and local governments in Puerto Rico. The Supreme Court's ruling in *Harris v. Rosario*, however, confirms the power of wide ranging power of Congress under the Territorial Clause to alter its treatment of Puerto Rico. In addition, cases such as *U.S. v. Quinones* and *U.S. v. Acosta-Martinez* confirm that adoption of the local territorial constitution in 1952 did not change the status of Puerto Rico or carve out a zone of local sovereignty beyond the reach of the Territory Clause power of Congress. More importantly, the "fundamental rights" recognized under federal

law in Puerto Rico are not part of a constitutionally defined citizenship equivalent to that secured through incorporation and statehood, or through separate nationhood, and, as such, are not part of a status leading to full and equal citizenship at the national level. Stated another way, the unincorporated territory doctrine has not enabled or empowered the U.S. citizens of Puerto Rico to exercise many of the most fundamental rights of all, including the rights to self-determination and government by consent of the governed.

Political status resolution is first and foremost a political question for Congress, and the *Insular Cases* and *Balzac* decision represent, if nothing else, a deferral by the federal courts to the political power of Congress under the Territorial Clause. However, like many legal decisions, the *Insular Cases* and *Balzac* decision venture into the realm of policy making. It is likely that that in deciding the *Insular Cases* or *Balzac* the Supreme Court felt a need not only to clarify the meaning of the territorial statutory policy at issue, but to fill a vacuum created by congressional inaction or ambiguities and inconsistencies created by congressional action.

The organic acts and territorial policies adopted for Hawaii, Alaska, Puerto Rico and the Philippines after 1900 illustrate this ambiguity and congressional inconsistency. Moreover, the disparate treatment of each of those territories in some respects represents a departure from the historical practices and constitutional law of the United States governing territorial status resolution. With regard to the Philippines, Congress declared in 1916 a policy of withholding U.S. citizenship from the Philippines and, on that basis, adopted a policy leading to a local constitutional government as a step to independence. With regard to Puerto Rico, however, Congress in 1917, just months after adopting its policy for the Philippines, conferred U.S. citizenship on the residents of Puerto Rico and left unanswered the effect of citizenship on Puerto Rico's future political status.

Instead of treating the grant of citizenship to the residents of Puerto Rico as a step toward incorporation as it had done with regard to Alaska in *Rasmussen v. United States*, the Supreme Court, with its decision in *Balzac*, filled the vacuum on the issue of future status for Puerto Rico by concluding that, contrary to the assumption of the *Insular Cases* that conferral of citizenship led to incorporation which led to statehood, the extension of U.S. citizenship was not a step toward incorporation for Puerto Rico. There are credible arguments on both sides of whether the *Insular Cases* were "good law" or "bad law" in trying to resolve the exigencies of America's experiment in imperialism and colonialism in the Philippines and Puerto Rico before U.S. citizenship was extended to Puerto Rico. However, the effects of those decisions on federal territorial policy become more conspicuous with each passing year and render it much more difficult to sustain a favorable view of the *Balzac* decision separating citizenship from the Constitution and its fundamental promise of government by consent for all U.S. citizens. Further undermining the continuing validity of the *Balzac* ruling is the questionable justification offered by Chief Justice Taft that any individual aggrieved by the decision could simply move to a State. According to Chief Justice Taft:

It became the yearning of the Puerto Ricans to be American citizens . . . and the act gave them the boon. What additional rights did it give them? It enabled them to move into the continental United States and becoming residents of any state there to enjoy every right of any citizens of the United States, civil, social and political.

This passage confirms that the *Balzac* decision created a class of U.S. citizenship under American sovereignty and under the America flag that could only be redeemed from a discriminatory state of inequality and disenfranchisement by migration to another part of America. That arguably was not really “good law” in 1922, and it should not be acceptable to Congress as federal law or policy in 2007. Put simply, when Congress’ past exercise or failure to exercise its Territorial Clause power gives rise to a constitutional detriment to Puerto Rico, Congress has a concomitant obligation to take responsibility for and ameliorate the failures of that political judgment. For all these reasons, a legally authoritative political status policy for Puerto Rico is not only within the exclusive power of Congress, as recognized by U.S. Senate Resolution 279, adopted September 17, 1998, but also the responsibility of Congress under the Territory Clause power.

C. H.R. 900 – Puerto Rico Democracy Act of 2007

As introduced, H.R. 900 meets the criteria for a federal statutory policy on status resolution for Puerto Rico. Implicit in H.R. 900 is the principle that all U.S. citizens are entitled to enjoy two of the most essential American democratic values – equality and self-determination. H.R. 900 accomplishes this by allowing voters to choose for Puerto Rico to either retain its current status or pursue permanent nonterritorial status. Pursuant to H.R. 900, if a majority of voters favors the continuation of existing territorial status, additional votes will continue to be held every eight years unless and until a majority votes to seek permanent nonterritorial status. In my view, this provision is necessary to ensure that a less than fully democratic status does not continue due to the failure of Congress to provide access to a federally sponsored mechanism for expression of the political will of the residents of the territory. Such periodic acts of self-determination as between options determined by Congress to be compatible with the Constitution and applicable federal law are vital to redeem America’s democratic principles and the fundamental rights of U.S. citizens in Puerto Rico.

Alternatively, if, and only if, a majority of the voters choose for Puerto Rico to pursue a path toward permanent nonterritorial status, H.R. 900 mandates that a plebiscite be conducted that allows voters to choose between statehood or sovereign nation status, including the possibility of free association, subject to such terms as may be agreed upon by Congress consistent with U.S. constitutional practice and international legal criteria. It bears noting that free association as envisioned by H.R. 900 is based on an agreement between two sovereign nations, and recognition of separate sovereignty, nationality, and citizenship. It also must be

terminable at will by either party in order to preserve the right of each nation to independence. Otherwise, if terminable only by mutual agreement, it would give each nation the power to deny the other nation's right to independence, and would therefore not be non-colonial and non-territorial. When crafted within the bounds of these principles, free association can be a useful means for a former colony and a former colonial power to sustain a close and mutually beneficial postcolonial relationship.

By approving H.R. 900, Congress can begin to correct the historical and constitutional dilemma created by the *Insular Cases*, the *Balzac* decision, and the incorporated versus unincorporated territory doctrines. Indeed, H.R. 900 is predicated on the need for a federally sponsored process in which Congress exercises its powers regarding a political status resolution for Puerto Rico based on informed self-determination between status options recognized as compatible with federal law and international criteria of decolonization in the modern era. For this reason, it is my view that H.R. 900 is a functionally status neutral approach. H.R. 900 neither favors a particular status nor gives rise to any sort of undue influence leading to a so-called artificial majority. Equally as important, H.R. 900 does not promote politically unrealistic or constitutionally unavailable status options for inclusion on a plebiscite ballot. H.R. 900 does, however, provide a clear path to end the current status policy for Puerto Rico that separates U.S. citizenship from the Constitution without any remedy based on consent of the governed. The end of this policy has the likelihood of leading to a democratically instituted unity of national citizenship and inherent sovereignty at the national level for the inhabitants of the Puerto Rico territory, if that is what a majority want when given the chance to express their will.

It bears noting that, whether by direct right of referendum sponsored by Congress or through a combination to federal and local measures including, but not limited to, a local constitutional convention, there is precedent for periodic votes in order to achieve orderly political status resolution. For example, in 1889 Congress sponsored a status resolution process for Dakota, Montana and Washington. Congress required each territory to propose a constitution "not repugnant to the Constitution of the United States", and to keep submitting such proposals to the voters until one was approved and proclaimed compatible with the federal enabling act by the President of the United States. As I noted in my earlier testimony, Congress may want to enact H.R. 900 exactly as introduced, or it may want to recognize a possible role for a constitutional convention similar to that proposed in H.R. 1230. As long as the constitutional convention is in some manner compelled to advance proposals determined at the federal level to be compatible with federal law, and the local constitutional process is not impeded from other measures to resolve the status question, there would be no legal reason not to recognize the concept underlying H.R. 1230 as part of an overall status policy. Of course, the local territorial constitution already authorizes constitutional conventions, and a convention called thereunder could possibly propose amendments that would change the status of Puerto Rico if approved by the people and Congress. With or without a local constitutional convention provision, a federally managed process is necessary to facilitate majority rule by the people of Puerto Rico in the

determination of whether the current territorial status should continue, or a new political status should be pursued.

CONCLUSION

Congress now presides over Puerto Rico as an annexed but unincorporated territory. Currently, the people of Puerto Rico lack full and equal national citizenship and they lack a status resolution process through which they can acquire full and equal national citizenship. Congress possesses the exclusive constitutional power to determine the appropriate status resolution. Moreover, it is imperative that Congress exercise this power in a fashion that is compatible with the options made available by the Constitution. It is my belief that H.R. 900 provides the best means to accomplish the necessary goal of redeeming government by consent for the people of Puerto Rico based on legally valid options under applicable federal law and policy.