Committee on Resources

Witness Testimony

POSITION OF THE
ASSOCIATION OF PRO-COMMONWEALTH ATTORNEYS
H.R. 856
UNITED STATES - PUERTO RICO POLITICAL STATUS ACT
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POSITION OF THE
ASSOCIATION OF PRO-COMMONWEALTH ATTORNEYS
REGARDING H.R. 856
UNITED STATES - PUERTO RICO POLITICAL STATUS ACT

The Association of Pro-Commonwealth Attorneys appears before the Committee today in order to participate in this Congressional Hearing on H.R. 856, United States - Puerto Rico Political Status Act. We believe it is important to point out to this Committee that there are several basic findings included in the Bill that in our opinion are incorrect or inconsistent with the law and court decisions. The most relevant ones are the interpretation proposed in the Bill of the 1950-52 procedure for instituting internal self-government; its legal effects; the application to Puerto Rico of Resolution 1541 (XV); the interpretation of Harris v. Rosario (446 U.S. 651) and the subsequent interpretation of the intent of Congress in the 1950-52 process; the interpretation of the 1993 plebiscite result and the use of the Territorial Clause to clarify status issues; the interpretation that full self-government for Puerto Rico is attainable only through independence with or without free association with the United States, or through statehood.

The history of political development in Puerto Rico and the political aspirations of our people have always been within the framework of autonomy. Puerto Rico is clearly a distinct people with a culture deeply rooted in its "Taíno", Spanish and African heritage.

In 1898, when the United States acquired Puerto Rico, an autonomous status had been achieved with Spain. Since then, a constitutional evolution and development started with the Congress of the United States. Throughout that process, law has been a decisive factor. The Supreme Court dealt with this new experience starting with the so-called Insular Cases in the period from 1901 to 1922. Since these newly acquired territories including Puerto Rico were not intended to become states of the Union, the legal deliberations and controversies were related on how to fit them in the American system and the application of the United States Constitution. Since no precedent existed, the Supreme Court created a new constitutional policy and instituted the concept of incorporated and unincorporated territories.

The Foraker Act of 1900 and the Jones Act of 1917 were the two organic acts that organized the government of Puerto Rico. Other Congress statutes together with those organic acts developed the local self-government. Finally, in the process of 1950-1952 the people of Puerto Rico achieved full self-government with a constitution adopted by the people of Puerto Rico as a compact. The federal government 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 Rico Constitutions, Public Law 600, the Puerto Rican Federal Relations Act and the rights of the people of Puerto Rico as United States citizens. Córdova & Simonpietri Insurance v. Chase Manhattan Bank, 649 F.2d 36 (1st Cir. 1981), cited with approval in Rivera-Rodríguez v. Popular Democratic Party, 457 U.S. 1, p. 634, (1982).

In 1950 the U.S. Congress enacted Public Law 600, 48 U.S.C. 731b, *et seq.*, which enabled the people of Puerto Rico to make a constitution to govern its internal affairs consistent with the American democratic tradition of government by consent of the people. Public Law 600, by its own terms, was a proposal to the people of Puerto Rico to enact this

constitution in the nature of a compact with the United States of America. In furtherance of this goal, it declared that when the constitution by the people of Puerto Rico was approved, most of the provisions of the Organic Act of 1917, as amended, 39 Stat. 951, 48 U.S.C 731, would be automatically repealed. All of the "territorial" or "organic" provisions of the Organic Act were repealed by this provision of Public Law 600, including Section 34 of the Act which established the power of Congress to review all laws enacted by the Puerto Rico Legislature as Congress saw fit.

Consistent with the nature of the Compact entailed by Public Law 600, this United States statute was itself submitted to the people of Puerto Rico in 1951 for its approval. After it was approved, a constitutional convention was elected by the people of Puerto Rico in order to enact a constitution in which the people organize itself into a body politic constructing the government of the island in accordance with the consent of those to be governed. This constitution was submitted to the Congress of the United States of America in 1951. It was approved by Congress, Public Law 447, 48 U.S.C.A. 731d in 1952, as a compact between Congress and the people of Puerto Rico. The Puerto Rico Constitution would become operative upon its approval by the people of Puerto Rico and subject to some changes in its language provided by the same act of Congress.

It is significant that Public Law 447 suggested that a paragraph be added to Section 3 of Article VII of the Constitution for the Commonwealth of Puerto Rico stating that any amendment or revision of the 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."

The Constitutional Convention of Puerto Rico approved Public Law 447 of the United States by resolution number 34 in its plenary session of July 10, 1952. Subsequently, the Constitution and the establishment of the Commonwealth of Puerto Rico as approved, came into effect by the proclamation of the Governor of Puerto Rico on July 25, 1952. This process is consistent with the negotiation of a compact between the Government of the United States and the People of Puerto Rico.

The United States of America informed the United Nations that it would not transmit any information under Article 73e of the U.N. Charter with regard to the Commonwealth of Puerto Rico, because the people of Puerto Rico had attain its full measure of self-government consistent with the Constitution of the United States. In its memorandum to the General Assembly, the United States stated that Puerto Rico "is a state which is free of superior authority in the management of its own local affairs but which is linked to the United States of America and hence is a part of its political system in a manner compatible with its federal structure and which does not have an independent separate existence."

It further stated that "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. Those laws which directed or authorized interference with matters of local government by the Federal Government have been repealed."

Representative Frances Bolton, a member of the United States delegation to the United Nations stated the following to that international body on November 3, 1953:

"There exists between the People of Puerto Rico and the United States a bilateral compact of association which has been accepted by both, and which, in accordance with judicial decisions, could not be amended without common consent."

The memorandum of the United States concluded the following:

"The U.S. Government, therefore, has decided that with the entry into force on July 25, 1952, of the constitutional arrangements establishing the Commonwealth of Puerto Rico, it is no longer appropriate for the United States to continue to transmit information to the United Nations on Puerto Rico... [This] constitutes a recognition of the full measure of self-government which has been achieved by the People of Puerto Rico."

During the process of debate and position papers the United States Government submitted several positions interpreting what has happened in 1952, among others the following:

"As noted above, the present chairmen of the congressional committees concerned with Puerto Rican affairs have both expressed the view that the new constitutional status of Puerto Rico and the terms of its voluntary association with the United States are the result of an agreement not to be rescinded or changed unilaterally by either party. However, under our constitutional system these are questions to be determined ultimately by our courts, including the questions as to the relationship of this agreement to the United States Constitution.

The problem has, in fact, been recently passed upon by the United States District Court for Puerto Rico (a federal, not a Commonwealth Court)."

The Court clearly states that the relationship between Puerto Rico and the United States is now based on a compact and cannot therefore be changed except by mutual consent. See U.S. Cong. Rec. 83rd Cong., 1st Sess, Vol. XCIX, 1953 (A1476). See also Mora v. Torres, 113 F.Supp. (D.P.R. 1953) and Mora v. Mejías, 206 F.2d 377 (1st Cir. 1953).

Subsequently, on November 27, 1953, the United Nations General Assembly promulgated Resolution 748 VIII approving the cessation of the transmission of information of the United States in respect to Puerto Rico.

The United States Supreme Court has consistently ruled that Puerto Rico has a unique relationship with the United States that had no parallel in American history. Examining Board v. Flores de Otero, 426 U.S. 572 (1972). It has consistently held that it has the degree of autonomy and independence normally associated with the states of the Union and that Puerto Rico, like a state, is an autonomous political entity. Rodríguez v. Popular Democratic Party, 457 U.S. 1 (1982). It has also been stated that Puerto Rico is to be deemed sovereign in matters not ruled by the Constitution. Calero Toledo v. Pearson Yacht Leasing, 416 U.S. 663 (1974); Rodríguez v. Popular Democratic Party, 457 U.S. 1 (1982); Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982); Posadas de Puerto Rico v. Tourism Company, 478 U.S. 328 (1986).

In Calero Toledo v. Pearson Yacht Leasing, 416 U.S. 663, the Supreme Court said "These significant changes in Puerto Rico's governmental structure formed the backdrop to Judge Magruder's observations in Mora v. Mejías, 206 F.2d 377 (1953); 'It may be that the Commonwealth of Puerto Rico --- "El Estado Libre Asociado de Puerto Rico" in the Spanish version - organized as a body politic by the people of Puerto Rico under their own Constitution, pursuant to the terms of the Compact offered to them in P.L. 600, and by them accepted, is a state within the meaning of 28 U.S.C. 2281." See also Torres v. Puerto Rico, 442 U.S. 465, 469-70 (1979); Alfred L. Snapp & Son Inc. v. Puerto Rico, 458 U.S. 592 (1982); Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328 (1986); United States v. Quiñones, 758 F.2d 40 (1st Cir. 1985). This makes Puerto Rico sovereign, as a state of the Union, over matters not ruled by the Constitution of the United States.

In Examining Board v. Flores de Otero, the United States Supreme Court again established that a compact between the United States and the Commonwealth of Puerto Rico exists after it was offered by Public Law 600, Flores, pages 593-594. It stated that the purpose of Congress under the Compact was to grant to Puerto Rico the degree of autonomy and independence normally associated with states of the Union. The Court stated that "we readily concede that Puerto Rico occupies a relationship to the United States that has no parallel in our history...", and recognized 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..."

In Rivera Rodríguez v. Popular Democratic Party, 457 U.S. 1 (1982) the United States Supreme Court stated unequivocally, in a right-to-vote case, that Puerto Rico, like a state, is an autonomous political entity, sovereign over matters not ruled by the Constitution". It cites Calero Toledo, *supra*, and Córdova & Simonpietri v. Chase Manhattan Bank, 649 F.2d 36 (1st Cir. 1981). The United States Supreme Court stated that the methods by which the People of Puerto Rico and their representatives "have chosen to structure the Commonwealth's electoral system are entitled to substantial deference."

Subsequently, in United States v. Quiñones, 758 F.2d 40, at page 42 (1st Cir. 1985), the Court stated that Puerto Rico

"ceased being a territory of the United States subject to the plenary powers of Congress as provided by the Federal Constitution. The authority exercised by the federal government emanates thereafter from the Compact itself. Under the compact between the People of Puerto Rico and the United States Congress, it cannot amend the Puerto Rico Constitution unilaterally."

The Bill mistakenly addresses the case of Harris v. Rosario, 446 U.S. 651 (1980) in order to state that Puerto Rico has not achieved the full measure of self-government that it can under the Constitution of the United States. Harris held in its two paragraph *per curiam* opinion citing Califano v. Torres, 435 U.S. 1 (1978), that Congress was empowered to treat Puerto Rico differently than a state in granting aid to families with dependent children because, among others, Puerto Rican residents do not contribute to the federal Treasury, and the cost of extending the provisions to Puerto Rico would be high for the U.S. Treasury. It mentioned briefly the Territorial Clause of the Constitution of the United States, Article IV 3 Cl. 2 as the basis for that power.

The Supreme Court of the United States did not face in Harris the question on whether Congress retained plenary power to legislate for Puerto Rico, and accordingly was silent as to that proposition. The Court simply ruled in Harris that Congress can under the Territorial Clause, treat Puerto Rico differently than a state as respect the application of aid programs. This interpretation simply misses the substantial distinction between the power of Congress to treat Puerto Rico differently than a state, and the power to legislate for the unincorporated territories basically at Congress pleasure. This decision is a glitch in the constitutional interpretation that the United States Supreme Court has advanced regarding Puerto Rico. The Court has consistently held that the powers of Congress to legislate in regards to internal affairs of Puerto Rico is limited by the compact and is the same as that in which Congress might legislate upon a state. That is the rule of law as it stands today. See Rivera-Rodríguez v. Popular Democratic Party, Alfred L. Snapp, and Posadas de Puerto Rico v. Tourism Company, *supra.*

Aside of cases involving Puerto Rico there are other cases which can throw some light to the issues of (a) the power of Congress to enter into agreements with territories and (b) the state of the law regarding self-governing territories or commonwealths' treatment under the law in the United States constitutional and judicial systems.

In Commonwealth of the Northern Mariana Islands v. Daniel Atalig, 723 F.2d 682 (9th Cir. 1984) the court stated: "Guam is subject to the plenary power of Congress and has no inherent right to govern itself. Okada, 694 F.2d at 568. In contrast, the NMI possesses a right to self-government acknowledged in the Trusteeship Agreement and the Covenant. This distinction suggests that the NMI [Northern Mariana Islands] legislature, like that of a state, has power to provide statutory authority for government appeals to this court in criminal cases." In the case of Ngiraingas v. Sánchez, 858 F.2d 1368 (9th cir. 1988) the court stated "As a creature of the federal government, Guam stands in sharp contrast to 'bodies politic' as that phrase is normally understood. ('The government of Guam totally lacks the degree of local autonomy possessed by states or commonwealths within the federal system.') Unlike states, Guam has no sovereign status; it cannot create a system of laws and administration except by leave of Congress." See also, U.S. Ex Rel. Richards v. De León Guerrero, 4 F.3d 749 (9th Cir. 1993).

In De León Guerrero, the Court of Appeals for the 9th Circuit stated as follows "At the outset, we emphasize that the authority of the United States towards the CNMI [Commonwealth of the Northern Mariana Islands] arises solely under the Covenant. The Covenant has created a "unique" relationship between the United States and the CNMI, and its provisions alone define the boundaries of those relations. For this reason, we find unpersuasive the Inspector General's reliance on the Territorial Clause as support for enforcement of the federal audit. He argues that because the CNMI is governed through Congress' power under the Territorial Clause, Congress has plenary legislative authority over the CNMI... The applicability of the Territorial Clause to the CNMI, however, is not dispositive of this dispute. Even 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' legislative powers." De León Guerrero, page 754 (citations omitted, emphasis supplied).

It has been stated publicly that the intent of this bill is to grant Puerto Rico the full extent of self-government consistent with the Constitution of the United States of America. It is an unnecessary provision to state that the existing relationship between Puerto Rico and the United States is not enough in this regard. The Supreme Court of the United States has stated in many occasions as we have seen, even after Harris (Rivera Rodríguez v. Popular

Democratic Party, *supra*), that Puerto Rico has the autonomy and sovereignty that a state has. If integration of Puerto Rico as a state would provide that measure of self-government sought by this bill, then the present Commonwealth status also provides same without the added costs that statehood would entail for the Treasury and the People of the United States of America. It is unnecessary to disenfranchise Commonwealth supporters with the promise of continued referendums that may bring havoc to the Puerto Rican economy.

We have found no judicial precedents whatsoever for the proposition that one Congress may not create a statutory limitation on another Congress power to legislate in the future with respect to the status of territories. Congress is not limited under the Territorial Clause to the binary options of retaining its plenary power or wholly ceding it to the subject jurisdiction. Congress has on many occasions chosen to delegate part of its Territorial Clause authority and to retain part. See for example, Cincinnati Soap Company v. United States, 301 U.S. 308 (1937), regarding the transition of powers to the Philippines. See also United States v. Husband R. (Roach), 453 F.2d 1054 (5th Cir. 1971), cert. den. 406 U.S. 935 (1972). In this case the Court stated that Congress has delegated its plenary authority over the Canal zone in Panama to the executive branch of the Government of the United States.

Congress, in the exercise of its plenary powers under the Territorial Clause also delegated its power over territories to the executive branch on February 20, 1929, through a joint resolution of Congress providing that, until legislation for the government of American Samoa and the Swains Islands was enacted, they were to be governed under the direction of the President of the United States, 45 Stat. 1253, 48 U.S.C. 1661. Again, Congress ceded part of its authority when it established its sovereignty in the former trust territory that is now part of the United States, know as the Commonwealth of the Northern Mariana Islands ("CNMI"). By Public Law No. 94-241, March 24, 1976, Congress ceded its plenary powers under the Territorial Clause over the CNMI, by entering into a Covenant of Political Union at the same time that Congress acquired sovereignty over the island. As is the case with Puerto Rico, the United States Court of Appeals for the ninth circuit has decided consistently that the relationship between the United States and the CNMI is governed by the covenant. See Commonwealth of the Northern Mariana Island v. Atalig, 723 F.2d 682 (9th Cir. 1984); U.S. ex rel. Richards v. De León Guerrero, 4 F.3d 749 (9th Cir. 1993).

Thus, the bipolar and black-and-white view that either the United States retain under the Territorial Clause full sovereignty over a territory or it does not, is mistaken.

In view of this history of judicial interpretations and United States Government official positions, we think it should be clear that Puerto Rico has achieved self-government and that its autonomy and sovereignty are equal to those normally attributed to a state.

It is therefore, a mistake to base this bill on the assumption that the only alternatives of complete self-government are the ones included in the bill. The Commonwealth created in 1952 is an alternative with dignity. It is not perfect, and can be expanded and modernized. The definition submitted by the Popular Democratic Party achieves the goal of respect to the Rule of Law and opens a process of negotiation to clarify and/or expand the present relationship. The concept of self-determination applies to the process of presenting the alternatives itself. The way this bill is enacted does not comply with that rule. The bill disqualifies the present state of the law without any participation of Puerto Rico. The final arbiter of these matters is the Supreme Court, as was announced to the United Nations. When Public Law 600 was approved by the Congress, the requirement of its acceptance by the People of Puerto Rico was dictated by Congress. That same procedure must be used now.

There is another aspect that should worry us all. The United States has been consistent year after year in the United Nations in its position that Puerto Rico's case is closed. The future development and greater autonomy of Puerto Rico is both necessary and desirable in a modern and changing world. However, it is a private matter between two sovereigns that are associated by a compact. The United Nations resolutions numbered 1514 (XV), 1541 (XV) and other resolutions require among other things the demilitarization of the territory. This applies to territories that have not achieved full self-government and are still under the jurisdiction of the United Nations. Puerto Rico is not such a territory, and arguing that it is, does not serve the best interest of either the United States or Puerto Rico. It is unnecessary and can be divisive and risky. The enemies of the United States and Puerto Rico may try to influence this Congress to fall into that mistake.

The presentation of the alternatives presented in this bill does not satisfy a majority of the potential voters in a plebiscite. The interpretation of the existing relationship in this bill may provoke the need for the courts intervention to adjudicate the controversies created by the premises included in it.

Statehood is not good business for the United States and Puerto Rico, neither is good for our desire to be a distinct people and your needs to be a cohesive nation bound by your language, traditions and history. This differences have been recognized by the Supreme Court on several cases since the Insular Cases.

Puerto Rico is associated with the United States permanently, bounded by our many common interests. Any bill should take this into consideration. The Supreme Court has constructed the Constitution creatively when needed. Congress must follow suit since, after all, this is a matter of political will. We are sure Commonwealth will win a fair and just plebiscite. Let us create a procedure for the expansion and modernization of the compact, that would make the next generations of Americans and Puerto Ricans proud of this generation.

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Ramón L. Velasco

President

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