APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Office of the Assistant Attorney General — Washington, D.C. 20530

February 22, 1991

Honorable Malcolm Wallop
United States Senate
Washington, D.C. 20510

Dear Senator Wallop:

This letter responds to the questions that you submitted in writing concerning the Department's analysis of S. 244, the "Puerto Rico Status Referendum Act," and to other concerns raised by the Committee in the February 7, 1991 hearings on this bill. The answers to these questions are set forth below along with the questions for ease of reference. Where an answer has been provided by another department, we have indicated that in the response.

Questions 1, 2, 6)

(1) If I understand your testimony correctly, we have a major problem with this legislation if we are serious and if Statehood were to obtain a majority. You state that there is no reason to delay Statehood because you believe that Congress has ample authority to make reasonable transition provisions after Statehood; and in any event the conjunction of Congress's explicit commitment to implement the winning status would, if Statehood were to be successful, constitute an "implied promise of eventual Statehood", to use the Court's language. That promise would lead to full application of the Constitution to Puerto Rico. Puerto Rico would become an "inchoate State" waiting only on the Congress to eventually pass an Admission Act. Your concern that the Committee make clear that the provisions of Title II are not binding only makes the problem more acute. The problem seems to me that on December 3 of this year, Puerto Rico may become incorporated and Congress would not only not have enacted transition provisions, but the legislation would not even have been introduced.

We seem to be left with two equally unpleasant choices. Either we enact the transition provisions now so the Courts have some guidance and do not immediately apply the Uniformity Clause or we completely disavow any intent to be bound by the results of

the referendum in order to preserve Puerto Rico's unincorporated status. Would anyone like to address this problem?

(2) Would it be possible to reframe the legislation to express a commitment by the Congress to enact such legislation as may be necessary, in the sole discretion of the Congress, to prepare Puerto Rico for the preferred status while explicitly declaring Puerto Rico to remain unincorporated until such time as Congress declares the territory to be adequately prepared?

Would such a formulation be sufficient to prevent the Courts from finding an intent to incorporate and would the Administration support legislation which did not include an explicit commitment to honor the results of the referendum?

(6) On page 2 of your analysis, you suggest that Congress make clear that none of the provisions in any of the status titles should be viewed as binding. While Constitutionally correct, wouldn't such a statement encourage each of the political parties to point to the statement and simply say that with an overwhelming vote, Congress will see reason and change the provisions.

Answer: As noted in our February 7, 1991 Section-by-Section Comments (hereinafter "Comments") at 10-11, it is not clear under Supreme Court precedents whether Puerto Rico would become "incorporated" in such circumstances. As noted in our Comments at 4-6, Congress may not legally bind itself to take future action to implement the status option receiving a majority in the referendum. But the declaration of a "commitment" to make Puerto Rico a state if statehood receives a majority, even if not legally binding on Congress, in the absence of clarifying statements might nonetheless be taken as expressing a settled intention to "incorporate" Puerto Rico.

This possibility highlights the difficulties with the language of section 101(e)(2). As we recommended in our section-by-section comments, we believe that the language of section 101(e)(2) should be clarified to avoid any suggestion of a legal or even moral "commitment" to enact legislation to implement the status option receiving a majority in the referendum. See Comments at 4-6. In addition, section 101(e)(2) could be further modified explicitly to disclaim any intention to "incorporate" Puerto Rico until such time as legislation is enacted to implement the statehood choice. While not dispositive, see Comments at 10, such a statement would likely be sufficient to prevent the unintended incorporation of Puerto Rico. See Balzac v. Puerto Rico, 258 U.S. 298, 311-313 (1922).

To avoid the legal difficulty identified by Senator Wallop, section 101(e)(1) should be deleted and section 101(e)(2) should be changed to read as follows:

> It is the sense of Congress that appropriate legislation should be considered to implement the status option receiving a majority in the referendum. It is further the sense of Congress that the Chairman of the Senate Committee on Energy and Natural Resources and the Chairman of the House Committee on Interior and Insular Affairs should introduce the title of this Act corresponding to the status preference expressed in the referendum. Nothing in this section shall be construed to commit Congress to enact legislation implementing such a status. This Act shall not be deemed to incorporate Puerto Rico into the United States or in any way to alter Puerto Rico's present status as an unincorporated territory absent further legislation.

Question 3)

Assuming that the Administration is prepared to support full extension of all federal programs to Puerto Rico in a phased manner which is consistent with either Statehood or Independence so long as the extension is budget neutral, why haven't you submitted legislation to do that? Why doesn't it make sense for Congress to consider enacting such legislation as is necessary to provide state-like treatment, without incorporation or any other commitment to any status, prior to a referendum so as to prevent any incorporation problems?

Answer: The disparity that currently exists in the application of certain federal programs to Puerto Rico is a result of decisions made by previous Congresses and Administrations, which took into account the economic conditions in Puerto Rico at the time, among other factors. Prior to the consideration of S. 244 and related legislation in the 101st Congress, the need to address changes in federal law that would be necessary for a transition to statehood or independence had not arisen. Indeed, there was no reason to believe that crafting appropriate transition provisions for the status option chosen would prove to be as problematic as has been the case to date. Moreover, as a practical matter, both the House and Senate Committees having jurisdiction over the affected programs have shown no interest in revisiting the decisions creating the current special treatment for Puerto Rico. Consequently, even if the Administration had considered proposing alterations in the application of federal programs to Puerto Rico, it is unlikely these initiatives would have been enacted.

Question 4)

The Finance Committee proposed a formula to finance the extension of federal programs which would, in their view, be budget neutral. Budget neutrality is only one side of the problem. The other side is the impact on the economy of Puerto Rico and the ability of the government of Puerto Rico to provide essential services. There are several sources of potential revenues. We could look to tax transfer payments, such as the rum fund, or to exemptions such as the 936 credit. We could also simply raise revenues by extending the Internal Revenue Code to Puerto Rico. Even within those options we have alternatives. We could lower the allowable credit under 936 by a percentage, as Finance proposes, or we could change the program to a wage credit as Treasury has proposed in the past. Each of these alternatives and the various combinations of them will have different effects. Has anyone examined what mix is best and over what time frame to encourage development in Puerto Rico and reduce unemployment?

Answer: (Treasury Department) With respect to the Commonwealth option, the Senate Finance Committee's amendment was made prior to consideration of this bill by the Agriculture Committee. Due to the expenditures proposed by the Agriculture Committee, the Commonwealth option in the current bill is not budget neutral.

With respect to the Statehood option, the Finance Committee examined the competing factors involved in structuring a fair and reasonable transition to Statehood status. In its hearing on April 26, 1990, the Finance Committee received testimony from each of the Puerto Rican parties, the Treasury Department, and other federal agencies concerning the effects of such a transition on the Puerto Rican economy. Details of the Treasury Department's analysis of this issue are provided in the written statement submitted by Philip D. Morrison, International Tax Counsel.

The Administration accepts the tax transition included in the Finance Committee amendment as one that acceptably outlines the issues involved in a choice for statehood. Other options raised in this question present significant concerns which are avoided in the Finance Committee approach.

For example, changing the section 936 system to a wage credit would require a separate transition period in order to minimize dislocation within the Puerto Rican economy. As the Justice Department has testified, the time frame for that transition is limited by Constitutional constraints; it is doubtful that there would be sufficient time both to accomplish a transition to a wage credit and to remove all tax incentives within that time frame.

With respect to the extension of income taxes to Puerto Rico, the Finance Committee transition allows a phase-in of such taxes at the same rate that section 936 benefits are reduced. An important advantage to this approach is that it imposes comparable federal tax burdens on all corporations operating in Puerto Rico, regardless of whether they are incorporated on the mainland, on the island, or overseas.

Question 5)

Has the Administration taken a comprehensive look at the economy of Puerto Rico and the extent to which federal programs are helping or hurting development since the Department of Commerce review in the late 1970's?

How long would it take the Administration to formulate a transition schedule which balances both federal fiscal neutrality with full state-like treatment under all programs and laws with minimal impact on the Puerto Rico economy?

Answer: (Office of Management and Budget) No, we have not. However, the Administration would be pleased to work with Congress on appropriate transition arrangements.

Questions 7, 15)

(7) On page 4, you recommend that the reference to international law be deleted in the preamble. In the 1966 report of the U.S.-Puerto Rico Commission, the sixth conclusion was that "As a form of political status, each alternative [Commonwealth, Statehood, and Independence] confers equal dignity and equality of status." Do you concur in that conclusion and that the present federal relationship is valid? Would you also concur that any alterations in the application of federal laws to Puerto Rico under the current relationship and alterations to Independence or Statehood are matters of internal municipal concern solely, subject to the parameters of the U.S. Constitution?

(15) You express concern with the language in section 402. When Congress enacted the Federal Relations Act, both the Senate and House Reports explicitly stated that "[T]he bill under consideration would not change Puerto Rico's fundamental political, social, and economic relationship to the United States." Do you disagree with the definition contained in last year's legislation, S. 712?

Do you believe it is necessary or advisable to make explicit that Title IV would not alter the current Constitutional status of Puerto Rico and that Puerto Rico remains under the sovereignty of the United States and subject to the plenary authority of

Congress under Article IV as limited by those other provisions of the Constitution which now or hereafter apply to Puerto Rico?

Would you object to a sense of the Congress that no alteration in Puerto Rico's political status would be considered or enacted without the consent of the residents of Puerto Rico?

In addition to the right to vote for President or to have voting representation in Congress, what other rights are enjoyed by the citizens of the several States by virtue of the Constitution which are not enjoyed by citizens resident in Puerto Rico?

Answer: As a matter of law, Puerto Rico's present political status is that of an unincorporated territory of the United States, subject to the sovereignty of the United States and Congress' plenary governing power under the Territory Clause of the Constitution. U.S. Const. Art. IV, § 3, cl. 2. See Comments at 30-33. Congress has allowed the people of Puerto Rico to organize a local government pursuant to a constitution of its own adoption. This does not, however, alter the fact that Puerto Rico remains subject to Congress' plenary governing power under the Territory Clause.

In Harris v. Rosario, 446 U.S. 651 (1980) (per curiam), the Supreme Court explicitly noted that Puerto Rico is subject to Congress' power under the Territory Clause. Id. at 651-52. Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982) is not to the contrary. Rodriguez, in describing "the methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth's electoral system," id. at 8, remarked that "Puerto Rico, like a state is an autonomous political entity, sovereign over matters not ruled by the Constitution." Id. at 8 (original quotation marks and citations omitted). This remark in Rodriguez does not overrule or call into question the doctrine of Rosario. Rather, the remark in Rodriguez (and in the cases quoted and cited by Rodriguez) is properly understood as a description of the powers of local self-government Congress has allowed the people of Puerto Rico to exercise, within a system in which all matters concerning Puerto Rico ultimately are subject to the power of Congress under the Territory Clause of the Constitution. But it is a far cry from this description of the way Congress has chosen to exercise its plenary power over a territory under the sovereignty of the United States -- allowing a significant measure of local self-government on local matters -- to the assertion that Puerto Rico "enjoys sovereignty, like a State, to the extent provided by the Tenth Amendment." Section 402(a) (emphasis added). As indicated in our section-by-section comments, such a description is inconsistent with the Constitution. See Comments at 30-33. It is also misleading to suggest that principles of international law applicable to relationships between two sovereign entities

are relevant to the relationship between the United States and Puerto Rico. See Comments at 4.

Whether the alternatives of commonwealth, statehood, and independence "confer[] equal dignity and equality of status" (question #7) is essentially the political judgment that the proposed referendum would permit the people of Puerto Rico to decide for themselves. It is certainly clear that the legal status and consequences of each relationship are different. Statehood is a permanent relationship in which residents of Puerto Rico would enjoy the same political, constitutional, and civil rights -- including voting representation in Congress and United States citizenship on a constitutional rather than statutory basis --, in exactly the same manner as citizens of the several states. Commonwealth is a relationship under which Puerto Rico remains an unincorporated territory under the sovereignty of the United States and subject to the plenary power of Congress under the Territory Clause, but under which residents of Puerto Rico are statutory United States citizens, enjoy many of the constitutional rights of citizens of the several states, and have been granted broad powers of self-government on local matters. The Supreme Court has held that "fundamental" constitutional rights apply to Puerto Rico, but has never set forth an exhaustive listing of which constitutional provisions are included in that category. However, the right to trial by jury is not applicable to Puerto Rico. Balzac v. Puerto Rico, 258 U.S. 298 (1922). Nor do Puerto Ricans enjoy fourteenth amendment protection of their U.S. citizenship status or the opportunity to vote in federal elections. Independence is a permanent relationship in which Puerto Rico would be a sovereign nation whose relationship with the United States would be determined by treaty or executive agreements between sovereign nations and by principles of international law, and under which residents of Puerto Rico would be expected to give up their United States citizenship for citizenship in the sovereign nation of Puerto Rico.

We believe that it is vitally important that any description of the several status options contained in the titles outlining proposed implementing legislation not be misleading. We think it particularly important in this regard to make clear the nature of the commonwealth relationship. As noted in our section-by-section comments, we believe the description contained in section 402 is seriously misleading and should be changed. Comments at 30-32. As noted in those comments, "[w]e consider it imperative that it be made clear beyond peradventure that the Commonwealth is and must remain under the sovereignty of the United States." Comments at 30-31.

We would have no objection to a sense of the Congress statement that no alteration in Puerto Rico's political status

should be considered or encacted without the consent of the residents of Puerto Rico. (Question 14.)

Section 402 of S. 712, as reported by this committee in the 101st Congress, is generally less problematic than the present draft of section 402. That provision read:

> The Commonwealth of Puerto Rico is a self-governing body politic joined in political relationship with the United States and under the sovereignty of the United States. This relationship is permanent unless revoked by mutual consent.

The second sentence is in our view legally flawed, but could be rendered unobjectionable by being recast as a "sense of Congress" statement. (See Question #15) The first sentence is by and large accurate, but incomplete and potentially misleading in its formulation. It would be more accurate to note that Puerto Rico has been granted powers of self-government by the authority having sovereignty over it. The language as written could be taken as suggesting that Puerto Rico has inherent powers of self-government. We therefore recommend that, if a formulation like the provision in S. 712 is substituted for the present draft of section 402 in S. 244, that it be amended to read as follows:

> The Commonwealth of Puerto Rico is a body politic under the sovereignty of the United States, joined in political relationship with the United States, but not a State of the United States. The Commonwealth of Puerto Rico has been granted powers of local self-government by the Congress of the United States. It is the sense of Congress that this relationship should not be revoked except by mutual consent.

Question 8)

Under the Statehood option, you discuss Congress's ability to tailor transition provisions. To the extent that the Treasury analysis indicated a net revenue increase to the federal treasury, have you examined the possibility of using a portion of that increase to offset economic assistance to replace the loss of current tax provisions, such as a demonstration enterprise zone tied to a wage credit to replace section 936?

Should Congress look to the Statehood economic transition from the standpoint of neutrality, using any surplus to help develop Puerto Rico, or should we look to any surplus to offset the deficit?

Answer: (Treasury Department) The projections compiled by the Office of Management and Budget indicate that there would be a

budget surplus under the Statehood option beginning in 1997 (assuming that option were ratified in 1992). For the years prior to statehood, the current bill provides substantial assistance to the government of Puerto Rico throughout the transition period. The Administration accepts the transition benefits proposed by the Finance Committee as an acceptable framework for a reasonable transition to statehood status. As discussed in response to question 4, it is doubtful that the limited time frame permitted for the statehood transition under the Constitution would allow for the imposition of a new set of tax incentives to replace section 936 during that transition period.

The issue of additional assistance to the new state after the transition would require a review of how the status change actually affected the Puerto Rican economy, as well as how federal transition benefits altered those results. If further federal assistance were appropriate, its form and scope would have to be judged in the context of the requirements of the U.S. and Puerto Rican governments at that stage. Moreover, any new incentives that might be considered at that time would have to conform to the restraints of the Constitution, and would raise issues of equitable treatment among the fifty-one states. Accordingly, it would not be appropriate for Congress to include commitments in the current bill regarding post-transition tax incentives for the new state of Puerto Rico.

Question 9)

S. 244 has altered the Defense provisions of Independence to delete the requirement that the U.S. retain unrestricted access and use of current base facilities and installations. Do you agree with that deletion?

Do you believe such a provision is essential?

Answer: The Department of Defense does not agree with the deletion of specific language on operating rights and status of forces that was in the original version of Section 312.

Under Title III, Section 312, "Defense," a task force established by the Joint Transition Commission would be required to "negotiate" several agreements, including one where the newly-independent nation of Puerto Rico would be legally committed to deny third countries access to or use of is territory for military purposes. DOD supports the inclusion of this caveat as a strategic imperative.

DOD would emphasize, however, that our national security and defense interests would be best protected by restoring the language on operating rights and status of forces that was in the

original version of Section 312. Inclusion of this degree of specificity establishes a viable framework for subsequent negotiations should the "Independence" option to chosen. This has proven to be an effective procedure in past negotiations of a similar nature.

At a minimum, the legislative history of S. 244 should reflect that the Department and/or Congress anticipates that the negotiations for the use of military areas, as provided for in Section 312, will result in a continued use and unrestricted access to a certain required number of the present U.S. defense facilities in Puerto Rico. The Department does not believe it to be the intention of the Congress to relinquish our defense relationship with an independent Puerto Rico, and therefore, recommends that the Committee restore specific language to note such intent.

Under the provisions of Section 307 of the independence option, the President would, "withdraw and surrender all rights of possession, supervision, jurisdiction, control or sovereignty" over the territory of Puerto Rico.

Operations that are critical to the execution of U.S. regional counternarcotics efforts, as well as Atlantic fleet weapons and multi-carrier training operations, could be halted or otherwise affected during the transition period if we fail to secure in advance an agreement on operating rights and status of forces.

Hence, if it is not possible to restore the Section 312 of the previous version, we would like, at a minimum, to insert the phrase "for continued use and unrestricted access to current miliary areas by the United States" in the second sentence after "by the Government of Puerto Rico" and before "to deny third countries" of the new proposed Section 312. All such access agreements must, of course, include a status of forces agreement for U.S. personnel.

Questions 10 and 11)

(10) S. 244 also deletes the requirement that the base access and that strategic denial be permanently binding on the new Republic unless altered by mutual consent. Do you agree with that deletion?

(11) You object to the requirement that the President obtain Congressional approval prior to altering the strategic denial requirement. The Committee had a series of fairly exhaustive questioning on that precise limitation in the Micronesian Compacts. Both the Departments of Justice and State agreed in

open hearings that the language was binding on the President. Were those assurances to this Committee misleading?

Answer: As noted in our section-by-section comments, we believe that the power to terminate a treaty or executive agreement or otherwise alter the foreign policy of the United States with a foreign nation is a presidential prerogative under the Constitution. Congress may not by statute control or restrict the President's power in this regard. See Comments at 26-29. We recognize that some persons dispute the President's constitutional power in this regard. See generally Goldwater v. Carter, 444 U.S. 996 (1979) (declining to resolve issue of whether Senate has a role in treaty termination in litigation brought by United States Senator). We also recognize the existence of statutory arrangements predicated on this contrary view. Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 101, 99 Stat. 1770, 1773 (1986), 48 U.S.C. § 1681 note (Micronesia and Marshall Islands). We question whether the statutory requirement with respect to Micronesia would be given effect by the courts were the President to seek to terminate such an agreement pursuant to his constitutional power in the area of foreign affairs. See Goldwater, 444 U.S. 996 (declining to resolve such an issue as nonjusticiable); Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979) (en banc), vacated and remanded with directions to dismiss the complaint, 444 U.S. 996 (1979) (power of treaty termination belongs to the President). In light of this conclusion, we think that any assurances made to committees considering the Micronesian Compacts should be understood as policy commitments by that administration to forbear the exercise of the President's constitutional power in that situation. Just as Congress cannot legally bind itself not to exercise constitutional powers within its authority at any point in the future, see Comments at 2-4, 32-34, one administration cannot agree to limit the constitutional powers of another. In any event, even if the limitation contained in the Micronesian Compact were to be honored, the President is not bound to agree to additional statutory encroachments on his constitutional power in the area of foreign affairs. We therefore adhere to our objection to inclusion of such a provision in this bill.

Question 12)

On page 22, you suggest that the Congress delegate to the President our plenary authority under Article IV and permit you to negotiate agreements unfettered by Congressional approval. Would it make more sense to treat Independence like the Micronesian negotiations -- that is, have you negotiate an Independence bill and submit that to Congress together with all necessary agreements so that we can decide whether to approve it or make alterations?

Answer: As noted in our section-by-section comments, there is a technical constitutional point concerning such negotiations that is best addressed by legislation authorizing the President to negotiate agreements. See Comments at 22. Simply put, before Puerto Rico becomes independent it remains a United States territory, subject to Congress' power under the Territory Clause. It is Congress that has power to direct upon what terms and conditions independence shall be granted, as part of its power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV., § 3, cl. 2. However, for such conditions to constitute commitments of Puerto Rico after it becomes an independent nation, they must also be in the nature of a treaty or executive agreement. Congress may not by statute create a treaty with a foreign nation, nor may Congress control the conduct of a foreign nation (even a prospective foreign nation that is presently a United States territory) by legislation.

We therefore have recommended that any such agreement be accomplished both by statute and by executive agreement. It is therefore useful for Congress to delegate to the President its authority under the Territory Clause to make a disposition of the property or territory of the United States, subject to Puerto Rico's agreement to certain conditions. The President would then be implementing Congress' directive pursuant to Congress' powers under the Territory Clause, and concluding an executive agreement that would take effect upon independence. This would assure that all constitutional requirements are satisfied. We do not mean to suggest that the Micronesian Compact is deficient in this regard. To the contrary, we have relied on the Micronesian situation as precedent for this type of arrangement. See Comments at 21-22. We simply believe that the procedure can be made even more clear.

Question 13)

Assuming Congress does not go to a self-implementing referendum, would one option to express our commitment to respect the results be to provide for the repeal of the Jones Act provisions on citizenship, effective on the certification of the referendum rather than waiting until formal legislation is enacted?

Answer: This question raises the possibility of repealing the Jones Act provisions on citizenship, effective on the certification of the referendum, rather than waiting until implementing legislation is enacted. We do not fully understand the purpose of this question. We do not understand how this would "express [Congress'] commitment to respect the results" of the referendum. We question whether it makes sense immediately

to repeal the statutory United States citizenship of residents of Puerto Rico before implementing legislation is enacted, especially if statehood or commonwealth were selected. We do not understand what is to be gained by depriving Puerto Ricans of their U.S. citizenship for any interregnum between the referendum and implementing legislation -- legislation which might in any event not be passed. Moreover, we believe that such a proposal would give rise to serious concerns on the part of the people of Puerto Rico. If the purpose of this proposal is to pressure Congress to enact some form of legislation immediately after the referendum in order to avoid the highly disconcerting prospect of a cut-off of United States citizenship, we believe it would be ill-advised. We believe it is not a good idea for Congress to be deliberating on important status implementation legislation under such extreme pressure.

Question 14)

You suggest that residents of Puerto Rico be put to an election as to whether they wish to retain U.S. citizenship or acquire Puerto Rico citizenship and that such an election would be Constitutional. Could you provide the Committee with a detailed legal analysis on that subject as well as Congress's ability to alter statutory citizenship? I expect that the three parties in Puerto Rico will want to respond and the Committee should have all views on the subject.

Answer: The Department's views on this question are set forth on pages 23-26 of the enclosed section-by-section analysis which has also been submitted to the Committee.

Question 16)

On page 35, you suggest several problems with section 404 dealing with regulatory review. Both the Finance and Agriculture Committees have excluded all programs within their jurisdiction from the application of this section. Have agencies such as EPA or Interior expressed any concern, and if so, what is the Administration's position?

Do you believe you could defend an agency against a suit by the Governor that a regulation dealing with point source emissions did not adequately take into account the unique circumstances of Puerto Rico?

Answer: As stated in our testimony and the section-by-section analysis, the Administration supports the deletion of proposed section 404(c). The Administration's position has been coordinated with the Department of the Interior and the EPA.

We believe a challenge to an agency action under this section could be defended.

The Office of Management and Budget has advised this Department that it has no objection to the submission of this report to the Congress.

Sincerely,

W. Lee Rawls
Assistant Attorney General