U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

January 18, 2001

The Honorable Frank H. Murkowski
Chairman, Committee on Energy and Natural Resources
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This is in response to your letter to President Clinton requesting that the Administration provide an analysis of the status options for Puerto Rico favored by the three principle political parties in Puerto Rico. This letter provides comments on two proposals that were voted on in the December 1998 political status plebiscite in Puerto Rico, as well as a third proposal outlined by the Popular Democratic Party in its 2000 platform. The first proposal, for Statehood, is outlined in option number 3 in Puerto Rico's recent *Petition to the Government of the United States*. The second proposal, for Independence, is outlined in option number 4 of that petition. The third proposal, the "New Commonwealth" option, is described in the Popular Democratic Party platform documents. Given the complexity and number of proposals on which our comments have been sought, we address only a limited number of issues raised by the proposals, most of them constitutional in nature.

1. Statehood

The Statehood option[1] provides that Puerto Rico would become "a sovereign state, with rights, responsibilities and benefits completely equivalent to those enjoyed by the rest of the

[1] The Statehood proposal contemplates a petition to Congress asking it to provide for the following:

> The admission of Puerto Rico into the Union of the United States of America as a sovereign state, with rights, responsibilities and benefits completely equal to those enjoyed by the rest of the states. Retaining, furthermore, the sovereignty of Puerto Rico in those matters which are not delegated by the Constitution of the United States to the Federal Government. The right to the presidential vote and equal representation in the Senate and proportional representation in the House of Representatives, without impairment to the representation of the rest of the states. Also maintaining the present Constitution of Puerto Rico and the same Commonwealth laws; and with permanent United States citizenship guaranteed by the Constitution of the United States of America. The provisions of the Federal law on the use of the English language in the agencies and courts of the Federal Government in the fifty states of the Union shall apply equally in the State of Puerto Rico, as at present.

states." The principle that a new State stands on "equal footing with the original States in all respects whatsoever" has been recognized since the first days of the republic. *Coyle v. Smith*, 221 U.S. 559, 567 (1911) (quoting 1796 declaration upon the admission of Tennessee). Supreme Court caselaw makes clear that, as a State, Puerto Rico would be "equal in power, dignity, and authority" to the other States. *Id.* This shift in status to statehood would also have tax consequences not fully articulated in the statehood proposal itself. Currently, as an unincorporated territory, Puerto Rico is not subject to the Tax Uniformity Clause, which requires that "all Duties, Imposts, and Excises" imposed by Congress "shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1; *see Downes v. Bidwell*, 182 U.S. 244 (1901). As a result, it can be and is exempted from some federal tax laws (including most federal income tax laws), and it has other tax preferences not applicable to the States, although it also does not receive certain benefits such as the earned income tax credit. *See* 48 U.S.C. § 734 (1994) (providing that, with certain exceptions, "the internal revenue laws" shall not apply in Puerto Rico); 26 U.S.C. § 32 (earned income tax credit). Were Puerto Rico to become a State, however, it would be covered by the Tax Uniformity Clause and many, if not all, of these different tax treatments could not constitutionally be preserved on a permanent basis. *See Political Status of Puerto Rico: Hearings on S. 244 Before the Senate Comm. on Energy and Natural Resources*, 102d Cong. 189-90 (1991) (testimony of Attorney General Richard Thornburgh) ("Thornburgh Testimony") (reaching this conclusion, but also noting that the Tax Uniformity Clause permits the use of narrowly tailored transition provisions under which Puerto Rico's tax status need not be altered immediately once the decision were made to bring it into the Union as a State).

In addition, the statement in the Statehood option that admitting Puerto Rico as a State would not result in the "impairment of the representation of the rest of the states" may be inaccurate. If Puerto Rico gains representatives in Congress, it will affect the representation of the rest of the States in both the Senate and the House. In the Senate, because granting Puerto Rico two senators will increase the total membership of the Senate, the representation of the other States in the Senate will decline as a proportion of the whole, arguably "impair[ing]" their representation. Similarly, if the total number of representatives in the House of Representatives were to be increased beyond its current number of 435 with the addition of representatives from Puerto Rico, then the representation of current States as a proportion of the whole would decline, again arguably "impair[ing]" their representation. If, on the other hand, the total number of representatives were to remain fixed at 435, then the fact that Puerto Rico had achieved representation would necessarily mean that at least one State would have fewer representatives. The representation of that State (or States) would arguably be "impair[ed]" in two ways: its number of representatives in the House would decline, and (like all the other States) its representation would decline as a proportion of the whole.[2]

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[2] In the past, Congress permanently increased the number of representatives in the House when new States were admitted. Most recently, however, when Hawaii and Alaska were admitted in 1959, the number of Members of Congress was temporarily increased (from 435 to a total of 437) by the addition of a representative from each of these States; following the 1960 census, however, the number of representatives returned to 435, and the House was reapportioned. *See* Comptroller General, *Puerto Rico's Political Future: A Divisive Issue with Many Dimensions* 103 (1981).

Moreover, the clause "maintaining the present Constitution of Puerto Rico and the same Commonwealth laws" contained in the Statehood option could be read as stating that the admission of Puerto Rico as a State would have no effect on the constitution and laws of Puerto Rico. Such a statement might not be entirely correct. Currently, not all provisions of the United States Constitution are fully applicable to Puerto Rico. *See Balzac v. Porto Rico*, 258 U.S. 298, 304-314 (1922) (Sixth Amendment right to jury trial not applicable in Puerto Rico); *Downes*, 182 U.S. at 291 (White, J., concurring in the judgment) (explaining that only constitutional provisions that are "of so fundamental a nature that they cannot be transgressed" apply to unincorporated territories such as Puerto Rico). If Puerto Rico were to become a State, however, it would then be subject to the entire Constitution. In that event, some aspects of Puerto Rico's constitution and laws might be preempted by the Constitution pursuant to the Supremacy Clause, U.S. Const. art. VI, cl. 2. Similarly, the admission of Puerto Rico as a State might extend to Puerto Rico some federal statutes that may be deemed not to apply to Puerto Rico at present because they are written to apply only in the several States. If so, then under the Supremacy Clause those statutes would also preempt aspects of Puerto Rican law with which they conflict (although it should be noted that Congress currently has power to preempt laws of Puerto Rico).

2. Independence

The Independence proposal contains certain provisions regarding citizenship. Specifically, it states:

> The residents of Puerto Rico shall owe allegiance to, and shall have the citizenship and nationality of, the Republic of Puerto Rico. Having been born in Puerto Rico or having relatives with statutory United States citizenship by birth shall no longer be grounds for United States citizenship; except for those persons who already had the United States citizenship, who shall have the statutory right to keep that citizenship for the rest of their lives, by right or by choice, as provided by the laws of the Congress of the United States.

This proposal could be read as having two possible meanings: it could mean that persons already holding United States citizenship based on their birth in Puerto Rico or on the birth of their relatives have a right to that citizenship and that Congress must legislate in a way that makes provision for that right; or, it could mean that Congress has discretion to decide whether persons who have United States citizenship by virtue of their birth in Puerto Rico (or by virtue of having United States citizen relatives) will retain that citizenship once Puerto Rico becomes independent.[3] At least the second reading raises the question whether statutory United States citizens residing in Puerto Rico at the time of independence would have a constitutionally

[3] We do not read the proposal to affect existing statutory provisions regarding U.S. citizenship for persons born outside the United States to a U.S. citizen parent or parents. *See* 8 U.S.C. §§ 1401, 1409.

protected right to retain that citizenship should Congress seek to terminate it.[4]

Although the proposal speaks of a "statutory right" to retain citizenship,[5] there is at least an argument that individuals possessing United States citizenship would have a constitutional right to retain that citizenship, even if they continue to reside in Puerto Rico after independence. *See Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) (rejecting the position that Congress has a "general power . . . to take away an American citizen's citizenship without his assent"). On the other hand, there is also case law dating from the early republic supporting the proposition that nationality follows sovereignty. *See American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828) (Marshall, C.J.) (upon the cession of a territory the relations of its inhabitants "with their former sovereign are dissolved, and new relations are created between them, and the government which has acquired their territory. The same Act which transfers their country, transfers the allegiance of those who remain in it."); *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 162 (1892) ("Manifestly the nationality of the inhabitants of territory acquired by . . . cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal, or otherwise, as may be provided."); *United States ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898, 902 (2d Cir. 1943) (describing *Canter* as recognizing a "generally accepted principle of international law" that "[i]f the inhabitants [of a newly independent nation] remain within the territory [of the new nation] their allegiance is transferred to the new sovereign."). *See also Restatement (Third) of The Law of Foreign Relations* § 208 (1987) (observing that "[n]ormally, the transfer of territory from one state to another results in a corresponding change in nationality for the inhabitants of that territory" and that, in some cases of territory transfer, inhabitants can choose between retaining their former nationality and acquiring that of the new state). In view of the tension between *Afroyim* and cases such as *Canter*, it is unclear whether the Independence proposal's possible provision for congressional revocation of United States citizenship passes constitutional muster. *See* Treanor Testimony at 19 (reserving the constitutional issue of whether, upon independence, it would be permissible to terminate non-consensually the United States citizenship of residents of Puerto

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[4] If such persons do have a constitutionally protected right to retain their United States citizenship even as they acquire Puerto Rican citizenship, then Puerto Rican independence could result in a significant number of people acquiring dual citizenship. While this letter does not address the policy implications of such dual citizenship, we do not think it would run afoul of any constitutional stricture.

[5] It is the Department's position that the source of the citizenship of those born in Puerto Rico is not the Fourteenth Amendment, but federal statute, specifically 8 U.S.C. § 1402 (1994). *See* Statement of William M. Treanor, Deputy Assistant Attorney General, Office of Legal Counsel, Before the House Comm. on Resources, 106th Cong. 18 (Oct. 4, 2000) ("Treanor Testimony"); *Puerto Rico: Hearings on H.R. 856 and S. 472 Before the Senate Comm. on Energy and Natural Resources*, 105th Cong. 148 (1998) (statement of Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice). That point is separate, however, from the question whether the Constitution protects that citizenship once it is statutorily conferred, and, if so, to the same extent as it protects "Fourteenth Amendment citizenship."

Rico).[6]

The Independence proposal also provides that "Puerto Rico and the United States shall develop cooperation treaties, including economic and programmatic assistance for a reasonable period, free commerce and transit, and military force status." Viewing this language as part of a ballot option for the people of Puerto Rico, we understand it as a possible proposal to be made by Puerto Rico to Congress. We do not, therefore, read the use of the word "shall" to impose on the United States any obligation to enter into certain treaties with an independent Puerto Rico. Moreover, if the proposal did purport to impose such an obligation, we would construe its language as precatory, not binding, in order to preserve the sovereign prerogatives of the United States. We discuss this point in greater detail *infra* at 7-9.

3. New Commonwealth[7]

The New Commonwealth proposal describes Puerto Rico as "an autonomous political body, that is neither colonial nor territorial, in permanent union with the United States under a covenant that cannot be invalidated or altered unilaterally." Our analysis of this proposal is based on two general premises, which we will outline before proceeding to address specific aspects of the proposal.

The first premise is that the Constitution recognizes only a limited number of options for governance of an area. Puerto Rico could constitutionally become a sovereign Nation, or it could remain subject to United States sovereignty. It can do the latter in only two ways: it can be admitted into the Union as a State, U.S. Const. art. IV, § 3, cl. 1, or it can remain subject to the authority of Congress under the Territory Clause, U.S. Const. art. IV, § 3, cl. 2. *See National Bank v. County of Yankton*, 101 U.S. 129, 133 (1879) ("All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress."). The terms of the Constitution do not contemplate an option other than sovereign independence, statehood, or territorial status.

Although Puerto Rico currently possesses significant autonomy and powers of self-government in local matters pursuant to the Puerto Rican Federal Relations Act, Pub. L. No. 81-600, 64 Stat. 319 (1950) (codified at 48 U.S.C. §§ 731b-731e (1994)) ("Public Law 600"), that statute did not take Puerto Rico outside the ambit of the Territory Clause. In *Harris v. Rosario*,

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[6] It should be noted that in 1991 the Department of Justice did not treat this question as unsettled. *See* Thornburgh Testimony at 206-07 (suggesting that should Puerto Rico become independent, its residents "should be required to elect between retaining United States citizenship (and ultimately taking up residence within the United States . . .)," and citizenship in the new republic of Puerto Rico.).

[7] Our comments on the New Commonwealth proposal are based in part on, and are intended to be consistent with, the October 4, 2000 testimony of Deputy Assistant Attorney General William M. Treanor before the House Committee on Resources. *See* Treanor Testimony, *supra* at n.5.

446 U.S. 651 (1980) (per curiam), for example, the Court sustained a level of assistance for Puerto Rico under the Aid to Families with Dependent Children program lower than that which States received, and explained that "Congress, which is empowered under the Territory Clause of the Constitution to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States,' may treat Puerto Rico differently from States so long as there is a rational basis for its actions." *Id.* at 651-52 (internal citation omitted). *See also Califano v. Torres*, 435 U.S. 1, 3 n.4 (1978) (per curiam) ("Congress has the power to treat Puerto Rico differently, and . . . every federal program does not have to be extended to it."). The Department of Justice has long taken the same view,[8] and the weight of appellate case law provides further support for it. *See, e.g., Mercado v. Commonwealth of Puerto Rico*, 214 F.3d 34, 44 (1st Cir. 2000) ("[U]nder the Territorial Clause, Congress may legislate for Puerto Rico differently than for the states."); *Davila-Perez v. Lockheed Martin Corp.*, 202 F.3d 464, 468 (1st Cir. 2000) (affirming that Puerto Rico "is still subject to the plenary powers of Congress under the territorial clause."); *United States v. Sanchez*, 992 F.2d 1143, 1152-53 (11th Cir. 1993) ("'Congress continues to be the ultimate source of power [over Puerto Rico] pursuant to the Territory Clause of the Constitution.'") (quoting *United States v. Andino*, 831 F.2d 1164, 1176 (1st Cir. 1987) (Torruella, J., concurring), *cert. denied*, 486 U.S. 1034 (1988)), *cert. denied*, 510 U.S. 1110 (1994).[9]

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[8] This position has been expressed in briefs filed in federal court by past Solicitors General. *See, e.g.*, Jurisdictional Statement of the United States at 10-11, *Harris v. Rosario*, 446 U.S. 651 (1980) (No. 79-1294). It has also been taken in memoranda and opinions issued by the Office of Legal Counsel. *See, e.g.*, Memoranda for Linda Cinciotta, Director, Office of Attorney Personnel Management, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Interpretation of the Term "Territory" in the Department of Justice Appropriations Act* (July 31, 1997); Memorandum for Lawrence E. Walsh, Deputy Attorney General, from Paul A. Sweeney, Acting Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 5926, 86th Cong., 1st Sess., a bill "To provide for amendments to the compact between the people of Puerto Rico and the United States"* (June 5, 1959). In a 1963 opinion, the Office of Legal Counsel treated the legal consequences of Public Law 600 as an open question and did not resolve it. *See Memorandum Re: Power of the United States to Conclude with the Commonwealth of Puerto Rico a Compact Which Could Be Modified Only by Mutual Consent* (July 23, 1963).

[9] We acknowledge, however, that the First Circuit has not always spoken with a single voice on this question. *See, e.g., United States v. Andino*, 831 F.2d 1164 (1st Cir. 1987) (prevailing opinion), *cert. denied*, 486 U.S. 1034 (1988)); *United States v. Quinones*, 758 F.2d 40, 42 (1st Cir. 1985) ("[I]n 1952, Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress as provided in the Federal Constitution."); *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 41 (1st Cir. 1981) (Breyer, J.) (stating that following the passage of Public Law 600, "Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth."); *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956) (Magruder, J.) (maintaining that to say that Public Law 600 was "just another Organic Act" for Puerto Rico would be to say that Congress had perpetrated a "monumental hoax" on the Puerto Rican people). Notwithstanding these inconsistencies, we believe the more recent First Circuit and other appellate decisions correctly state the law and properly recognize that the Supreme Court's decision in *Harris* is controlling.

We also acknowledge that the Federal Circuit's opinion in *Romero v. United States*, 38 F.3d 1204 (Fed. Cir. 1994), found that, for purposes of 5 U.S.C. § 5517, Puerto Rico is not a "State," "territory," or "possession." We read that opinion as addressing questions regarding the terms of that particular statute alone.

The second premise is that, as a matter of domestic constitutional law, the United States cannot irrevocably surrender an essential attribute of its sovereignty. *See United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996) (The United States "may not contract away 'an essential attribute of its sovereignty.'") (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977)); *Burnet v. Brooks*, 288 U.S. 378, 396 (1933) ("As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations."). This premise is reflected in the rule that, in general, one Congress cannot irrevocably bind subsequent Congresses. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.) (noting that legislative acts are "alterable when the legislature shall please to alter [them]."); *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.) (recognizing the general rule that "one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature," while holding that vested rights are protected against subsequent congressional enactments). Moreover, as the Supreme Court has recognized, treaties and other covenants to which the United States is party stand, for constitutional purposes, on the same footing as federal legislation. *See Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam) ("We have held 'that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'") (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion)). Thus, to the extent a covenant to which the United States is party stands on no stronger footing than an Act of Congress, it is, for purposes of federal constitutional law, subject to unilateral alteration or revocation by subsequent Acts of Congress. As the Court explained in *Whitney v. Robertson*, 124 U.S. 190, 194 (1888):

> When the stipulations [of a treaty] are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether.

This second premise applies to the exercise of presidential powers as well as to the exercise of congressional powers. Thus, a compact could not constitutionally limit the President's power to terminate treaties by requiring that he not exercise that power in the context of that compact without first obtaining the consent of the other signatories to the compact. *Cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (President has "plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations"); *Goldwater v. Carter*, 617 F.2d 697, 703-09 (D.C. Cir.) (en banc), *rev'd on other grounds*, 444 U.S. 996 (1979) (finding that the President has constitutional authority to terminate a treaty); *Goldwater*, 444 U.S. at 1007 (Brennan, J., dissenting) (President's power to recognize the People's Republic of China entailed power to abrogate existing defense treaty with Taiwan).

With these two premises established, we turn now to analyzing the New Commonwealth proposal. The threshold point to consider is what type of status the proposal contemplates for Puerto Rico. Parts of the New Commonwealth proposal appear to contemplate Puerto Rico's becoming an independent Nation,[10] while others contemplate Puerto Rico's remaining subject to United States sovereignty to some degree.[11] To the extent that the proposal would thereby create for Puerto Rico a hybrid status, it runs afoul of the first premise discussed above. The proposal must be assessed against the constitutionally permissible status categories that exist, and the precise nature of the constitutional issues raised by the proposal turns in part on whether it is understood to recognize Puerto Rico as a sovereign nation or to maintain United States sovereignty over Puerto Rico.

First, regardless of whether the New Commonwealth proposal contemplates full Puerto Rican independence or continued United States sovereignty over Puerto Rico, the proposal's mutual consent provisions are constitutionally unenforceable. Article X of the proposal specifies that the New Commonwealth will be implemented pursuant to an "agreement between the people of Puerto Rico and the government of the United States," and provides that the agreement will have the force of a "bilateral covenant . . . based on mutual consent, that cannot be unilaterally renounced or altered."[12] If the proposal is read to maintain United States sovereignty over Puerto Rico, then, since the "enhanced" Commonwealth it contemplates would not be a State, it would necessarily remain subject to congressional power under the Territory Clause. It follows, then, that Congress could later unilaterally alter the terms of the covenant between the United States and Puerto Rico. *See District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 106 (1953) (explaining that delegations of power from one Congress to the government of a territory are generally subject to revision, alteration, or revocation by a later Congress); *see also* Thornburgh Testimony at 194 (stating that proposed legislation conferring on Puerto Rico "sovereignty, like a State" and making that status irrevocable absent mutual consent was "totally inconsistent with the

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[10] *See, e.g.*, Preamble (referring to Puerto Rico as a "nation," and describing the "natural right to self government" and "free will" of the people of Puerto Rico as "ultimate sources of their political power"); Article V(B) (referring to Puerto Rico's authority over international matters),

[11] *See, e.g.*, Preamble (describing Puerto Rico as being "in permanent union with the United States"); Article II (providing for continued United States citizenship for persons born in Puerto Rico); Article VIII (providing for federal court jurisdiction over matters arising from "provisions of the Constitution of the United States and of the Federal laws that apply to Puerto Rico consistent with this Covenant and not in violation [of] the laws of the Constitution of Puerto Rico"); Article XIII (providing that the Resident Commissioner of Puerto Rico shall be "considered a Member of the U.S. House of Representatives" for certain purposes).

[12] This mutual consent requirement appears in a number of places throughout the proposal. The Preamble states that Puerto Rico shall remain "in permanent union with the United States under a covenant that cannot be invalidated or altered unilaterally." Article II(A) provides that "[p]eople born in Puerto Rico will continue to be citizens of the United States by birth," and specifies that this rule "will not be unilaterally revokable"). *See also* Article XIII(e) (prohibiting unilateral alteration of the covenant by the United States by providing that "[a]ny change to the terms of this Covenant will have to be approved by the people of Puerto Rico in a special vote conducted consistent with its democratic processes and institutions.").

Constitution").[13]

If Puerto Rico is to become an independent nation under the New Commonwealth proposal, then the relationship between the United States and Puerto Rico would necessarily be subject to subsequent action by Congress or the President, even without Puerto Rico's consent. As a general matter, a treaty cannot, for purposes of domestic constitutional law, irrevocably bind the United States. *See supra* at 7-8. In particular, because the power to make and unmake treaties is "inherently inseparable from the conception" of national sovereignty, *Curtiss-Wright Export Corp.*, 299 U.S. at 318, it can not be contracted away. Thus, if Puerto Rico were to become independent, the New Commonwealth proposal's mutual consent requirements would be constitutionally unenforceable against the United States.[14]

The New Commonwealth proposal also contains certain provisions regarding the retention of United States citizenship. Specifically, it provides that "[p]eople born in Puerto Rico will continue to be citizens of the United States by birth and this citizenship will continue to be protected by the Constitution of the United States and by this Covenant and will not be unilaterally revokable."

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[13] Under the approach set forth in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), a different result would be warranted if the covenant called for in the New Commonwealth proposal had the effect of vesting rights in Puerto Rico's status as a commonwealth or in an element of that status, such as the mutual consent requirement. It is true that in 1963, the Office of Legal Counsel concluded that a mutual consent provision would be constitutional because Congress could vest rights in political status. *See Memorandum Re: Power of the United States to Conclude with the Commonwealth of Puerto Rico a Compact which Could be Modified Only by Mutual Consent* (July 23, 1963). But the Justice Department altered its position on that question during the administration of President Bush, *see* Thornburgh Testimony at 194, and the Office of Legal Counsel now adheres to that position. *See* Treanor Testimony at 15-16; Memorandum for the Special Representative for Guam from Teresa Roseborough, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Mutual Consent Provisions in the Guam Commonwealth Legislation* (July 28, 1994).

Two independent grounds support our current position that rights may not be vested in political status. First, after the issuance of the Department's 1963 opinion, the Supreme Court concluded that the Fifth Amendment's guarantee of due process applies only to persons and not to States. *See South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966). While *Katzenbach* was concerned with a State, its rationale suggests that a governmental body, including a territory such as Puerto Rico, could not assert rights under the Due Process Clause. Second, the modern Supreme Court case law concerning vested rights is limited in scope. While the Court has recognized that economic rights are protected under the Due Process Clause, *see, e.g., Lynch v. United States*, 292 U.S. 571 (1934), the case law does not support the view that there would be Fifth Amendment vested rights in a political status for a governmental body that is not itself provided for in the Constitution. *Cf. Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986) ("[T]he contractual right at issue in this case bears little, if any, resemblance to rights held to constitute 'property' within the meaning of the Fifth Amendment. . . . The provision simply cannot be viewed as conferring any sort of 'vested right' in the fact of precedent concerning the effect of Congress' reserved power on agreements entered into under a statute containing the language of reservation.").

[14] It is a separate question whether, or to what extent, the New Commonwealth proposal's mutual consent requirements would be binding under international law, and we do not address that question here.

This provision could be read in two different ways. First, it could be read as concerned only with persons born in Puerto Rico after the New Commonwealth proposal goes into effect. Understood as limited to these individuals, the proposal would confer United States citizenship on them unless and until Puerto Rico and the United States mutually agree to revoke it. Second, the text could be read as addressing the United States citizenship of all persons born in Puerto Rico, whether before or after the New Commonwealth proposal goes into effect.[15] Under this second reading, the proposal would preserve these individuals' citizenship subject to revocation by the mutual consent of Puerto Rico and the United States.

With respect to either reading, the mutual consent stipulation (i.e. that the grant of citizenship cannot be altered except by mutual consent) is, for the reasons discussed above, *see supra* at 8-9, constitutionally unenforceable. If that stipulation is set aside, the provision then reads as a simple grant of citizenship to certain persons born in Puerto Rico – either those born in Puerto Rico after the New Commonwealth proposal goes into effect, or all those born in Puerto Rico before and after such time. We see no constitutional impediment with that provision, regardless of how broadly it is read. However, whether that provision is itself alterable by a subsequent Act of Congress becomes a question of whether the United States citizenship of the persons covered by the provision is constitutionally protected. The answer to that question depends on how the provision is read (that is, whether it is read as addressing those born in Puerto Rico in the future, or as covering those already born in Puerto Rico, or both),[16] and may also depend on whether the New Commonwealth proposal in general is understood as creating an independent nation or as maintaining United States sovereignty over Puerto Rico.

We first address whether there would be any constitutional constraints on Congress's authority to provide that persons born in Puerto Rico in the future would not acquire United States citizenship by virtue of their birth in Puerto Rico. If Puerto Rico is to become an independent nation, then, while Congress may well have the power to provide (as the New Commonwealth proposal appears to contemplate) that persons born in Puerto Rico in the future shall acquire United States citizenship, we think Congress could also change that rule and provide that, in the future, birth in Puerto Rico shall no longer be a basis for United States citizenship.[17] If, however, Puerto Rico is to remain subject to United States sovereignty, then the answer is less clear. We are unaware of any case addressing the power of Congress to withhold prospectively non-Fourteenth Amendment citizenship from those born in an area subject to United States

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[15] One limitation to the scope of the clause should be noted: presumably it is not intended to apply to those residing outside of Puerto Rico at the time the proposal took effect.

[16] The proposal might also be read to refer to people born in Puerto Rico in the future, but before any future action by Congress to cease extending citizenship to persons born in Puerto Rico. Identifying the precise constitutional considerations relevant to that reading of the proposal would require further study.

[17] We do not, however, address whether Congress could also exclude residents of Puerto Rico from other statutory sources of United States citizenship, such as being born abroad to a United States citizen parent or parents.

sovereignty, when persons previously born in that area received statutory citizenship by birthright, and we think it is unclear how a court would resolve that issue.

Next, we consider whether the Constitution would permit Congress to revoke the United States citizenship of persons who already have such citizenship because they were born in Puerto Rico. If the New Commonwealth proposal is understood to maintain United States sovereignty over Puerto Rico, then we think Congress could not revoke the United States citizenship of persons who already possess that citizenship by virtue of their birth in Puerto Rico. As the Court explained in *Afroyim*, Congress lacks a "general power . . . to take away an American citizen's citizenship without his assent." 387 U.S. at 257. While not squarely faced with a case of statutory citizenship, the Court in *Afroyim* did not limit its decision to persons whose citizenship is based on the Fourteenth Amendment, and we think it should not be so confined.[18] Accordingly, while we find no constitutional impediment in the New Commonwealth proposal's provision that those born in Puerto Rico will retain their citizenship in the future, we do think that to the extent Puerto Rico is to remain subject to United States sovereignty, the provision is redundant (or at best declaratory) of an underlying constitutional requirement that such citizenship not be revoked once it is granted. If, on the other hand, Puerto Rico were to become an independent nation under the New Commonwealth proposal, then, as we noted in our discussion of the Independence proposal's treatment of citizenship, *see supra* at 4-5, it is unclear whether Congress could revoke the U.S. citizenship of persons already holding such citizenship at the time of independence. There is an argument that the Constitution would ensure that those who possessed United States citizenship at the time of Puerto Rican independence must be able to retain that citizenship after independence, *see Afroyim*, 387 U.S. at 257, but there is also case law supporting the proposition that nationality follows the flag. *See Canter*, 26 U.S. at 542. As noted, it is unclear how a court would resolve this issue.

The New Commonwealth proposal also provides for the election of a Resident Commissioner to "represent Puerto Rico before the Government of the United States and who will be considered a Member of the U.S. House of Representatives for purposes of all legislative matters that have to do with Puerto Rico." The applicable provision of the Constitution – Article

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[18] A counter-argument might be made based on the Supreme Court's decision in *Rogers v. Bellei*, 401 U.S. 815 (1971), which upheld the loss of citizenship of an individual who was born in Italy and who acquired citizenship under a federal statute because one of his parents was an American citizen. The statute required that persons claiming citizenship on that basis meet certain requirements of residency in the United States prior to their twenty-eighth birthday. The *Rogers* Court upheld the statute's provision for loss of citizenship for those who failed to meet the residency requirement. While the *Rogers* Court criticized *Afroyim*'s language concerning non-Fourteenth Amendment citizenship and based its own holding in part on the fact that Bellei's citizenship was not conferred pursuant to the Fourteenth Amendment, *see* 401 U.S. at 835, *Rogers* is best understood as addressing the legitimacy of pre-established requirements for statutorily conferred citizenship (including conditions subsequent such as the residency by age 28 requirement) when Congress grants citizenship to those who would not otherwise receive it directly by operation of the Fourteenth Amendment. That issue – of the legitimacy of pre-established requirements – is not relevant to Congress's powers to divest citizenship once it has been unconditionally conferred. *Afroyim* thus appears to be the most relevant precedent, and it supports the view that, so long as Puerto Rico remains under United States sovereignty, citizenship that has been granted is constitutionally protected.

I, Section 2, Clause 1 – provides that the House of Representatives "shall be composed of Members chosen every second Year by the People *of the several States*." (emphasis added). On its face, that provision would seem to mean that the Resident Commissioner from Puerto Rico could not be "considered a Member" of the House because, under the New Commonwealth proposal, Puerto Rico would not be a "State." While Congress has the ability to permit participation by representatives of the territories, *see Michel v. Anderson*, 14 F.3d 623, 630-32 (D.C. Cir. 1994) (holding that the House of Representatives had the authority to permit a territorial delegate (including the Resident Commissioner from Puerto Rico) to vote in the House's committees, including the Committee of the Whole), there are constitutional limits to the participation that would be permitted.

The New Commonwealth proposal contains a number of other provisions that may raise particular constitutional concerns if the proposal contemplates Puerto Rico remaining subject to United States sovereignty. The proposal authorizes Puerto Rico to "enter into commercial and tax agreements, among others, with other countries," and to "enter into international agreements and belong to regional and international organizations." The Constitution vests the foreign relations power of the United States, which includes the power to enter into treaties, in the federal government. *Curtiss-Wright Export Corp.*, 299 U.S. at 318. Specifically, Article I, Section 10, Clause 1 (the "Treaty Clause") prohibits States from entering into "any Treaty, Alliance, or Confederation." Under Article I, Section 10, Clause 3 (the "Compact Clause"), however, States are permitted, if authorized by Congress, to "enter into any Agreement or Compact . . . with a foreign Power." Read against the backdrop of these constitutional provisions, the New Commonwealth proposal raises several issues.

First, it is unclear whether either the Treaty Clause or the Compact Clause applies to Puerto Rico, since both clauses refer only to "State[s]." What little case law there is on this question is not in agreement. *Compare Venable v. Thornburgh*, 766 F. Supp. 1012, 1013 (D. Kan. 1991) (stating in dicta that "the compact clause addresses agreements between the states, territories and the District of Columbia."), *with Mora v. Torres*, 113 F. Supp. 309, 315 (D.P.R.) (concluding that "Puerto Rico is not a State, and the compact clause, as such, is not applicable to it."), *aff'd*, 206 F.2d 377 (1st Cir. 1953). If the two clauses do apply to Puerto Rico, then presumably the Compact Clause's provision for congressional authorization to enter into "Agreement[s] or Compact[s]" applies to Puerto Rico. Second, even if Congress may consent to Puerto Rico's entry into "Agreement[s] or Compact[s]," it is not clear that the"commercial and tax agreements" and "international agreements and . . . regional and international organizations" referred to in the New Commonwealth proposal would all constitute "Agreement[s] or Compact[s]" to which Congress may give its consent. As the Supreme Court has noted, the constitutional distinction between "Agreement[s] [and] Compact[s]," on the one hand, and "Treat[ies], Alliance[s], [and] Confederation[s]," on the other, is not easily discerned. *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 461-62 (1978) (noting that "the Framers used the words 'treaty,' 'compact,' and 'agreement' as terms of art, for which no explanation was

required and with which we are unfamiliar.").[19] Some "commercial and tax agreements" would be likely to qualify as "Agreement[s] or Compact[s]" under Article I, Section 10, Clause 3 of the Constitution. If so, then Congress may be able to authorize Puerto Rico to enter into such agreements. The status of the "international agreements and . . . regional and international organizations" referred to in the New Commonwealth proposal, however, is less clear. At least some of the agreements embraced in this phrase might constitute "Treat[ies], Alliance[s], or Confederation[s]" under Article I, Section 10, Clause 1. If so, then Puerto Rico may not constitutionally enter into them, with or without congressional consent. Third, even assuming Congress may authorize Puerto Rico to enter into at least some of the types of international agreements referenced in the New Commonwealth proposal, it is unclear whether Congress could, as apparently contemplated by the proposal, give Puerto Rico prospective blanket authorization to conclude such agreements. Although it is our view that, under the Compact Clause, Congress may consent in advance to a State's entering into certain international agreements,[20] there would still be a question whether advance consent over such a broad and unspecified range of agreements as is contemplated here would be an impermissible use of Congress's power.[21]

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[19] On one account (which traces back to Justice Story) of the distinction between the Treaty and Compact Clauses, the Treaty Clause's categorical prohibition refers to agreements of a political character such as one Nation would make with another, while the conditional prohibition of the Compact Clause on agreements with foreign countries refers to arrangements regarding the private rights of sovereigns, such as adjusting boundaries, making territorial acquisitions in another State, or harmonizing the internal regulations of bordering States. *See Louisiana v. Texas*, 176 U.S. 1, 16-18 (1900) (outlining Story's theory); *Virginia v. Tennessee*, 148 U.S. 503, 519-20 (1893) (same). Agreements between Puerto Rico and foreign countries regarding taxation and commerce seem unlikely to concern private sovereign rights; *a fortiori*, international agreements and membership in international or regional organizations would seem to be political in character. On this theory, therefore, the Treaty Clause, if applicable to Puerto Rico, could well bar *all* forms of international agreements mentioned in the bill.

[20] *See* Letter for the Hon. Caspar W. Weinberger, Director, Office of Management & Budget, from Ralph E. Erickson, Deputy Attorney General (Sept. 19, 1972); Memorandum for Nicholas deB. Katzenbach, Deputy Attorney General, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, Re: *Draft bill "To authorize the construction of certain international bridges," the proposed International Bridge Act of 1963* (July 18, 1963). The case law accords with that conclusion. *See Cuyler v. Adams*, 449 U.S. 433, 441 (1981) (advance congressional consent to certain interstate compacts relating to crime prevention and law enforcement); *Seattle Master Builders Ass'n v. Pacific Northwest Power and Conservation Council*, 786 F.2d 1359, 1363 (9th Cir. 1986) (even if advance congressional consent were "unusual," it would not be unconstitutional), *cert. denied*, 479 U.S. 1059 (1987); *see generally Virginia v. Tennessee*, 148 U.S. at 521 ("The Constitution does not state when the consent of congress shall be given, whether it shall precede or may follow the compact made . . . . In many cases the consent will usually precede the compact or agreement.").

[21] We have found little authority addressing the scope of permissible congressional delegation under the Compact Clause, and we note that potential "delegation" problems might arise whether or not the Compact Clause were thought to apply to Puerto Rico. *Compare Milk Industry Found. v. Glickman*, 132 F.3d 1467, 1473-78 (D.C. Cir. 1998) (analyzing issue arising under Compact Clause of delegation of authority to Executive Department), *with Philippine Islands--Postal Service*, 29 Op. Att'y Gen. 380 (1912) (analyzing without reference to Compact Clause whether Congress could delegate to government of Philippine Islands authority to negotiate and enter into international postal conventions). In either case, the breadth of the delegation contemplated here might raise constitutional concerns.

Finally, if Puerto Rico remains subject to United States sovereignty, the provision that Puerto Rico would "retain[] all the powers that have not been delegated to the United States" rests on a constitutionally flawed premise. This provision appears to attempt to create for Puerto Rico an analogue to the Tenth Amendment. But the legislative powers of a non-State region under the sovereignty of the United States are entirely vested in Congress. Because territories are created by the Nation, as a matter of constitutional law they can not delegate power to the Nation. As Chief Justice Marshall explained in *Canter*, "[i]n legislating for [the territories], Congress exercises the combined powers of the general, and of a state government." 26 U.S. at 546. And while Congress may delegate some of its powers over a territory to the territory itself, such delegation is, as discussed *supra* at 7-8, always subject to Congress's own plenary power to revise, alter, or revoke that authority. *See Thompson*, 346 U.S. at 106, 109; *United States v. Sharpnack*, 355 U.S. 286, 296 (1958).[22]

We hope this information is helpful to you. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

Robert Raben
Assistant Attorney General

cc: The Honorable Jeff Bingaman
Ranking Minority Member

[22] Other provisions of the Commonwealth proposal may present constitutional concerns. Article VIII makes jurisdiction of federal courts subject to the provisions of the Constitution of Puerto Rico, and article XIII concerns the creation of a mechanism by which application of United States laws to Puerto Rico will be subject to the laws of Puerto Rico.