104TH CONGRESS, 2d Session } HOUSE OF REPRESENTATIVES { REPT. 104–713 Part 1

# UNITED STATES-PUERTO RICO POLITICAL STATUS ACT

JULY 26, 1996.—Ordered to be printed

Mr. YOUNG of Alaska, from the Committee on Resources, submitted the following

## R E P O R T

together with

## DISSENTING AND ADDITIONAL VIEWS

[To accompany H.R. 3024]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 3024) to provide a process leading to full self-government for Puerto Rico, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

(a) SHORT TITLE.—This Act may be cited as the "United States-Puerto Rico Political Status Act".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:



**SEC. 2. FINDINGS.**

The Congress finds the following:

(1) Puerto Rico was ceded to the United States and came under this Nation's sovereignty pursuant to the Treaty of Paris ending the Spanish-American War

Concurrent Resolution 62 was transmitted by the four chairmen of the committees and subcommittees in the House of Representatives with primary jurisdiction over the status of Puerto Rico. The statement of February 29, 1996, subsequently was included in the Congressional Record to accompany introduction of H.R. 3024 on March 6, 1996 (See, Cong. Rec., March 6, 1996, E299–300, Appendix III).

*Differences between H.R. 3024 and other political status proposals for Puerto Rico*

H.R. 3024, the "United States Puerto Rico Political Status Act," is firmly grounded in U.S. practice regarding self-government for unincorporated territories over which this nation exercises sovereignty. The current territorial regime and less-than-equal citizenship status of Puerto Ricans does not constitute full self-government, and will not lead to a permanent status with guaranteed rights until one of the recognized forms of self-government is established through a process of self-determination.

After the U.S. Congress failed to approve legislation on Puerto Rico's political status in 1992, the Legislature of Puerto Rico authorized a local status vote in 1993. Under the local referendum law, each principal local political party in Puerto Rico was allowed to formulate the ballot definition for the political status option it endorses. The local political party endorsing "Commonwealth" adopted a ballot definition which promised:

> The terms of the "Commonwealth" relationship are binding upon Congress in perpetuity, enforceable under an unalterable "bilateral pact" giving Puerto Rico a "mutual consent" veto power over acts of Congress.
>
> Conversion of the current temporary unincorporated territorial status and limited statutory citizenship into permanent union with the U.S. and fully guaranteed citizenship equivalent to birth or naturalization in one of the States.
>
> Increases in Federal outlays to give Puerto Rico parity with the states in taxpayer-funded social spending in Puerto Rico, while at the same time continuing exemption from Federal taxation for U.S. citizens and corporations in Puerto Rico.
>
> Continuation of the possessions tax credits (Section 936 of the Internal Revenue Code), as well as entitlement to Federal programs and services, at the same time guaranteeing a right to fiscal autonomy and cultural separatism from the United States.

Given the unrealistic and misleading "have it both ways" nature of this definition, the most remarkable thing about the result of the 1993 referendum is that the "Commonwealth" option received only a slim plurality and less than a majority of the votes cast.

Unlike the 1993 plebiscite, the political status process contemplated by H.R. 3024 recognizes that resolution of Puerto Rico's political status is not something that is going to result from unilateral action by Puerto Rico. Certainly, there has been no suggestion to date that there will be a change of status that is not approved

by the people in a valid act of self-determination, but H.R. 3024 also establishes that the U.S. has a right to self-determination in its relationship with Puerto Rico. That is why a legitimate self-determination process requires a give-and-take between Congress and Puerto Rico to define and approve the options for change.

H.R. 3024 also recognizes that the current status of Puerto Rico is that of an unincorporated territory under U.S. sovereignty exercised by Congress under the Territorial Clause power, and that defines its relationship to the United States. The current "Commonwealth" system of local self-government has not altered the status of Puerto Rico or the underlying Constitutional relationship. While the territorial status and relationship has lasted nearly 100 years, the "Commonwealth" structure for local self-government organized under a territorial constitution authorized by Congress in the Puerto Rico organic statute is a 40 year arrangement which has not resulted in full self-government.

This "Commonwealth" status was a significant improvement over previous civil administration under the prior organic law, and the new local constitutional arrangements established in 1952 has had strengths of which the U.S. and Puerto Rico properly have been proud over the years. The problem that arises is that those who wish the "Commonwealth" arrangements were something other than what it is attempt to impose their theories and doctrines on the people of Puerto Rico and the people of the United States at the expense of accuracy and objectivity. Thus, as already discussed, any ballot option regarding "Commonwealth" must be formulated carefully based on realistic and correct statements of current law.

Since the current "Commonwealth" unincorporated status is not a basis for achieving full self-government, the original version of H.R. 3024 did not present the status quo as an option. Instead, a decision by the people not to approve any of the legally recognized alternatives for full self-government would have meant that the status quo would continue, and that any changes to the current relationship proposed by Puerto Rico would be made by Congress under the Territorial Clause. This approach mistakenly was perceived by some as one intended to exclude the "Commonwealth" option which received a plurality of votes in the 1993 local plebiscite. Of course, the 1993 definition of "Commonwealth" failed to present the voters with a status option consistent with full self-government, and it was misleading to propose to the voters an option which was unconstitutional and unacceptable to the Congress in almost every respect.

Still, to avoid even the perception of unfairness by otherwise rational people who might not appreciate the history of these issues, the version of H.R. 3024 which has been reported to the full House of Representatives expressly provides that the voters will have an opportunity in the form of ballot options to preserve the current "Commonwealth" status, defined in a manner consistent with the rulings of the U.S. Supreme Court regarding Puerto Rico's present status. In addition, on June 4, 1996, Congressman Elton Gallegly (R–CA), cosponsor of H.R. 3024 and Chairman of the Subcommittee on Native American and Insular Affairs, included in the Congressional Record a statement about this 1993 ballot definition of the "Commonwealth" status option (See, Appendix VII, Congressional

Record June 4, 1996). Consistent with that statement, the 1993 ballot definition of "Commonwealth" was offered as an amendment to H.R. 3014, only to be unanimously rejected by the Subcommittee of Native American and Insular Affairs at its mark up of this bill on June 12, 1996.

To understand H.R. 3024, Congress must realize it is the official position of the party of "Commonwealth" in Puerto Rico that there is no need for further self-determination in Puerto Rico. This position runs deeper than the short-term tactic of insisting that H.R. 3024 is unnecessary because "the people have spoken" and the 1993 definition of "Commonwealth" simply should be implemented. Everyone knows Congress is not going to implement a ballot option which not only received less than a majority of votes cast, but is unconstitutional and unacceptable as well.

The long-term strategy of the local party identified with "Commonwealth" is to win U.S. and international recognition that Puerto Rico enjoys a fully autonomous status within the U.S. Constitutional system. This is based on a misleading interpretation of the U.N. acceptance in 1953 of the U.S. decision to stop reporting to the world body on Puerto Rico due to the degree of internal self-government under the new constitution in 1952—as already discussed in this report. Even though the U.S. formally advised the U.N. and Puerto Rico all along that the authority of the local government was limited to internal affairs, and was subject to the U.S. Constitution and Federal law as determined by Congress and the courts, "Commonwealth" leaders recently confirmed the party's position that the U.N. findings in 1953 establish that Puerto Rico is a free state, associated with the U.S. but no longer an unincorporated territory subject to the authority of Congress under the Territorial Clause of the Constitution.

In support of this implausible and paradoxical position, the supporters of this hypothetical hybrid "Commonwealth" status in Puerto Rico assert that Puerto Rico already has a right to permanent union with the U.S. and guaranteed U.S. citizenship, and at the same time has a separate Puerto Rican nationality and sufficient separate sovereignty to conduct its own international relations. Indeed, until the U.S. Department of State intervened, in the late 1980s supporters of the extra-legal "Commonwealth" doctrine in the administration of a former Governor of Puerto Rico and President of the party of "Commonwealth" attempted to negotiate tax sparing treaties with foreign governments. Leaders of the party of "Commonwealth" still insist that in the future the "Commonwealth" of Puerto Rico as established in 1952 will be able to conduct treaty relations in its own name and right once the "misunderstanding" about the nature of the present status is "corrected."

To this day, the advocates of a revised "Commonwealth" status that creates a separate "nation" within the U.S. Constitutional framework also assert that P.L. 600, the Federal statute passed by Congress in 1950 which authorized adoption of the local constitution approved in 1952, created an "unalterable bilateral pact" which precludes Congress from making any changes in the state of Federal law applicable to the "Commonwealth" without the consent of Puerto Rico. (See 48 U.S.C. 731b–e). Coupled with the assertion

of separate international personality, this extra-constitutional political and ideological doctrine is nothing less than an attempt to convert the statutory delegation of Congressional authority over local affairs in 1952 into a de facto form of the international, treaty-based status of "free association" within the framework of the U.S. Constitution.

This "nation-within-a-nation" political strategy, which ultimately would usurp Federal authority if it were fully carried out, has been epitomized by the adoption of "Free Associated State" as the official Spanish language term for the present status, but using the unrelated term "Commonwealth" as the English term since it was deemed more familiar and acceptable to the United States. In a similar tactic, the language of Federal statutes describing the process for approving the local constitution in 1952 as being "in the nature of a compact" is cited by "Commonwealth" supporters as proof that the statute created a binding, treaty-like, government-to-government compact which—if it were true—would give Puerto Rico a political status superior to the states of the union.

The notion of an unalterable bilateral pact is predicated on the theory that the implied compact supposedly created in 1952 is mutually binding on Puerto Rico and the Congress. The principle of consent recognized in Public Law 600 with respect to establishment of local constitutional self-government respecting internal affairs is elevated, according to this revisionist theory, onto the plane of government-to-government mutuality, and on that basis it is concluded that there is a treaty-like relationship which can be altered only with mutual consent of both governments. This is precisely the relationship—based on separate sovereignty, nationality and citizenship—which exists between the U.S. and the Pacific island nations party to the Compact of Free Association which ended the U.S. administered U.N. trusteeship in Micronesia. See, Title II, Public Law 99–239.

While such a relationship presumably is available to Puerto Rico if that is the option chosen by the voters, and it is established by mutual agreement in accordance with U.S. policy and practice relating to free association as defined in international law, such a mutual consent relationship was not created in 1952. Indeed, the notion that an unalterable, permanently binding mutual consent political relationship can be instituted under the U.S. Constitution between an unincorporated territory and the Congress has been discredited. The Clinton Administration Justice Department has confirmed that mutual consent provisions are not binding on a future Congress, are not legally enforceable, and must not be used to mislead territorial residents about their political status and legal rights.

Specifically, on July 28, 1994, the Deputy Assistant Attorney General of the United States Department of Justice issued a legal opinion which included the following statement about "bilateral mutuality" in the case of Puerto

> The Department [of Justice] revisited this issue in the early 1990's in connection with the Puerto Rico Status Referendum Bill in light of *Bowen* v. *Agencies Opposed to Soc. Sec. Entrapment,* 477 U.S. 41 (1986), and concluded that there could not be an enforceable vested right in a political

> status; hence the mutual consent clauses were ineffective because they would not bind a subsequent Congress.

Dept. of Justice Memo, footnote 2, p. 2; See, Report on Joint Hearing of the Committee on Resources and Committee on International Relations, October 17, 1995, p. 312.

The Department of Justice (DOJ) memo also concludes that:

> A ballot definition of commonwealth based on the idea of an unalterable bilateral pact with mutual consent as the foundation "would be misleading," and that "honesty and fair dealing forbid the inclusion of such illusory and deceptive provisions * * *."
>
> Unalterable mutual consent pacts "raise serious constitutional issues and are legally unenforceable."
>
> Status definitions based on the notion of unalterable mutual consent pact should not be on a plebiscite ballot "unless their unenforceability (or precatory nature) is clearly stated in the document itself."

The DOJ memo offers, as a sympathetic exercise of discretionary authority by Federal officials rather than as of right, to honor as existing mutual consent provisions—such as that in the Northern Mariana Islands Covenant—even though "unenforceable" as a matter of law. Congress should not indulge such discretionary disposition of the political status and civil rights of U.S. citizens in the territories. Instead Congress must create a process that defines real status options under which the people of Puerto Rico will have real rights that are enforceable.

As explained above, Public Law 600 established a process for approval of a new constitution for local self-government, and was described as being "in the nature of a compact" because Congress determined that approval by the voters alone would not have been sufficient to institute constitutional government. Thus, joint action—including approval by the voters followed by approval of Congress—was required. The 1952 statute constituted precisely such a process, which was "in the nature of a compact" to organize a local constitutional government approved by the people to replace the previous local government established unilaterally by Congress.

The approval process for the local constitution did not alter Puerto Rico's status as an unincorporated territory or create a political status under international or domestic U.S. law which constitutes full self-government. This was made very clear at the time the Puerto Rico Federal Relations Act was approved by House Report 2275. Instead, it was intended that the "Commonwealth" would, as described in a Memorandum of the President regarding Puerto Rico signed by President Kennedy in 1961, "provide for self-government in respect of internal affairs and administration."

If Congress had intended for the U.S. to enter into a "compact of free association" on a plane of mutuality or at the international level (like the current compact between the U.S. and the Micronesian republics), Public Law 600 would not have prescribed a process which by definition was not a government-to-government or "bilateral" compact at all, but was "in the nature of a compact" limited to internal affairs and administration. Nor if "free association" or a binding, unalterable "bilateral pact" had been intended would

the U.S. have informed the U.N. and Puerto Rico that the U.S. Constitution and Federal law would still apply even after a local constitution was in place, and that the nature of the relationship would be subject to judicial interpretation as a matter of U.S. domestic law.

Given U.S. notification to the U.N. in 1953 that the nature of the "Commonwealth" would be "as may be interpreted by judicial decision," it is significant that in 1980 the U.S. Supreme Court did not adopt the "free association" theory of Puerto Rico's status, and ruled instead that Puerto Rico remains an unincorporated territory subject to the Territorial Clause. See *Harris* v. *Rosario,* 446 U.S. 651 (1980).

If the "have-it-both-ways" legal theory advanced by those who advocate the revisionist version of "Commonwealth" were to prevail, Puerto Rico would enjoy in perpetuity the most precious American rights of membership in the national union and guaranteed citizenship, without having to cast its lot or fully share risks and burdens with the rest of the American political family. But this expansive and unconstitutional "Commonwealth" mythology can not withstand scrutiny any longer.

While sometimes confusing the issue by trying to accommodate those on all sides of this matter, in relevant formal measures the Congress, the Federal courts and the last several Presidents have exercised their Constitutional powers with respect to Puerto Rico in a manner consistent with applicability of the Territorial Clause, continued unincorporated territory status and local self-government limited to internal affairs. See *U.S.* v *Sanchez,* 992 F.2d 1143 (1993). Supporters of the extra-constitutional theory of "Commonwealth" explain this away as merely demonstrating the need to perfect the free association with permanent union and common citizenship which they insist in the status the U.S. and U.N. recognized in 1953.

For example, supporters of the expansive theory of "Commonwealth" often cite the case of *U.S.* v. *Quinones,* 758 F.2d. 40, (1st Cir. 1985), because dictum in that opinion adopted some of the nomenclature of the "commonwealth" doctrine. However, the Department of Justice has pointed out that reliance on this dictum to advance the expansive and revisionist theory of "Commonwealth" is contradicted by the actual ruling of the court in that case, which upheld a Federal law unilaterally altering the 1952 constitution and the Puerto Rico Federal Relations Act without the consent of Puerto Rico. See, Appendix VIII, GAO/HRD–91–18, The U.S. Constitution and the Insular Areas, April 12, 1991, Letter to GAO from Assistant Attorney General of the United States.

H.R. 3024 is the most significant decolonization measure for Puerto Rico offered in the last 100 years. By offering Puerto Ricans full self-government through statehood or real separate sovereignty, and defining the option of continued "Commonwealth" based on an accurate account of existing law, H.R. 3024 will end the ambiguity and internal inconsistency that has eroded the moral and Constitutional basis of Federal policy toward the territory for more than 40 years.