

UNITED STATES-PUERTO RICO POLITICAL STATUS ACT

—————
JUNE 12, 1997.—Ordered to be printed
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Mr. YOUNG of Alaska, from the Committee on Resources,
submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 856]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 856) 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. 1. Short title, table of contents.

Sec. 2. Findings.

Sec. 3. Policy.

Sec. 4. Process for Puerto Rican full self-government, including the initial decision stage, transition stage, and implementation stage.

Sec. 5. Requirements relating to referenda, including inconclusive referendum and applicable laws.

Sec. 6. Congressional procedures for consideration of legislation.

Sec. 7. Availability of funds for the referenda.

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 in 1898. Article IX of the Treaty of Paris recognized the authority of Congress to provide for the political status of the inhabitants of the territory.

Act (Act of April 12, 1900, c. 191. 31 Stat. 77). Shortly thereafter the Supreme Court ruled that Puerto Rico and the other territories ceded under the Treaty of Paris had the status of unincorporated territories subject to the plenary authority of the U.S. Congress under the Territorial Clause, and that the Constitution and laws of the U.S. would apply in such U.S. possessions as determined by Congress. *Downes v. Bidwell*, 182 U.S. 244 (1901); *Dorr v. United States*, 195 U.S. 138 (1904).

Puerto Ricans' citizen status

In 1904 the Supreme Court confirmed that under the Foraker Act the people of Puerto Rico—as inhabitants of a territory which had come under U.S. sovereignty and nationality—were not “aliens” under U.S. immigration law, and were entitled at home or abroad to the protection of the United States. *Gonzales v. Williams*, 195 U.S. 1 (1904). While recognizing that the territory and its residents had come within U.S. nationality by operation of Article IX of the Treaty of Paris, in accordance with that same provision of the Treaty the Court left to Congress the authority and responsibility to determine the citizenship status and rights of the Puerto Rican body politic under U.S. sovereignty.

Thus, under the Foraker Act the residents and persons born in Puerto Rico were classified under Federal law as “citizens of Puerto Rico” until 1917. Under the Jones Act (Act of March 2, 1917, c. 145, 39 Stat. 961), Congress extended statutory U.S. citizenship to residents of Puerto Rico, but less than equal civil rights, and statutory rather than Constitutional citizenship of Puerto Rican residents continued under that arrangement due to the continuation of unincorporated territory status.

The Jones Act also reorganized local civilian government, but in contrast to the incorporation of Alaska, or the determination of Congress in 1916 that the unincorporated territory status of the Philippines would be terminated in favor of independence (39 Stat. 546), the Jones Act for Puerto Rico did not resolve the question of an ultimate status for the territory. Even after internal self-government was established under Public Law 81-600 in 1952, statutory rather than Constitutional citizenship has continued under 8 U.S.C. 1402, and less than equal civil rights for persons born in the territory also continues, as discussed below.

For as long as unincorporated territory status continues, the extent to which rights under the U.S. Constitution apply to actions of the U.S. government in Puerto Rico will continue to be defined by Congress consistent with relevant decisions of the U.S. Supreme Court. For example, in addition to the measures adopted by Congress under the Jones Act in 1917, the U.S. Supreme Court ruled in *Balzac v. People of Puerto Rico*, 258 U.S. 298 (1922), that basic requirements for protection of fundamental individual rights govern the measures taken by our national government where it exercises sovereignty over persons or property.

Thus, under *Balzac* and later cases life, liberty and property cannot be taken without due process and other fundamental protections which apply any place in the world in which the U.S. government exercises sovereign powers of government over persons under

its jurisdiction, including unincorporated territories and other territories or properties owned by the U.S. but not a State of the Union.

However, the fact that the Federal Government is constrained from exercising sovereignty anywhere, including the unincorporated territory of Puerto Rico, in a manner that violates such fundamental rights does not mean that Congress has extended the U.S. Constitution or any part of it fully or permanently to such non-state areas, including Puerto Rico. In its 1957 decision in *Reid v. Covert* (354 U.S. 1), the Supreme Court stated that the exercise of U.S. sovereignty in unincorporated territories, as construed in the *Balzac* decision, “* * * involved the power of Congress to provide rules and regulations to govern *temporarily* territories with wholly dissimilar traditions and institutions * * *” [emphasis added].

As the Supreme Court stated in *Balzac*, for the purpose of determining where U.S. sovereignty, nationality and citizenship has been extended permanently and irrevocably, “It is locality that is determinative of the application of the Constitution. * * *” Unlike the States, unincorporated territories are not localities to which the Constitution has been extended permanently, nor has permanent union, permanent U.S. nationality or equal citizenship been established in such territories. Unless and until Congress extends the U.S. Constitution fully, this will be the condition of Puerto Rico’s status.

That is why even U.S. citizens born in a State, whose rights and status are protected by the 14th Amendment of the U.S. Constitution, lose the ability to enjoy equal legal and political rights when they go to reside in an unincorporated territory. As soon as a person with full Constitutional U.S. nationality and citizenship in the States of the Union establishes legal residence in Puerto Rico (see, 48 U.S.C. 733a), that person joins the ranks of the disenfranchised residents of the territory, and no longer has the same civil, legal or political rights under Federal law as citizens living in those territories and commonwealths which have been fully incorporated into the Union as States along with the original 13 States.

It has been recognized that Congress has broad discretion in making rules and regulations for the unincorporated territories, which measures must be promulgated and implemented in a manner which does not abuse personal rights of due process and equal protection. However, in relation to self-determination for Puerto Rico it is important to note that the fundamental rights requirement of *Balzac* and other cases does not preclude Congress from altering the political status of the territory through the appropriate U.S. Constitutional processes consistent with due process and equal protection principles. *U.S. v. Sanchez*, 992 F.2d 1143 (1993).

At this time no one expects the U.S. Congress to act arbitrarily or unilaterally with respect to status for Puerto Rico. However, an informed self-determination process requires that Congress and the people of Puerto Rico understand that current policy and statutory provisions may change in time, while fundamental Constitutional powers do not. It is impossible to predict what conditions will develop in the future or what measures Congress would determine necessary to promote the national interest if the status of Puerto

Rico remains subject to the discretion of Congress under the Territorial Clause.

Puerto Rico's "Commonwealth" status as a territory under Federal law

The current "Commonwealth of Puerto Rico" structure for local self-government was established through an exercise of the authority of Congress under the Territorial Clause (Article IV, Section 3, Clause 2) of the U.S. Constitution, pursuant to which the process for approval of a local constitution was prescribed and the current Puerto Rico Federal Relations Act was enacted. (Public Law 81-600, July 3, 1950, c. 446, 64 Stat. 319; *codified* at 48 U.S.C. 731 et seq.)

Public Law 81-600 authorized the process for democratically instituting a local constitutional government in Puerto Rico. The process prescribed by Congress included authorization for the people of Puerto Rico to organize a government under a constitution approved by the voters. Congressional amendment and conditional approval of the locally-promulgated constitution also was an element of the process, as was acceptance of the Congressionally-determined amendments by the Puerto Rican constitutional convention. This method of establishing a local government charter with consent of both the people and Congress is the basis for the language in Section 1 of Public Law 81-600 (48 U.S.C. 731b) describing the process as being in the "nature of a compact" based on recognition of the "principle of consent."

The subject matter of Public Law 81-600 was limited to organization of a local government as authorized by Congress under the Territorial Clause, and the very existence—as well as the actions of—the local government are subject to the supremacy of the Federal Constitution and laws passed by Congress. Thus, the authority and powers of the constitutional government established under the Public Law 81-600 process are a creation of Federal law, and the approval of the local constitution by the people constitutes their consent to the legal framework defined in Federal law for a form of self-government over internal affairs and administration.

Although Congress presumably would include some procedure which recognizes the principle of self-determination in changing the structure for local self-government in the future, the existing statutory authority for the current "commonwealth" structure can be rescinded by Congress under the same Territorial Clause power exercised to create it in the first place. Public Law 81-600 merely revises the previously enacted territorial organic act adopted by Congress in the 1917 Jones Act, and changes the name to the "Puerto Rico Federal Relations Act" (PRFRA). This analysis is confirmed by the legislative history of PRFRA (H. Rept. 2275), which states:

The bill under consideration would not change Puerto Rico's fundamental political, social, and economic relationship to the United States. Those sections of the Organic Act of Puerto Rico pertaining to the political, social, and economic relationship of the United States and Puerto Rico concerning such matters as the applicability of United States laws, customs, internal revenue, Federal judicial jurisdiction in Puerto Rico, Puerto Rican representation by a

As noted above with respect to Puerto Rico's status under U.S. domestic law, the Foraker Act of 1900, the Jones Act of 1917 and Public Law 81-600 each constitute measures to implement Article IX of the Treaty of Paris adopted by Congress in the exercise of its plenary authority over unincorporated territories under the Territorial Clause. However, the Treaty of Paris no longer is the only relevant international agreement regarding the status of Puerto Rico to which the U.S. is a party.

Specifically, after the United States became a party to the U.N. Charter, Puerto Rico was classified as a non-self-governing area under Chapter XI of the Charter, "Declaration Regarding Non-Self-Governing Territories." As such, the U.S. was designated to be a responsible administering power obligated under Chapter XI of the Charter to adhere to U.N. decolonization procedures with respect to Puerto Rico.

This included the specific requirement to transmit reports to the U.N. regarding conditions in the territory under Article 73(e) of Chapter XI of the Charter. In 1953 the U.S. informed the U.N. that it would cease to transmit information regarding Puerto Rico pursuant to Article 73(e) of the Charter based upon establishment of local constitutional government in Puerto Rico under Public Law 81-600. See, "Memorandum by the Government of the United States of America Concerning the Cessation of Transmission of Information Under Article 73(e) of the Charter with regard to the Commonwealth of Puerto Rico." (Appendix A).

Based on that communication from the United States, on September 27, 1953, the General Assembly of the United Nations, by a vote of 22 to 18 with 19 abstentions, adopted Resolution 748 (VIII), accepting the U.S. decision to cease transmission of reports regarding Puerto Rico. The formal United States notification to the U.N. that reporting on Puerto Rico would cease was based on the detailed memorandum to the U.N. Secretary-General which put the Members of the U.N. on notice that, among other things, the new constitutional arrangements in Puerto Rico were limited to "internal affairs and administration" subject to the applicable provisions of the U.S. Constitution, that the new local self-government would be administered consistent with the Federal structure of government in the U.S., and that the precise legal nature of the relationship and Puerto Rico's status was subject to judicial interpretation in the U.S. courts.

Thus, those who suggest that U.S. diplomats overstated the degree of self-government achieved under the Constitution to get the U.N. to go along may be partially right, but that is why countries submit written statements to clarify ambiguities and set the record straight. The formal, written communication which notified the U.N. of the U.S. position clearly and expressly limited the scope of constitutional self-government to local affairs and required compatibility with the Federal Constitution, including judicial interpretation of the relationship by the Federal courts. In this respect, it is correct to conclude the United States told the truth to the U.N. in 1953.

The following critical elements of Resolution 748 reveal that while there may have been a meeting of the minds between the U.N. and the United States as to the result of Resolution 748 for

the international purposes of the world body, the tension created between the U.S. Constitutional process for administering non-state areas under the Territorial Clause and the terms of reference employed by the U.N. in the resolution would contribute to decades of ambiguity which has been actively exploited in the debate between local political parties in Puerto Rico. The failure of Congress to more actively seek to resolve these ambiguities and the overall political status issue also has contributed to the confusion related to the non-binding but politically-relevant U.N. measures adopted in 1953.

The most critical elements of Resolution 748 include the following passages:

The General Assembly * * * Bearing in mind the competence of the General Assembly to decide whether a Non-Self-Governing Territory has or has not attained a full measure of self-government * * * Recognizes that the people of the Commonwealth of Puerto Rico, by expressing their will in a free and democratic way, have achieved a new constitutional status * * * Expresses the opinion that it stems from the documentation provided that the association of the Commonwealth of Puerto Rico with the United States has been established as a mutually agreed association * * * Recognizes that, in the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with the attributes of political sovereignty which clearly identify the status of the self-government attained by the Puerto Rican people as that of an autonomous political entity. * * *

The meaning and significance of this language from Resolution 748 must be understood in the context of Resolution 742 (VIII), also adopted by the General Assembly on September 27, 1953. That general resolution is entitled "Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government." Resolution 742 establishes the criteria for the General Assembly to determine "whether any Territory, due to changes in its Constitutional status, is or is no longer within the scope of Chapter XI of the Charter, in order that, in view of the documentation provided * * * a decision may be taken by the General Assembly on the continuation or cessation of the transmission of information required by Chapter XI of the Charter." In prescribing the conditions which provide a basis for, *inter alia*, cessation of reporting under Article 73(e), the provisions of the resolution regarding association between a territory and an administering power include the following statement of criteria:

The General Assembly * * * Considers that the manner in which Territories * * * can become fully self-governing is primarily through the attainment of independence, although it is recognized that self-government also can be achieved by association with another State * * * if this is done freely and on the basis of absolute equality * * * and the freedom of the population of a Territory which has as-

Similarly, in the 104th Congress, the United States-Puerto Rico Political Status Act, H.R. 3024, was first introduced in the U.S. Congress. See, Appendix III, House Report 104-713, Part 1, pp. 55-56. That bill and the statement included by its sponsors (including four committee and subcommittee chairmen with jurisdiction and interest in the status of the Puerto Rico) in the Congressional Record are strong evidence of continued U.S. recognition that Puerto Rico's decolonization process has not been completed as a matter of international or domestic law.

However, it is irrefutable that the United States has provided for an unprecedented level of local self-government in Puerto Rico since 1952. During the past four decades there have been continuing elections conducted pursuant to democratic processes under Puerto Rico law, often resulting in changes in government. Puerto Rico has indeed administered internal affairs and local matters without intrusion by the United States beyond that which is exercised by the Federal Government in the States of the Union. Although Puerto Rico has not yet achieved a permanent political status, given the local self-governance of the territory and the nature of the United States-Puerto Rico relationship, there is no basis for the United States to resume annual reporting to the U. N.

Puerto Rico's political status and self-determination process: recent developments and current situation

Following a failed attempt by Congress in 1991 to approve legislation to enable the people to exercise the right of self-determination regarding their political status, a plebiscite to enable the residents of Puerto Rico to express their preferences on the status question was conducted by the local government under Puerto Rican law on November 14, 1993. For the first time in almost a century of U.S. sovereignty, less than a majority of the voters approved the current status of the territory.

Indeed, none of the three options on the ballot—*independence, commonwealth or statehood*—received a majority of votes cast. Controversy ensued after the vote, and still continues, regarding the manner in which the local political parties were allowed—in the absence of status definitions approved by Congress—to define the options on the ballot.

Recognizing that Puerto Rico cannot unilaterally determine its ultimate status within a political framework to which the U.S. also is to be a party in agreement, and that the results of the 1993 plebiscite made further self-determination for Puerto Rico necessary, on January 23, 1997, the Legislature of Puerto Rico adopted Concurrent Resolution 2, requesting the 105th Congress to “* * * respond to the democratic aspirations of the American citizens of Puerto Rico” by approving legislation to authorize “* * * a plebiscite sponsored by the Federal Government, which shall be held no later than 1998.” (Appendix B).

Since, as discussed above, Puerto Rico does not enjoy equal participation or representation in the U.S. political and legal system through which the citizens of the territory are governed, the absence of a democratic majority among the people there in favor of the current commonwealth status as established under Federal law is cause for concern. Among other things, it raises a serious ques-

tion regarding the long-term viability of the present commonwealth structure of local self-government for Puerto Rico as an unincorporated territory subject to the authority of Congress.

The United States is the national body politic in which Puerto Rico presently exists, and Puerto Rico's relationship with the U.S. establishes the current status of the territory internationally and within the U.S. Constitutional and legal system. Thus, the process for approving any new relationship or change of the underlying status involves mutual self-determination by the U.S. as a whole as well as the local body politic composed of U.S. citizens born or residing in Puerto Rico. Thus, Congress also is an indispensable party in any process for defining the options which will be considered for approval by the voters on behalf of Puerto Rico, and by Congress itself on behalf of the United States.

The decision of a majority of the voters not to ratify the current status calls into question the legitimacy of the policy espoused by many in Congress and the Executive Branch to the effect that political leaders in the Federal Government simply should "remain neutral" and support the right of the people to choose their own status. That policy, which constitutes failure of the Federal Government adequately to inform the people of the territory as to what status options the U.S. is willing to consider, effectively deprives the residents of the territory of an opportunity for meaningful self-determination.

Accordingly, the Legislature of Puerto Rico's request in Resolution 2 for a Congressionally-sponsored self-determination process expressly recognized the record which was established regarding the status of Puerto Rico by the Committee on Resources during the 104th Congress. Specifically, the request recognizes the historical importance of the Statement of Principles transmitted by concerned Congressional leaders dated February 29, 1996, responding to a previous request from the Legislature of Puerto Rico to Congress asking for Federally-accepted definitions of status options and self-determination procedures.

In renewing the request to Congress for a Federally-recognized mutual self-determination process, the newly re-elected Legislature also noted in Resolution 2 that the signatories of the Statement of Principles dated February 29, 1996, had "fulfilled their pledge" to the people of Puerto Rico by introducing H.R. 3024 in the 104th Congress.

Resolution 2 goes on to note significant bipartisan sponsorship of H.R. 3024, as well as documentation in the record before Congress of strong support by distinguished Members of the Minority party in Congress for the approach to self-determination for Puerto Rico embodied in both H.R. 3024 and S. 2019—a companion bill in the U.S. Senate.

Resolution 2 the Legislature of Puerto Rico also explicitly notes adoption of House Report 104-713, Part 1 of which establishes that legitimate self-determination for Puerto Rico requires more than a one-stage decision-making process, as well as periodic referenda in the event of an inconclusive vote. The Committee on Rules also filed a report on H.R. 3024 (H. Rept. 104-713, Part 2).

Resolution 2 describes all these provisions embodied in H.R. 3024 and its accompanying reports as "well-founded" ones which rep-

This is an unrealistic and inaccurate rendition of 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 of Public Law 99-239.

While such a free association relationship is available to Puerto Rico if that is the option chosen by the voters, U.S. policy and practice relating to free association as defined in international law is not a status which exists within the U.S. Constitutional system. As an international status, free association is not a model which provides a basis for the assertion that a mutual consent relationship was created between Puerto Rico and the U.S. within the U.S. Constitutional system 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 Congress has been discredited and rejected by the U.S. Supreme Court as already discussed.

In addition, the Department of Justice (DOJ) 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 DOJ Deputy Assistant Attorney General issued a legal opinion which included the following statement about "bilateral mutuality" in the case of Puerto Rico: "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, Committee on Resources Hearing 104-56, p. 312. The DOJ memo also concludes that a ballot definition of "commonwealth" based on the idea of an unalterable bilateral pact with mutual consent at the foundation "would be misleading," and that "honesty and fair dealing forbid the inclusion of such illusory and deceptive provisions. * * *" The document goes on to state that 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.

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