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BEFORE THE HOUSE RESOURCES COMMITTEE

REGARDING FOREIGN RELATIONS AND CITIZENSHIP ISSUES PRESENTED BY H.R. 4751 ON STATUS OF PUERTO RICO

WEDNESDAY, OCTOBER 4, 2000

Mr. Chairman and members of the Committee:

I am pleased to have this opportunity to discuss some aspects of H.R. 4751, the proposed legislation on the future status of Puerto Rico.

Specifically, I am here to testify on three points: 1) the foreign relations aspects of the legislation, particularly the proposed provisions regarding Puerto Rico's ability to enter into agreements with foreign nations and participate in international organizations; 2) the implications of the proposal that residents of Puerto Rico be guaranteed U.S. citizenship; and 3) constitutional issues posed by the legislation as drafted, with respect to executive branch prerogatives in the conduct of foreign relations.

1) Foreign Relations Issues

As this Administration and previous ones have repeatedly stated, Puerto Rico is free to opt, in its own discretion, to become an independent nation or a nation in free association with the United States, and if such choice were made the United States would handle its foreign relations with Puerto Rico in much the same way it does with other sovereign nations. Puerto Rico would have full control over the handling of its foreign affairs, including decisions regarding whether to enter into treaties and agreements with other nations, and to become a member of international organizations.

The proposed legislation, however, would purport to make the Commonwealth a nation legally and constitutionally and provide it with many of the trappings of a sovereign nation, and yet at the same time would retain or create links to the United States that are inconsistent with sovereignty as that term is understood in international law. It is this hybrid nature of the arrangement contemplated in the legislation that renders the arrangement untenable as a functional matter. I will now address some of the specific reasons for this conclusion.

Under our system of government, the conduct of foreign affairs is constitutionally vested solely in the federal government. The exercise of a parallel and co-existing foreign affairs authority by a sub-federal unit of the United States would not only be unconstitutional, but retrogressive and impractical as well. The existing U.S. territories and commonwealths have different relationships with the Federal Government in terms of the degree of autonomy they exercise in the conduct of domestic affairs.

But a few general principles apply to all of them with respect to the conduct of foreign affairs. Just as with the States of the Union, there are many types of foreign activities in which a U.S. territory or commonwealth may choose to engage. Indeed, activities such as trade promotion and participation in cultural and sports events can be beneficial to the United States as a whole. At the same time, however, the Federal Government is responsible internationally for the affairs of the territories and commonwealths in precisely the same manner as for the States of the Union. The Federal Government is held responsible for meeting commitments relating to them and for ensuring that the obligations of other nations towards them are met. The efficacy of U.S. international relations accordingly depends upon the foreign activities of territories and

commonwealths, as well as of the States, fitting within the framework of an overall United States foreign policy. This point was central in the recent Supreme Court decision in the case of Crosby v. National Foreign Trade Council, 530 U.S. ___ (2000), in which the Court struck down a Massachusetts state law that barred state entities from buying goods and services from companies doing business with Burma, on the grounds (inter alia) that such law limited "the plenitude of Executive authority" by the federal government in the implementation of sanctions against Burma.

Not every foreign commitment must always apply in identical fashion to each of the territories and commonwealths as well as the States; there are in some instances considerations of local interests, geography, historical and cultural ties, and the like, which warrant application of certain arrangements with foreign governments to one or more of the territories or commonwealths and not to the States, or vice versa. But what is essential ultimately is that the component parts of U.S. foreign policy form a coherent and internally consistent whole. This cannot be accomplished if areas that are within U.S. control, or that are populated principally by U.S. citizens, conduct their own foreign affairs. It benefits neither the United States as a whole nor the territories and commonwealths if the United States is perceived as speaking with many, inconsistent voices internationally.

The founding fathers -- based on unhappy lessons learned under the Articles of Confederation -- wisely recognized this in framing our Constitution. The conclusion of international agreements, for example, is one of the most basic functions of foreign policy, and the framers emphasized the exclusive authority of the Federal Government with respect to foreign policy functions by inserting the following prohibition in Article I,

Section 10, Clause 1 of the U.S. Constitution: "No State shall enter into any treaty, alliance, or confederation." Clause 3 of that Section further provides: "No State shall, without the Consent of the Congress, enter into any Agreement or Compact with another State, or with a foreign power ...."

The juxtaposition of the foregoing provisions of Article I and Article IV, Section 3, Clause 2, of the Constitution concerning the power of the Congress to "make all needful Rules and Regulations respecting the Territory of the United States" raise a number of issues. Should the rules with respect to making international agreements applicable to the States be narrower than those made applicable to the territories by the Congress? How broadly should the term "Agreement" in clause 3 of Article I, Section 10 of the Constitution be read? Would the proposed legislation insofar as it refers to making international agreements be an unconstitutional delegation of authority by the Congress? These are questions that the Executive Branch is not prepared authoritatively to answer at this time.

The Department of State is concerned that a broad delegation of authority to Puerto Rico to make international agreements with respect to certain subjects could result in the simultaneous existence of different -- perhaps conflicting – obligations to foreign countries. Such cases could make it impossible for the United States to fulfill its responsibility to guarantee that all of its constituent units comply with U.S. treaty obligations. That is why a fundamental feature of the various organic instruments establishing the relationship between the Federal Government and the territories and commonwealths is that ultimate authority over the conduct of foreign relations is retained by the Federal Government.

This arrangement makes eminent sense, as one can envision the possible consequences of allowing a territory, commonwealth, State, or other political subdivision of the United States to enter into its own agreements. Let me posit, as an example, a hypothetical case in which a U.S. subdivision were to enter into an agreement to maintain information or cultural offices in Saddam Hussein's Iraq. Such an agreement could directly contradict, and interfere with, federal measures taken against Iraq, and at a minimum could embarrass the United States.

Under the current arrangement with Puerto Rico, matters of foreign relations and national defense are conducted by the United States, as is the case with the States of the Union. Thus, any actions by Puerto Rico that have implications on an international level must be consistent with the foreign policy set and pursued by the Federal Government. As a practical matter, this consistency is achieved through consultations with the State Department. In that process, as appropriate, the Department also obtains and coordinates the views of other Federal departments and agencies which may have an interest in any particular proposed activity. Where possible, the Department seeks to accommodate such proposed activity, so long as it is compatible with U.S. foreign policy.

Under the arrangement proposed in the legislation before us, however, Puerto Rico would be granted foreign policy prerogatives that could affect the foreign relations of the United States, and that could yield inconsistent foreign policy commitments and measures of the sort mentioned above. Although the framework calls for a "common defense, market, and currency" (Sec. 2(1)), it also provides that "the Commonwealth may arrange commercial and tax agreements, as well as other agreements, with other countries and belong to regional and international organizations ...." (Sec. 2(5); see also Sec.

3(17)). And although this grant of authority to Puerto Rico in the foreign affairs area is rendered subject to the "defense and security interests of the United States ..." it is not likewise subordinated to the United States' foreign policy interests. Moreover, the legislation contemplates that "the Commonwealth shall control its international trade ...." (Sec. 3(16)), and it is unclear how this provision would be compatible with having Puerto Rico be part of a common market with the United States. The potential for trade policies and measures inconsistent with those of the U.S., and possibly at odds with U.S. treaty obligations, is patent.

In sum, the hybrid nature of the status proposed for Puerto Rico in H.R. 4751 would render it impossible for the United States to maintain a unitary foreign policy with respect to all areas under its control or to maintain cohesive overall control over laws and policies affecting the entirety of the U.S. citizenry. For this reason, the Department of State opposes the provisions of the proposed legislation relating to the foreign affairs powers to be conferred on Puerto Rico, which would be untenable functionally in the overall context of the proposed arrangements for Puerto Rico's status.

2) Citizenship Issues

The Department of State opposes HR 4751's attempt to legislate dual nationality for residents of Puerto Rico. Our opposition is grounded in the recognition that the conferral of that status upon the citizens of another nation is wholly incompatible with the notion of sovereignty.

Moreover, our opposition is not based merely on conceptual difficulties in reconciling dual nationality with sovereignty. The United States takes seriously the protection of its citizens in other countries and devotes considerable consular resources to

assisting them. It is difficult to overestimate the size or complexity of the undertaking that would be necessary on the part of the United States Government to provide consular protection to United States citizens in Puerto Rico in the framework envisioned by this legislation. This is particularly true in light of Sec. 3 para. 13 of H.R. 4751, which states that U.S. citizens living in Puerto Rico would be "protected by all the rights, privileges and immunities conferred upon them by the United States Constitution" as well as the Constitution of Puerto Rico.

Under the proposed scheme, every action or decision of Puerto Rican government officials would be scrutinized to assess its impact on U.S. citizens, and, one could easily presume, challenged based upon considerations of United States law. Our consular officials would be asked to intervene in the day-to-day actions of local government. In this untenable state of affairs, the U.S. Embassy in San Juan, were there to be one, would function as a "shadow government," in effect, ever watchful of the interests and concerns of the millions of U.S. citizens in Puerto Rico.

In addition, given Sec. 3 para. 6 of the proposed legislation, which mandates that all persons born in Puerto Rico receive U.S. citizenship, the United States would be required to confer U.S. citizenship on persons whose admission to Puerto Rico it apparently would not control. This is an unacceptable surrender of sovereignty by the United States with profound consequences since birth in Puerto Rico would guarantee the right to enter, live, and work in any part of the United States.

3) Constitutional Issues

The proposed legislation makes reference to an agreement that the United States would need to enter into with Puerto Rico. The bill indicates that such agreement will

not be subject to unilateral nullification or change (see Sec. 1), and it also purports to dictate the structure and size of the U.S. negotiating team (Sec. 3, para. 21), and the dispute resolution mechanism that the parties would need to resort to if a controversy between the parties to the negotiation do not admit of solution (Sec. 3, para. 22). The Department believes that in this regard the legislation would encroach unconstitutionally on the foreign affairs prerogatives of the executive branch conferred on the President by Article II of the U.S. Constitution. The negotiation of agreements with foreign states (which is essentially what Puerto Rico would functionally constitute at the point of the proposed negotiations), including issues relating to the U.S. Government's negotiating team, and the articulation of terms for dispute resolution mechanisms to resolve controversies with foreign states, are essentially foreign relations functions, within the province of the executive branch. The legislation also directs the executive branch to support the entry by Puerto Rico into international organizations, and to "endorse Puerto Rico's participation or membership in agreements ...." Sec. 3, para. 17.

The Department of State therefore would oppose those provisions of the legislation that purport to constitute mandatory stipulations regarding the proposed agreement with Puerto Rico, the negotiation of such agreement, and related issues, as well as the decision of whether or not to endorse Puerto Rico's participation in particular international organizations or agreements, as all of these are matters with respect to which the U.S. Constitution confers responsibility solely on the executive branch.

Thank you, Mr. Chairman. I would be pleased to answer any questions the Committee members may have.

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