



Department of Justice

STATEMENT

OF

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ACTING DEPUTY ATTORNEY GENERAL

BEFORE

COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE
WASHINGTON, D.C.

CONCERNING

S. 712
A BILL TO PROVIDE FOR A REFERENDUM ON THE POLITICAL STATUS
OF PUERTO RICO

ON

JULY 11, 1989

Mr. Chairman and Members of the Committee:

It is a pleasure to be here today on behalf of the Administration to discuss S. 712, a bill "To Provide for a Referendum on the Political Status of Puerto Rico." This bill would provide for an island-wide referendum, to be held in 1991, on Puerto Rico's political status. If this bill were to become law, the referendum would present the voters of Puerto Rico with three options: (1) statehood; (2) independence; and (3) "enhanced commonwealth," each separately defined in the bill.

The Administration strongly supports the right of the people of Puerto Rico to choose their political status by means of a referendum. Further, as the President has noted a number of times, he favors the admission of Puerto Rico to the Union as a state, thereby assuring the people of Puerto Rico an equal standing with other United States citizens. However, while the referendum can present options that, if selected by a majority of the voters in Puerto Rico, can immediately be implemented; it is essential that clear choices be offered to the Puerto Rican people. Further, these choices must represent realistic, workable, and economically viable options. As presently drafted, many of the provisions of S. 712 are essentially extraneous to the ultimate goal of giving the Puerto Rican people such a choice

-- a goal that should not be obscured by confusing and unnecessarily detailed provisions.

I would like to highlight some of the provisions that would require revision before this important process goes forward. Please note that this discussion includes what we believe to be the most significant legal, constitutional and policy issues presented by the bill, and is not intended to be exhaustive. Further, as you know, the Departments of Treasury, State, Defense, Agriculture, Health and Human Services, Transportation, and the U.S. Trade Representative, will also be appearing before the Committee to address particular concerns they have with the legislation. Let me assure you, on behalf of the entire Administration, that we are eager to work with the Committee to establish clearly defined status options that can be presented to the Puerto Rican people.

A. TITLE II: STATEHOOD.

Title II of S. 712 defines a "statehood" choice for Puerto Rico. This option is the least problematic from a legal and constitutional standpoint. We do have several comments on the bill as drafted, but on the whole Title II currently represents a realistic status option.

1. Exploitation of the Continental Shelf.

Under Title II, as currently drafted, the new state would be granted the "exclusive right to explore, exploit, lease, possess and use all seabed, natural, and mineral resources lying within the two hundred mile economic zone continental shelf boundary around the waters of the Archipelago of Puerto Rico." (§ 5(b)). No state enjoys such wide authority over its coastal areas. The use and development of the United States coast and continental shelf is governed by the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315, and by the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. § 1331. Under these statutes, the states generally are entitled to utilize submerged lands within a three-mile boundary, while the Federal Government retains jurisdiction over the balance of the continental shelf. ^{1/} The legislation admitting both Alaska and Hawaii to the Union specifically required that they be covered by this statutory scheme. ^{2/} The Administration believes that the same provisions should be included in any act admitting Puerto Rico to the Union.

^{1/} By Proclamation No. 5928 (Dec. 27, 1988), the United States extended its territorial sea from three miles to a width of twelve miles. It was provided, however, that this extension would not "extend or otherwise alter existing Federal or State law or any jurisdiction, rights, legal interest or obligation derived therefrom."

^{2/} See Hawaii Statehood Act, Pub. L. 86-3, Mar. 18, 1959, 73 Stat. 4, § 5(i) [hereinafter Hawaii Statehood Act]; Alaska Statehood Act, Pub. L. 85-508, July 7, 1958, 72 Stat. 339, § 6(m) [hereinafter Alaska Statehood Act].

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2. Economic Adjustments.

The Administration recognizes and supports the realistic need to have an economically viable transition from commonwealth to statehood. A realistic transition is in the interest of the federal government, as well as Puerto Rico. Such transition provisions have been adopted in previous statehood bills. For example, when Alaska was admitted to the Union, the federal government made very significant land grants to the new state to help establish it on a sound fiscal footing. The Administration believes that a transition to statehood should result in no net revenue loss to Puerto Rico. The Administration would support a transition grant to Puerto Rico. The budgetary treatment of a transition to statehood should be consistent with sound budget discipline.

3. Attainment of Equal Social and Economic Status.

Title II also would require Congress to pass an "omnibus act" "to ensure that the people of Puerto Rico attain equal social and economic opportunities with the residents of the several States." (§ 16(c)). This provision is very problematic as the bill does not define "equal social and economic opportunities." Federal law, not to mention the Constitution, guarantees that individuals will not be discriminated against on account of race, religion, sex, age, or national origin. It does

not, however, guarantee equal social and economic rights or opportunities in a broader sense. It is impossible to foresee all of the implications of such a vague provision. But it is doubtful whether Congress truly could "ensure" that the people of Puerto Rico -- or any other group -- enjoy equal "social and economic opportunities," presumably in all spheres of life. The Constitution and laws can guarantee equality under the law, and forbid invidious discrimination. We doubt whether any legal code effectively could ensure equal social and economic opportunities.

B. TITLE III: INDEPENDENCE.

Title III of S. 712 details the independence option to be offered to the Puerto Rican people. As currently drafted, the provisions of Title III do not represent a total "independence" option. While the administration fully supports the right of the Puerto Rican people to chose independence, the serious constitutional and policy problems of Title III must be addressed. We discuss the most significant of these.

1. Unconstitutional Voter Qualifications.

Title III, § 2.1(b), strictly limits those entitled to vote for delegates to the convention responsible for drafting a constitution for an independent Puerto Rico. The franchise for this election would be restricted to residents born in Puerto

Rico, residents who have at least one parent born in Puerto Rico, 20 year residents, residents who established their residence before attaining voting age, and the spouses of voters who meet these qualifications.

At present, Puerto Rico is under the sovereignty of the United States, and is bound by the Equal Protection Element of the Due Process Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. See Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982). Voting qualifications based upon place of birth, parentage, or an excessively long residence requirement clearly violate those Equal Protection guarantees. This is so even if the limitations are imposed in an election in preparation of future independence.

2. Citizenship.

Under the independence provisions of S. 712, Puerto Rican residents would be entitled to maintain a dual citizenship, in both the United States and the new Republic of Puerto Rico ("RPR"). Allowing Puerto Rican residents to retain United States citizenship while becoming citizens of the new republic obscures the reality of independence for the Puerto Rican voter more than any other provision. Allowing such dual citizenship, while not

unconstitutional, is fundamentally inconsistent with granting full independence to the Island. ^{3/}

Moreover, under accepted principles of international law a transfer of sovereignty of a territory transfers the allegiance of those who remain in the territory from the former sovereign to the new sovereign. ^{4/} We believe that it is well within the authority of the Congress to require the residents of Puerto Rico at the time of independence, and who continue to reside there, to choose between their United States citizenship, and citizenship in the newly independent Puerto Rican Republic.

Requiring such a choice would be consistent with the Supreme Court's jurisprudence with respect to United States citizenship under the 14th Amendment. Citizenship acquired

^{3/} "Dual" citizenship is allowed on an individual basis. But this is quite different from allowing virtually the entire population of Puerto Rico to maintain American citizenship while nevertheless residing on foreign soil.

Indeed, when the Philippine Islands were granted their independence in 1946, both the residents of the new nation and Philippine citizens living in the United States lost their status as United States "nationals." It is true that the people of the Philippines never enjoyed full United States citizenship, but were only United States "nationals." While "nationality" is a lesser status than "citizenship," the principle remains the same; to effectively grant independence to Puerto Rico, her residents must chose between allegiance to the United States or allegiance to the new nation.

^{4/} See American Insurance Company v. Canter 26 U.S. (1 Pet.) 511, 542 (1828); United States ex rel. Schwarzkopf v. Uhl, 137 F.2d 898, 902 (2d Cir. 1943) and the authorities there cited; O'Connell, The Law of State Succession 246 (1956).

pursuant to the 14th Amendment, by birth or naturalization in the United States, is constitutionally protected. The Supreme Court has held, however, that Congress has authority to condition citizenship acquired outside of the territorial boundaries of the United States -- i.e., outside of the States, the District of Columbia, or a territory that actually has been "incorporated" into the United States. See Rogers v. Bellei, 401 U.S. 815 (1971).

Puerto Rico was not "incorporated" within the United States upon its acquisition from Spain, see Downes v. Bidwell, 182 U.S. 244 (1900), and Congress has never purported to effect such an incorporation. As a result, the citizenship of Puerto Rican residents is statutorily protected by the Jones Act, 39 Stat. 953, 8 U.S.C. § 1402 (1917), rather than by the 14th Amendment. Such citizenship is subject to reasonable statutory regulations. Consequently, it would be within Congress' authority to require Puerto Rican residents to choose between their United States citizenship and citizenship in the new republic.

3. Treaty of Friendship and Cooperation.

Title III of S. 712 also contains a number of provisions dealing with the relationship between the United

States and the RPR after independence. ^{5/} Section 6.1 would require that all of the provisions of the bill scheduled to take effect after the proclamation of independence be embodied in a treaty of friendship and cooperation between the RPR and the United States.

This provision is troublesome insofar as it attempts to define in detail the policy of the United States towards Puerto Rico after independence. The Constitution vests the authority to formulate and implement the foreign policy of the United States primarily in the President. Treaties are made by the President with the advice and consent of the Senate. We believe that such a detailed statutory scheme governing the future relationship of the United States and an independent Puerto Rico would violate the principle of separation of powers. For example, under the Constitution the President cannot be required to negotiate, and the Senate cannot be required to consent to, particular treaty provisions required in advance by statute.

^{5/} For example, the United States would be required to: "collaborate with" the RPR "toward the ultimate goal of disarmament, peace, and international relations based on the principles of equality, mutual respect and interdependence"; give the RPR particularly favorable trade treatment for a period of twenty years; maintain for twenty-five years a full income tax exemption on interest payments to holders of Puerto Rican bonds; aid Puerto Rico in the establishment of a deposit insurance system; and continue guarantees currently provided to investors in the secondary loan market.

Further, in addition to attempting to define United States policy toward a newly independent Puerto Rico, the bill attempts to define in detail the policy of the RPR towards the United States. The act must provide for a smooth transition to independence, if that is the result of the referendum. But it is imperative that both nations remain free to define their future relationships.

C. TITLE IV: COMMONWEALTH.

1. Enhanced Commonwealth Status.

Under Title IV of S. 712 Puerto Rico's present commonwealth status would be "enhanced" by a number of provisions. For example, in many instances federal legislation would be inapplicable to the Island, the President's right to appoint federal officials in Puerto Rico would be restricted to a list provided by the Puerto Rican Governor, Puerto Rico would be authorized to negotiate its own air transportation treaties, the functions of the National Labor Relations Board in Puerto Rico would be taken over by a Puerto Rican Labor Relations Board, special protection would be provided for Puerto Rican copyrights, and the Governor of Puerto Rico would be empowered to issue United States passports. This list is not exhaustive, but it does reflect issues that are of concern to the Administration.

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In many respects, the "enhanced" Commonwealth option would render the Island virtually independent of United States authority in many areas. It also would grant Puerto Rico much greater advantages than any other area under United States sovereignty that is not a State. So long as Puerto Rico remains under the sovereignty of the United States, it is essential that this fact be made clear beyond peradventure. Any statements that the Island is "autonomous" in the bill must make clear that this "autonomy" is limited to internal affairs, and that as a commonwealth Puerto Rico remains under the sovereignty of the United States. Congress retains the authority to legislate with respect to Puerto Rico, and federal law may not be preempted or nullified by the local government.

2. Federal Statutes and Regulations.

Subpart 4 of Title IV discusses the applicability of federal laws to Puerto Rico. Under current law, federal statutes "not locally inapplicable" within the meaning of section 734 of the Puerto Rico Federal Relations Act, ^{6/} have the same force and effect in Puerto Rico as in the United States. Under Title IV, however, any federal statute would be inapplicable to Puerto Rico unless it is consistent with a policy of allowing Puerto Rico: greater autonomy; "more equitable" participation in federal programs; greater participation in federal government decisions

^{6/} 48 U.S.C. § 734.

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affecting the Island; provides safeguards for Puerto Rico's "distinct cultural identity; and "has proper regard for the economic, cultural, ecological, geographic, demographic and other local conditions of the Commonwealth of Puerto Rico." 1/ Under this provision, the great bulk of federal legislation would become "locally inapplicable" to Puerto Rico. Only if Congress makes a certification of an overriding national interest would a particular federal law apply to Puerto Rico. Similar provisions would apply to federal rules and regulations.

Further, under Subpart 4, the Governor of Puerto Rico would be granted an unprecedented and truly extraordinary power to certify that a federal law or a federal regulation is inapplicable to Puerto Rico. The subsection would thereby confer on the Governor a significant authority pursuant to the laws of the United States. Such authority, however, may be vested only in an officer of the United States. 2/ The Governor of Puerto Rico is elected by the people of Puerto Rico. He is not an

1/ The bill provides four exceptions to this rule: laws relating to citizenship; laws providing grants or services for individuals; uniform laws involving defense or national security, and laws for which Congress makes a specific finding that there is an overriding national interest in the law's application to Puerto Rico.

2/ I.e., a person appointed pursuant to the Appointments Clause of the Constitution (Art. II, section 2, cl. 2). Such an officer must be appointed by the President by and with the advice and consent of the Senate or, where authorized by Congress, by the President alone, the courts of law, or the heads of departments. Buckley v. Valeo, 424 U.S. 1, 118-41 (1976).

officer of the United States. The power envisaged by subsections (c) and (f) of Subpart 4 therefore cannot constitutionally be vested in him.

3. Federal Appointments and Representation.

Subpart 13 of Title IV would provide that the highest ranking federal officials in Puerto Rico must be appointed by the President from a list of eligible candidates recommended by the Governor of Puerto Rico. A requirement that the President make appointments only from a list of candidates submitted to him is objectionable as a matter of constitutional law.

As noted above, the Appointments Clause of the Constitution (Art. II, section 2, cl. 2) requires that "officers of the United States" -- i.e., those persons who exercise "significant authority pursuant to the laws of the United States," Buckley v. Valeo, 424 U.S. 1, 126 (1976) -- be appointed by the President subject to the advice and consent of the Senate. "Inferior" officers may be appointed by the President alone where the Congress has vested this authority in him, or in the heads of the executive branch departments. The President's authority to nominate principal officers cannot be qualified by law.

Subsection 13 purports to permit the Governor of Puerto Rico to share in the President's appointment power, and to accord

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the Governor significant authority under the laws of the United States. Accordingly, we believe that the requirement that the President nominate officials from a list submitted by the Governor of Puerto Rico is unconstitutional and should be deleted.

4. Special Treatment Regarding Labor Relations Laws.

Under Title IV, Subpart 12, the National Labor Relations Board would no longer handle cases arising in Puerto Rico under the National Labor Relations Act; the NLRB's authority in such cases would be delegated to the Puerto Rican Labor Relations Board. Thus, the Puerto Rican Labor Relations Board would exercise significant authority pursuant to the laws of the United States, and perform a significant governmental duty pursuant to federal law. As mentioned above, such authority may only be delegated to, and exercised by, persons appointed pursuant to the Appointments Clause. Thus, in our view, this delegation would be subject to a serious constitutional infirmity.

5. Special Treatment Regarding Passports.

Additionally, under Title IV, Subpart 16(a), the Governor of Puerto Rico would be entitled to issue United States passports, and Subpart 16(b) would entitled the Governor to

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administer a United States passport office. We object to this entire subpart. The issuance of a passport constitutes the performance of a significant authority pursuant to the laws of the United States. As indicated above, such authority cannot be vested in the Governor of Puerto Rico.

Moreover, these functions have been strictly relegated to the Department of State. The United States under no circumstances should cede its power to determine nationality by the issuance of U.S. passports, nor should it cede regulation and control of its borders to any other authority. Apart from obvious constitutional concerns stemming from the same separation-of-powers arguments detailed earlier, and foreign policy concerns, there are sound practical reasons for opposing these provisions. Chief among these is law enforcement. Control over the issuance of U.S. passports and immigration must remain wholly within a federal authority if matters such as extradition and narcotics are to be approached and dealt with in a coordinated and effective fashion.

6. Special Treatment Regarding Federal Functions.

Finally, Subpart 20 would authorize the Government of the United States, or any agency thereof, to delegate to the Commonwealth of Puerto Rico the total or partial performance of functions vested in the United States. These functions would

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include the administration of such federal laws and programs on the Island, as may be mutually agreed. As explained above, the enforcement of federal laws cannot be vested in, or delegated to, persons not appointed in conformity with the Appointments Clause of the Constitution. To this extent, Subpart 20 would be unconstitutional.

CONCLUSION:

In conclusion, Mr. Chairman, let me again affirm that the Administration wholeheartedly supports a referendum allowing the people of Puerto Rico to determine what their continuing relationship with the federal government shall be. It is the hope of the Administration that the difficulties outlined above can be easily and expeditiously resolved. As drafted, S. 712 provides a first step in this direction, and we believe that it can be revised so as to structure a fair and workable referendum within the applicable constitutional parameters.

The Administration is committed to working with the Committee and the Congress to create a referendum vehicle that will enable the people of Puerto Rico to determine in a meaningful way whether, and how, to alter their Island's existing political relationship with the United States. I would be happy to address any questions the Committee may have.