

defeat of the Solomon amendment and the support of the substitute offered by the gentleman from Alaska (Mr. YOUNG) and the gentleman from California (Mr. MILLER) and others to assure that this historic opportunity is taken advantage of.

Mr. Chairman, H.R. 856 will enable Congress to administer and determine the status of Puerto Rico in the same manner this institution has been administering and decolonizing territories since the Northwest Ordinance of 1789. The historical constitutional practice of the United States has been to decolonize non-state territories which come under U.S. sovereignty by either full incorporation leading to statehood (as in the case of Alaska and Hawaii) or separate nationhood (Philippines).

For too long Puerto Rico has been diverted from the historical process of decolonization. Because local self-government was established under P.L. 81-600 in 1952, Congress has pretended that Puerto Rico could be administered permanently as a territory with internal constitutional self-government. However, the local constitution did not create a separate nation as the pro-commonwealth party in Puerto Rico argues. Puerto Rican born Americans are still disenfranchised in the federal political system which is supreme in the territory as long as the U.S. flag flies over the island.

Puerto Rico is not a "free associated state" in the U.S. constitutional sense or under international law as recognized by the United States. Puerto Rico remains a colony. That is not my choice of words, that is the term used by the McKinley Administration to describe Puerto Rico. It is also the term used by the former chief justice of the Puerto Rico Supreme Court who was one of the architects of the commonwealth constitution.

Because H.R. 856 will define the real and true options that the Congress and the people in Puerto Rico have to resolve the status question, I strongly support this bill. Informing the voters in the territory of the real definition of commonwealth, statehood and separate sovereignty including free association is necessary because of the misleading adoption in 1952 of the Spanish words for "free association" by the pro-commonwealth party to describe the current commonwealth status. No wonder people are confused!

Only when people understand the real options can there be informed self-determination, and only when there has been informed self-determination can Congress then decide what status is in the national interest. Then the status of Puerto Rico can be resolved if there is agreement on the terms for status change. If not the status quo continues, but the process to decolonize Puerto Rico will exist. Then Puerto Rico's colonial status will continue only as long as the people of Puerto Rico are unable to choose between statehood and independence on terms acceptable to Congress.

To promote a better understanding of the nature of free association, I would like to share the following background paper on free association written by the U.S. Ambassador who negotiated free association treaties for President Reagan. The U.S. has a free association relationship with three Pacific island nations, and this status is very different from the free association espoused by the so-called "autonomists in Puerto Rico"—who want to be a separate sovereign nation but also keep U.S. nationality and citizenship.

That "have it both ways" approach to free association was attempted in the case of the Micronesian Compact of Free Association, but the State Department, Justice Department and Congress rejected that model as unconstitutional and unwise. It was an attempt to "perfect" the legal theory of the Puerto Rican commonwealth as a form of permanent self-government, a nation-within-a-nation concept that has always failed and always will because the U.S. constitution does not allow a Quebec-like problem in our Federal system.

Ambassador Zeder's explanation of free association as an option for Puerto Rico makes the ground rules for this form of separate sovereignty very clear and easy to understand. I include his statement for the RECORD.

The statement referred to is as follows:

UNDERSTANDING FREE ASSOCIATION AS A FORM OF SEPARATE SOVEREIGNTY AND POLITICAL INDEPENDENCE IN THE CASE OF DECOLONIZATION OF PUERTO RICO

(By Ambassador Fred M. Zeder, II)

Consistent with relevant resolutions of the U.N. General Assembly, Puerto Rico's options for full self-government are: Independence (Example: Philippines); Free Association (Example: Republic of the Marshall Islands); Integration (Example: Hawaii). See, G.A. Resolution 1514 (1960); G.A. Resolution 1541 (1960); G.A. Resolution 2625 (1970).

For purposes of international law including the relevant U.N. resolutions international conventions to which the U.S. is a party, the current status of Puerto Rico is best described as substantial but incomplete integration. This means that the decolonization process that commenced in 1952 has not been fulfilled.

As a matter of U.S. domestic constitutional law, a territory within U.S. sovereignty which has internal constitutional self-government but is not fully integrated into the national system of political union on the basis of equality remains an unincorporated territory, and can be referred to as a "commonwealth." (Example: Puerto Rico and the Northern Mariana Islands).

For purposes of U.S. constitutional law, independence and free association are status options which are created and exist on the international plane. Thus, instead of the sovereign primacy of Congress under the territorial clause, the sources of constitutional authority with respect to nations with separate sovereignty include the article II, section 2 treaty-making power and the applicable article I, section 8 powers of Congress such as that relating to nationality and immigration law.

Relations between the U.S. and a nation which is independent or in free association are conducted on the basis of international law. Thus, independence and free association are status options which would remove Puerto Rico from its present existence within the sphere of sovereignty of the United States and establish a separate Puerto Rican sovereignty outside the political union and federal constitutional system of the United States.

Instead of completing the integration process through full incorporation and statehood, either independence or free association would "dis-integrate" Puerto Rico from the United States. This would terminate U.S. sovereignty, nationality and citizenship and end application of the U.S. Constitution in Puerto Rico. In other words, the process of gradual integration which began in 1898, and which was advanced by statutory U.S. citizenship in 1917 and establishment of constitutional arrangements approved by the people in 1952, would be terminated in favor of either independence or free association.

Under either independence or free association, the U.S. and Puerto Rico could enter into treaties to define relations on a sovereign-to-sovereign basis. Free association as practiced by the U.S. is simply a form of independence in which two sovereign nations agree to a special close relationship that involves delegations of the sovereign powers of the associated to the United States in such areas as defense and other governmental functions to the extent both parties to the treaty-based relationship agree to continue such arrangements.

The specific features of free association and balance between autonomy and interdependence can vary within well-defined limits based on negotiated terms to which both parties to the arrangement have agreed, but all such features must be consistent with the structure of the agreement as a treaty-based sovereign-to-sovereign relationship. In U.S. experience and practice, even where free association has many features of a dependent territorial status the sources and allocation of constitutional authority triggered by the underlying separation of sovereignty, nationality and citizenship causes the relationship to evolve in the direction of full independence rather than functional re-integration.

Free association is essentially a transitional status for peoples who do not seek full integration, but rather seek to maintain close political, economic and security relations with another nation during the period after separate sovereignty is achieved. Again, this could be accomplished by treaty between independent nations as well. Thus, free association is a form of separate sovereignty that usually arises from the relationship between a colonial power and a people formerly in a colonial status who at least temporarily want close ties with the former colonial power for so long as both parties agree to the arrangements.

Free association is recognized as a distinct form of separate sovereignty, even though legally it also is consistent with independence. Specifically, free association is consistent with independence because, as explained below, the special and close bilateral relationship created by a free association treaty or pact can be terminated in favor of conventional independence at any time by either party.

In addition, the U.S. and the international community have recognized that a separate nation can be a party to a bilateral pact of free association and be an independent nation in the conventional sense at the same time. For example, the Republic of the Marshall Islands is party to the Compact of Free Association with the United States, but has been admitted to the United Nations as an independent nation.

Thus, the international practice regarding free association actually is best understood as a method of facilitating the decolonization process leading to simple and absolute independence. Essentially, it allows new nations not prepared economically, socially or strategically for emergence into conventional independence to achieve separate nationhood in cooperation with a former colonial power or another existing nation.

Under international law and practice including the relevant U.N. resolutions and existing free association precedents, free association must be terminable at will by either party in order to establish that the relationship is consistent with separate sovereignty and the right of self-determination is preserved. This international standard, also recognized by the U.S., is based on the requirement that free association not be allowed to become merely a new form of internationally accepted colonialism.

Specifically, free association is not intended to create a new form of territorial status or quasi-sovereignty. It is not a "nation-within-a-nation" relationship or a form of irrevocable permanent union, but is, again, a sovereign-to-sovereign treaty-based relationship which is either of limited duration or terminable at will by either party acting unilaterally.

In other words, both parties have a sovereign right to terminate the relationship at any time. The free association treaty may provide for the terms and measures which will apply in the event of unilateral termination, but the ability of either party to do so can not be conditioned or encumbered in such a manner that the exercise of the right to terminate the relationship effectively is impaired or precluded.

For that reason, the territory and population of each nation involved must be within the sovereignty, nationality and citizenship of that nation, and the elements and mechanisms of the free association relationship must be defined consistent with that requirement. Separate and distinct sovereignty and nationality must be established at the time of decolonization and preserved under the relationship or the ability of either party to terminate will be impaired.

Thus, the major power may grant to people of the free associated nation special rights normally associated with the major power's own citizenship classifications, such as open immigration and residence rights.

However, these arrangements are subject to the same terminability as the overall relationship, and thus may be either for a limited duration or subject to unilateral termination by either party at any time.

Consequently, there can be no permanent mass dual nationality because this would be inconsistent with the preservation of the underlying separate sovereignty. Any special rights or classifications of the major power extended to the people of a free associated nation are more in the nature of residency rights and do not prevent either nation from exercising separate sovereignty with respect to the nationality its own population.

Upon termination of the free association relationship by either party, any such classifications or special residency rights will be subject to unilateral termination as well. Both during and after any period of free association, the people of each of the two nations will owe their allegiance to and have the separate nationality of their own country. Any attempt to deviate from these norms of international law and practice would undermine the sovereignty of both nations, and would impair the right of self-determination which must be preserved to ensure the relationship is based on consent rather than coercion.

In summary, the United States recognizes each of the three U.N. accepted status options for Puerto Rico to achieve full self-government. One of those options, integration, is within U.S. sovereignty and the federal political union, the other two, independence and free association, exist without U.S. sovereignty, nationality and citizenship.

Obviously, Puerto Rico can not act unilaterally to establish a new status. This is so not only because of U.S. sovereignty and the authority of Congress under the territorial clause, but also because Puerto Rico seeks the agreement of the U.S. to the terms under which any of these options would be implemented. This means Congress must agree to the terms under which a new status is defined and implemented.

There is no right on the part of Puerto Rico unilaterally to define its relationship with the United States. Nor would it be consistent with U.S. commitments to respect the right of self-determination for non-self-

governing people under U.S. administration to dispose of the territory of Puerto Rico in a manner which does not take into account the freely expressed wishes of the residents.

Thus, as the two parties which must define and carry out a future relationship based on consent and the right of self-determination which each must exercise, Congress, on behalf of the United States, and the people of Puerto Rico, acting through their constitutional process, must decide whether decolonization will be completed through completion of the process for integration into union or separation and nationhood apart from the U.S. for Puerto Rico.

Mr. GUTIERREZ. Mr. Chairman, I yield 2½ minutes to the gentleman from Massachusetts (Mr. KENNEDY).

Mr. KENNEDY of Massachusetts. Mr. Chairman, I thank the gentleman for yielding time to me.

Mr. Chairman, I have been impressed in this debate thus far about the determination of us as Members of Congress to provide for real self-determination for the great people of Puerto Rico. I think it is fundamentally important to the Puerto Rican people themselves and to all of us as Americans, when we talk about the most important issue, perhaps, that we can determine in this Chamber, as to whether or not and who we define as American citizens, that we are clearly saying to the Puerto Rican people that they are welcome as not only citizens of this country, but they are in fact welcome as a 51st State.

But, and I mean a serious but, for anyone who has taken the time to visit Puerto Rico, to not just visit there in the sense of getting a nice suntan, but going there and talking with the Puerto Rican people and gaining a better understanding of their own identification, the truth of the matter is there are millions of Puerto Ricans that consider themselves to be Puerto Ricans, Puerto Ricans first.

American citizens, yes. They are willing to fight and die for this country. But I do not consider myself a Massachusettan first and then an American, I consider myself to be an American.

I think that we as American citizens ought to fundamentally be wide enough in the breadth of our knowledge and our sense of other human beings to allow them their own self-identification. That means that we ought to respect those that believe in the Commonwealth party.

I have a great many friends that are commonwealthers and statehooders. But I have great respect for the Commonwealth party, and I believe that this bill unfairly slants the way we define Commonwealth by bringing up issues as to whether or not this means that Puerto Rican people are going to be forever faced with determinations by this body as to whether or not we are going to consider them to be citizens, whether or not we are going to tax them, a whole series of questions that effectively undermines one group of Puerto Ricans that over and over again has stood up for equality status versus statehood.

If the people of Puerto Rico claim and vote for statehood, I would be the first in this Chamber to vote with them and to give them their vote and voice here in the Congress of the United States. But if in fact they choose Commonwealth status, then let us respect that as well, and let us make this an evenhanded debate that does not slight one side or the other, but gives this important issue the respect it is due.

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Mr. SOLOMON. Mr. Chairman, I yield such time as he may consume to the gentleman from New York (Mr. GILMAN), the honorable chairman of the Committee on International Relations. (Mr. GILMAN asked and was given permission to revise and extend his remarks.)

Mr. GILMAN. Mr. Chairman, I thank the gentleman from New York (Mr. SOLOMON) for yielding me this time. Mr. Chairman, I rise today in support of H.R. 856, the United States-Puerto Rico Political Status Act, allowing Puerto Ricans to determine their future political status.

Mr. Chairman, I rise today in support of H.R. 856, the United States-Puerto Rico Political Status Act, which will allow Puerto Ricans to determine their future political status.

This bill would give the U.S. citizens of Puerto Rico the right to self-determination. I believe every U.S. citizen should be afforded that opportunity.

The right to self-determination is a foundation or our freedoms. By voting against this bill, we would be sending a message that we don't believe other citizens should be given the opportunity and privilege of voting that we enjoy.

Puerto Ricans have served and died in wars defending democracy for years, yet they cannot elect a President or participate in the legislative process. This is unjust and un-American. Voting for H.R. 856 will entrust 3.8 million Hispanic Americans who reside in Puerto Rico with the power of an educated vote on self-determination.

Furthermore, voting for H.R. 856 does not confer statehood to Puerto Rico, but merely establishes a referendum that sets the terms and clarifies the choices to allow Puerto Ricans to determine their future political status. With regard to the language of the island, Puerto Rico recognized English as an official language of the local government in 1902—longer than any other American domain. English is the language of the local and federal governments, courts, and businesses, and is also in the curriculum of all the schools on the island of Puerto Rico.

As chairman of the International Relations Committee, I recognize the importance of supporting democratic principles abroad. Supporting H.R. 856 were enormously help to strengthen U.S. relations with Latin American nations. It is equally important to support these democratic standards here in America, by voting for a non-binding referendum.

For these reasons, I urge my colleagues to join in voting for H.R. 856, and grant Puerto Ricans the right to self-determination.

Mr. ROMERO-BARCELÓ. Mr. Chairman, I yield 1 minute to the gentleman from the District of Columbia (Ms. NORTON).

# PUERTO RICO STATUS

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## HEARING

BEFORE THE

### COMMITTEE ON RESOURCES HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

ON

#### **H.R. 856**

A BILL TO PROVIDE A PROCESS LEADING TO FULL SELF-  
GOVERNMENT FOR PUERTO RICO

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MARCH 19, 1997—WASHINGTON, DC

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efforts in redefining Puerto Rico's relationship with the United States. Across two seas, from the east and from the west, a question echoes in Chamorro, Spanish and English, "Is there a place for us in this community?"

STATEMENT OF FRED M. ZEDER II, RANCHO MIRAGE, CALIFORNIA

Mr. Chairman:

In 1982 I was appointed by President Ronald Reagan with Senate confirmation to serve as Ambassador in the post of President's Personal Representative for Micronesian Status Negotiations. In that capacity I concluded status treaties which had been under discussion for over a decade, and by the end of 1983 on behalf of the United States I signed the Compact of Free Association with the Republic of the Marshall Islands, the Republic of Palau, and the Federated States of Micronesia.

From 1983 to 1986 I also represented the Reagan Administration in Congressional hearings which led to approval of the Compact of Free Association Act (P.L. 99-239), effective January 14, 1986. On November 3, 1986, President Reagan issued Proclamation 5564, ending the U.N. trusteeship in the Pacific islands based on implementation of the Compact. At that time I returned to the private sector, after initiating measures to decommission the National Security Council interagency office which successfully had supported fulfillment of my negotiating mission and Presidential instructions.

I hardly need remind you of those events. As the Ranking Minority member on the Interior and Insular Affairs Committee during that period, you asked many of the tough questions that the Administration and the island governments needed to answer in order to persuade Congress to approve the Compact. Because you addressed these issues based on principle without allowing partisanship unduly to influence your position, in my view there is no one better prepared to provide stewardship in Congress regarding the matter of self-determination for Puerto Rico.

In this regard, I have had the opportunity to review materials concerning the definition of free association which were submitted to the Committee during hearings in 1996 on H.R. 3024. In order to correct clever but misleading interpretations presented to the Committee regarding the legislative history of the Compact for associated republics in the Pacific, the following subjects are addressed below:

*Status of Puerto Rico Compared to Trust Territory*  
 Citizenship in Trust Territory Compared to Citizenship of Persons Born in Puerto Rico  
 Comparison of Decolonization Processes for Trust Territory and Puerto Rico  
 Basis for U.S. Sovereignty in the Commonwealth Territories  
 Nationality and Citizenship in Associated Republics  
 Separate Nationality and Citizenship as Required Elements of Separate Sovereignty  
 Summary of Governing Principles of Citizenship for Associated Republic Status (Free Association)

While there are important similarities and analogies to be drawn between the decolonization process for Puerto Rico and that resulting from the Micronesian status negotiations, there also are fundamental structural differences between Puerto Rico's current status and that of the trusteeship for the Pacific islands. The distinctions which must be drawn in this respect have profound legal and political significance in defining options for Puerto Rico. The following discussion is based on the existing Congressionally approved precedents, which establish how applicable international law and practice regarding free association can be implemented consistent with the U.S. constitutional process.

*Status of Puerto Rico Compared to Trust Territory*

In the case of the Federated States of Micronesia, the Republic of the Marshall Islands and the Republic of Palau, the status of their peoples while still within the former trust territory had been determined and controlled by the U.S. Congress under a Trusteeship Agreement with the United Nations. In one sense, the Trusteeship Agreement was merely an internationally approved form of plenary U.S. governmental authority over the trust territory as provided by the U.N. Charter. This Congressional authority was implemented not on the basis of U.S. sovereignty, but rather under the trusteeship agreement as a treaty between the U.S. and the U.N. to which the U.S. became a party through the foreign affairs powers in article II, section 2 of the U.S. Constitution, as well as relevant provisions of article I, section 8.

As such, the power of the federal government over the trust territory was equivalent to—and in some respects arguably even greater than—the power of Congress

under article IV, section 3, clause 2 of the Constitution to govern the unincorporated territories over which the U.S. acquired actual sovereignty under the Treaty of Paris. For under Article 3 of the Trusteeship Agreement the U.N. had agreed that the U.S. would "have full power of administration, legislation and jurisdiction over the territory...and may apply to the trust territory, subject to any modifications which the administering authority may consider desirable, such of the laws of the United States as it may deem appropriate..."

Under this virtually unrestricted power, analogous to the broad powers of Congress over the U.S. territories under the Territorial Clause, the U.S. made many Federal laws applicable to the trust territory, and also created a trust territory government under a separate body of trust territory law which legalized less-than-equal citizenship status for trust territory citizens—even in comparison to those with full U.S. citizenship living and working in the trust territory itself. Puerto Ricans are familiar with the fact that the legal and political rights of all U.S. citizens residing in Puerto Rico are less than when those citizens reside in one of the states, but in the trust territory the U.S. citizens residing there had preferences, legal rights, privileges and benefits that the trust territory citizens did not enjoy.

This was possible because U.N. trusteeship status existed under international law, rather than U.S. sovereignty. Consequently, those born in the trust territory never had U.S. citizenship, and the U.S. Constitution did not apply directly or of its own force. Even the "fundamental rights" doctrine of the *Insular Cases* did not apply directly to the trust territory because it was not "Territory or other Property belonging to the United States" for purposes of article IV, section 3, clause 2 as construed by the Supreme Court in that line of cases. Although there had been some confusion about this during the trusteeship period, the non-applicability of the Territorial Clause to the trust territory was confirmed by Congress in approving the negotiated free association treaty, and by the federal courts in cases which include *Juda v. United States*, 6 Cl. Ct. 441 (Cl. Ct. 1984).

#### *Citizenship in Trust Territory Compared to Citizenship of Persons Born in Puerto Rico*

Under the U.N. Trusteeship Agreement people born in the trust territory were given the status of "citizens of the Trust Territory of the Pacific Islands." This is another aspect of U.S. trusteeship treaty implementation in the Pacific islands that is analogous to the exercise of actual sovereignty by the U.S. in Puerto Rico pursuant to which the people of Puerto Rico were given the status of "citizens of Puerto Rico" under the Foraker Act between 1900 and 1917.

Rather than being a form of indigenous nationality and citizenship arising from an exercise of the inherent sovereignty of the people, in the case of both Puerto Rico and the trust territory these territorial citizenship arrangements were conferred in an exercise of U.S. authority which was predicated on the non-self-governing status of the territorial populations concerned. The only difference is that in the case of Puerto Rico the source of the authority for classification of territorial citizens was the Territorial Clause, and in the case of the trust territory the source of that authority was the U.N. Trusteeship Agreement as a treaty.

In both cases discriminatory citizenship classifications and measures based thereon adopted by Congress or the Executive Branch of the U.S. federal government—which would not withstand constitutional scrutiny if applied to U.S. citizens in one of the states of the union—were held by the federal courts to be permissible as long as the territorial status continued. This remains true in Puerto Rico even though the Foraker Act citizenship has been replaced with statutory U.S. citizenship under the Jones Act, now codified at 8 U.S.C. 1402. See, *Harris v. Rosario*, 446 U.S. 651 (1980).

Although the inhabitants of the trust territory were never given the legal status of U.S. citizenship, in both the case of Puerto Rico and the trust territory it was clear that the decolonization process would not be completed until each territory got out from under the less-than-equal citizenship prescribed by the U.S. in the exercise of plenary powers over less-than-fully-self-governing peoples. For the currently federated Micronesian islands, the Marshalls and Palau that meant ending the application of the Trusteeship Agreement, which was accomplished in 1986 for the Marshallese and Micronesians, and in 1993 for Palau. In the case of Puerto Rico it means ending application of the Territorial Clause.

#### *Comparison of Decolonization Processes for Trust Territory and Puerto Rico*

Understanding decolonization of the trust territory under U.N. auspices is instructive with respect to decolonization for Puerto Rico and the nature of the commonwealth structure of self-government as long as Puerto Rico remains under the Territorial Clause. For example, it is interesting to note that even after the people of the trust territory had exercised self-determination to create local constitutional govern-

ments in the 1978-1981 period, the U.S. retained the ultimate authority granted under Article 3 of the U.N. Trusteeship Agreement. This, again, is analogous to the retention by the Congress of Territorial Clause authority after Puerto Rico established its constitution under P.L. 600 in 1952.

In the case of Puerto Rico, failure to complete the decolonization process begun in 1952 precludes full extension of the U.S. Constitution or equal citizenship and full self-government within the federal constitutional system. Thus, if full equality and the related benefits of U.S. federalism are desired by the people of Puerto Rico, the decolonization process needs to be completed in favor of full political integration to realize that desire.

Similarly, if the people of Puerto Rico desire a completely separate identity and existence apart from the U.S.—not just social and cultural distinctness but separation in the legal and political sense of another constitutional nationality like Cuba or the Philippines—it is necessary to complete the decolonization process begun in 1952 in favor of independence or free association. For just as the U. S. had to end the trusteeship before the world would fully recognize the status of the associated republics under the Compact of Free Association, international recognition of Puerto Rico as an independent or free associated nation should not be expected until and unless Congress exercises its Territorial Clause power in conjunction with an exercise by the President of the foreign policy power by approving as a treaty an agreement ending U.S. sovereignty, nationality and citizenship in Puerto Rico.

To illustrate the point, even after the Marshall Islands called itself a "Republic" under its own constitution in 1978, the U.S. and the community of nations, including international organizations, did not recognize it as a nation or a legal government in the international sense because the status of the government was established under the Trusteeship Agreement, which remained in force and continued the virtually plenary authority of Congress. Only in 1986 when the U.S. acted to effectively end the application of the U.N. trusteeship to the Marshall Islands, so that the treaty relationship between the U.S. and the free associated nations under the Compact of Free Association replaced the U.N. Trusteeship Agreement as the legal basis for the status of these new nations, did the international community generally begin to recognize that the decolonization process was complete for these territories, including the Republic of the Marshall Islands.

This demonstrates the need under both international law and the U.S. constitutional process to complete decolonization based on a valid self-determination process and accepted definitions in order successfully to implement a permanent status—be it integration or separate sovereignty—that will be recognized by the world as a form of full self-government and not merely a more politically correct form of colonialism. Thus, there is a need for Puerto Rico to become fully integrated or a separate sovereign in order to end application of the Territorial Clause and become fully self-governing under a recognized definition of that term.

#### *Basis for U.S. Sovereignty in the Commonwealth Territories*

Perhaps also of interest in relation to the situation in Puerto Rico, another part of the Pacific islands trust territory, the Northern Mariana Islands, did not adopt the free association separate sovereignty model of independence. Instead, the Northern Mariana Islands adopted the Puerto Rico model of an unincorporated territory with statutory U.S. citizenship and a structure of local constitutional self-government under the "commonwealth" label.

As a result, U.S. sovereignty was extended to the Northern Mariana Islands based on approval of the commonwealth status by the voters there in a 1976 plebiscite, rather than by a treaty of cession as in the case of Puerto Rico. This was the legal basis upon which application of the Trusteeship Agreement was terminated and the Territorial Clause became applicable to the NMI—which is now an unincorporated territory based on the consent to the people.

Thus, establishment of the commonwealth structure of local constitutional self-government with the consent of the people in the CNMI also changed the political status of that island territory from being part of an international trusteeship to territorial status under U.S. sovereignty. The result is a status virtually the same as that which Puerto Rico has due to the extension of U.S. sovereignty under the Treaty of Paris combined with approval of the commonwealth structure of local constitutional self-government by the voters of Puerto Rico in 1952.

The historical ironies of this decolonization process are profound. For the Northern Mariana Islands are only 100 miles from Guam, which was ceded to the U.S. under the Treaty of Paris along with the Philippines, Puerto Rico and Cuba. However, instead of coming under U.S. sovereignty along with neighboring Guam, essentially by historical accident the Northern Marianas became a League of Nations mandate administered by the Japanese.

The Japanese mandated area was in the larger geographic region known as "Micronesia," and included both the Eastern Carolines and the Western Carolines— islands chains now comprised within the associated republics of the Marshall Islands, Palau and the Federated States of Micronesia. Because of its cession to the U.S. under the Treaty of Paris, Guam was not included in the Japanese mandate.

The Japanese abused the League of Nations mandate by using the islands to perpetrate illegal international aggression, among other things staging elements of the attack on Pearl Harbor from the Marshall Islands. Upon being invaded and occupied by Japan during WWII, Guam temporarily was governed for the first time under the same power that ruled the rest of the Micronesian islands within the mandated area. Much of the famous "island-hopping" campaign of WWII took place within the Japanese mandate area, and both Guam and the Northern Marianas were liberated from Japanese totalitarianism in some of the bloodiest fighting of WWII.

However, the Northern Marianas were not ceded to the U.S. by Japan at the end of WWII, as nearby Guam and the other Treaty of Paris territories had been at the end of the Spanish American War. Instead, because they had been under the League of Nations mandate system, the Northern Marianas and the rest of the Micronesian islands were placed under the new U.N. trusteeship system and administered by the United States. Guam was restored to unincorporated territorial status under the Treaty of Paris.

The technical legal title of the trusteeship treaty between the U.N. and the U.S. was "Trusteeship Agreement for the Former Japanese Mandated Islands." Politically, this meant the islands were part of an internationally supervised decolonization process. However, as a practical and legal matter the trusteeship treaty with the U.N. conferred on the United States powers of administration in the Northern Mariana Islands and the rest of the trust territory at least comparable to—and, again, arguably greater than—those which it had regarding the Treaty of Paris territories over which the U.S. had sovereignty resulting from cession by Spain after losing a war with the United States.

Thus, notwithstanding the advent of the international trusteeship system, the U.S. ended up governing the Northern Marianas and other islands it occupied after the allies defeated Japan in WWII, just as it ended up governing the Treaty of Paris territories after the defeat of Spain in 1898. However, both the Treaty of Paris territories still under U.S. sovereignty and the trust territory were designated "non-self-governing" areas subject to decolonization consistent with Article 73 of the U.N. Charter.

In the case of the Northern Marianas, the U.S. addressed its obligations regarding decolonization by supporting the self-determination process leading to the new commonwealth structure of local constitutional self-government established for the CNMI in 1976. This new constitutional status was formally implemented along with the Compact of Free Association under Presidential Proclamation 5564 on November 3, 1986. This was sufficient to persuade the U.N. to accept the U.S. determination to cease reporting to the U.N. on the CNMI, just as the new constitutional status of the Commonwealth of Puerto Rico in 1952 was deemed sufficient by the U.N. in 1953 for the U.S. to stop reporting on Puerto Rico.

While the Puerto Rican and CNMI commonwealth models adopted with approval of the peoples concerned represent sufficient self-government to end reporting to the U.N., the form of local self-government established in each case is still subject to the Territorial Clause power of Congress and does not constitute a form of full self-government based on equality. Therefore the ultimate fulfillment of the decolonization process has not been completed.

Thus, the CNMI self-determination process under the U.N. trusteeship system has produced for the Northern Marianas the same unincorporated territory status as neighboring Guam, the very result which might have obtained had it been ceded to the U.S. along with Guam in 1898. Despite the fact Guam has been part of a different political order than the CNMI throughout most of this century, the common Chamorro culture and language continue to thrive today in both territories.

Some people believe Guam and the CNMI should be reunited to their pre-colonial condition of inter-relationship, and that whether the ultimate status of the islands is full integration with the U.S. or separate sovereignty it should be as one people. That is a matter to be resolved through the self-determination process regarding the ultimate status of Guam and the CNMI. Interestingly, Guam is still under an organic act without a local constitution, but as a result of the combined self-determination process for political status and establishment of a local constitution in 1976 the CNMI has a degree of local self-government comparable to that of Puerto Rico.

*Nationality and Citizenship in the Associated Republics*

Turning now to the question of citizenship implications of free associated nation status, under Section 141 of the Compact of Free Association citizens of the Freely Associated States are non-immigrant aliens under U.S. immigration and nationality law, but there is a waiver of visa requirements so that they may enter, reside and be employed in the U.S. during the period of free association. This visa waiver arrangement is not a constitutional right, but a privilege under a treaty which is unilaterally terminable by the U.S. or the free associated nations.

Any period of residence in the U.S. under this visa waiver does not count toward naturalization in the United States, and eligibility for naturalization must be established on a basis other than birth or citizenship in the trust territory or one of the associated republics to emerge therefrom. Similarly, in the case of a U.S. territory such as Puerto Rico which chooses separate sovereignty, it is clear for reasons discussed below that neither birth in the former U.S. territory, statutory U.S. citizenship based thereon due to birth in a U.S. territory, nor relationship to a person with such statutory citizenship will provide a basis for naturalization in the U.S. following establishment of separate sovereignty.

Against this background, the Committee must carefully scrutinize the characterizations—in materials submitted during hearings on H.R. 3024 in San Juan on March 23, 1996—regarding the testimony on the Pacific islands free association pact by a former State Department officer, James D. Berg. Mr. Berg was assigned to my NSC staff during the hearings on the Compact, and I can speak with authority about the meaning of his testimony during questioning by former Congressman John Seiberling.

In this regard, Congressman Seiberling's questions, as quoted at page 5-6 of the legal memorandum attached to the testimony of the PROELA witness presented to the Committee at its hearing on H.R. 3024 on March 23, 1996, correctly noted that Section 172 of the Compact of Free Association does not address the issue of dual nationality or citizenship. See, Hearing Report, Subcommittee on Native American and Insular Affairs, Committee on Resources, H.R. 3024, San Juan, Puerto Rico, March 23, 1996, p. 136-137. However, since the official section-by-section analysis relating to this provision of the treaty included a background explanation which addressed the issue of dual citizenship, Congressman Seiberling asked and Mr. Berg answered the question regarding dual citizenship as recorded in the hearing and included in the material submitted to the Committee.

The statement regarding dual citizenship in the section-by-section analysis quoted on page 3 of the PROELA testimony (Hearing Report p. 127), and Mr. Berg's reiteration of that statement in response to Mr. Seiberling's question, correctly states U.S. law regarding dual citizenship. Specifically, consistent with 8 U.S.C. 1481 and the U.S. Supreme Court ruling in *Afroyim v. Rusk*, a person who has U.S. nationality based on birth or naturalization in the United States does not automatically lose U.S. nationality by acquiring citizenship of another country.

It is well-established under U.S. law and practice that a person with citizenship conferred under and protected by the U.S. Constitution based on birth or naturalization in a state must renounce that status voluntarily and with the intention to relinquish U.S. nationality in order for loss of nationality and citizenship to occur. However, the *Afroyim* case would not apply to termination of statutory U.S. nationality and citizenship under the Supreme Court's ruling in the case of *Rogers v. Bellei*.

This is especially clear where the citizenship issues arises in the context of the law of state succession upon establishment of separate sovereignty based on an act of self-determination by the people of Puerto Rico. In that circumstance, there would not be the same due process issues that would arise if Congress simply terminated the statutory citizenship of persons who already had acquired it based on birth in an unincorporated territory, especially if Congress provided for an election between retention of statutory citizenship rights or transfer of allegiance and citizenship to the new sovereign. Under the Supreme Court's decision in *Bellei* there would be none of the 14th Amendment issues that would arise in a case where the nationality and citizenship of a person born or naturalized in one of the States of the Union is involved.

Because the Federated States of Micronesia, Republic of the Marshall Islands and Republic of Palau have separate sovereignty and are foreign countries under the Compact of Free Association, a U.S. citizen who acquires dual citizenship in those nations will be treated under U.S. law in the same manner as a U.S. citizen who acquires a second citizenship in any other foreign country. Thus, no special dual citizenship arrangements were made under the Compact of Free Association, and existing U.S. law governs this matter without modification related to the Compact of Free Association.

It would be misleading to suggest that the exchange between Mr. Berg and Mr. Seiberling provides support for the view that the free association status established



under the Compact of Free Association created any new or special right, or that the background explanation on this issue in the section-by-section analysis simply can be converted into a provision of law governing the nationality and citizenship status of the people of Puerto Rico should they exercise their right of self-determination in favor of separate sovereignty.

If the people of Puerto Rico vote to establish separate Puerto Rican sovereignty, the procedures for transition to separate nationality will be determined by Congress and subject to approval by the people of Puerto Rico. All parties will be required to take into account, among other things, the international law of state succession. Based on U.S. and international practice, Congress presumably will provide for U.S. sovereignty, nationality and citizenship to be terminated in favor of separate Puerto Rican sovereignty, nationality and citizenship.

The PROELA proposal that virtually 100 percent of the population of Puerto Rico could keep the current U.S. nationality and statutory citizenship status granted under the Treaty of Paris and the Territorial Clause, and at the same time also acquire separate Puerto Rican nationality and citizenship under a new government-to-government treaty relationship establishing separate sovereignty, is legally inconsistent and politically incompatible with separate sovereignty for Puerto Rico. The idea that under separate sovereignty the people of Puerto Rico would acquire a citizenship right superior to the current limited statutory citizenship—that is to say a guaranteed and enforceable right comparable to the 14th Amendment citizenship protected by the U.S. Constitution under the *Afroyim* case—is even more implausible.

This would amount to an upgrade from the current statutory citizenship status of person born in Puerto Rico under 8 U.S.C. 1402, based on a vote by the people of Puerto Rico to terminate U.S. sovereignty in Puerto Rico in favor of separate sovereignty. As discussed below, there are political, legal and constitutional reasons why that simply is not going to happen under any circumstances.

*Separate Nationality and Citizenship as Required Elements of Separate Sovereignty*

While it is possible that some temporary exceptions and special rights for people with current statutory territorial citizenship may be part of the transition process for Puerto Rico if the people choose separate sovereignty, the general result will be that the people of Puerto Rico will become nationals and citizens of Puerto Rico and U.S. nationality and citizenship conferred during the territorial period will end. In the case of the Compact of Free Association for the Federated States of Micronesia and the Republic of the Marshall Islands, Congress granted special temporary immigration status for the citizens of the free associated nations when the separate sovereignty status was implemented. However, this arrangement is terminable by the U.S., and under this terminable arrangement the citizens of these associated republics are alien non-immigrants under U.S. law.

Based on existing U.S. policy and practice regarding free association, as well as Congressionally determined principles which constitute precedent in these matters, establishment of full and effective separate nationality is a necessary element of separate sovereignty and nationhood itself. Once separate Puerto Rican nationality and citizenship is established, the eligibility of Puerto Rican citizens for U.S. nationality and citizenship status will be determined and controlled by U.S. law.

Similarly, U.S. citizens born in a state of the union with 14th Amendment protection who are eligible under Puerto Rican law to acquire Puerto Rican citizenship will not lose their status as U.S. nationals by acquiring Puerto Rican nationality, unless they also renounce U.S. nationality with that intention. But persons born in Puerto Rico with statutory U.S. citizenship under 8 U.S.C. 1402 will lose their statutory U.S. citizenship if they do not elect to keep it, or if they acquire or have Puerto Rican nationality and citizenship once separate sovereignty is established. This is because the U.S. has a legitimate interest in limiting statutory U.S. citizenship conferred during the territorial era once separate sovereignty is established.

This must be reflected in any decolonization measure approved by Congress, especially because given the size of the Puerto Rican population in the U.S. and in Puerto Rico—creation of automatic mass dual citizenship at the time of establishing separate nationality would undermine both U.S. and Puerto Rican sovereignty.

*Summary of Governing Principles of Citizenship for Associated Republic Status (FREE ASSOCIATION)*

There are many other important points that I could make about the decolonization process for U.S. administered trust territory in the Pacific, and this really has been the bare minimum necessary to set the record straight on a very complex historical and political process. Again, in my judgment this was necessary

given the liberties that have been taken with the truth by some of the proponents of free association for Puerto Rico.

Free association may be a solution for Puerto Rico's status, but the people there will never be given a chance to make that decision for themselves unless it first is defined accurately and honestly.

Ironically, the hardest thing about decolonization seems to be that there are always people who do not trust the people to determine their own destiny. So there often is an attempt to stack the deck by defining the choices based on political and economics gimmicks that favor one political group over another, instead of using straightforward definitions based on the basic structure of the actual status options.

This actually results in delay of self-determination and decolonization, because those who think the people are not wise enough to choose between accurate and realistic options try to manipulate the ballot language. In the case of Palau, for example, the attempt to promote the anti-nuclear agenda that was part of the "politics of the moment" back in 1982 delayed Palau's Compact of Free Association for years. This forced the U.S. to terminate the trusteeship for the Marshall Islands, the Federated States of Micronesia and the Commonwealth of the Northern Mariana Islands and leave Palau behind as a U.N. trust territory.

That was a difficult and unwelcome political and diplomatic task for the U.S. during the last years of the Cold War era—but it was a challenge the U.S. faced up to and overcame out of our commitment to self-determination and decolonization for the people of those two new sovereign nations who had decided to take a stand as allies of America. In the case of the Marshall Islands, the decision to implement the Compact and thereby ensure U.S. access to Kwajalein was an important element of the strategic defense initiative which contributed to the end of the Cold War.

As for Palau, its Compact of Free Association eventually entered into force, but by then the Cold War was over. Ironically, while pursuing a short-sighted anti-nuclear agenda largely at the urging of non-Palauans with an anti-U.S. agenda, Palau missed its chance to participate more fully in the success of President Reagan's strategy to end of the uncontrolled superpower nuclear arm's race.

To help Congress avoid the same kind of mischief in the final stage of the decolonization process for Puerto Rico, perhaps it would be useful for me to try to state the clear citizenship implications of free association for Puerto Rico in the most succinct and plain language possible:

For Puerto Rico to be a nation in the legal and political sense, it must separate from the U.S. legally and politically. Separation of sovereignty, nationality and citizenship is necessary if the relationship between the U.S. and Puerto Rico is to be governed by a bilateral pact under which Puerto Rico has the status of independence or free association. The very term "bilateral pact" in this context means two separate nations exercising separate sovereignty to create a pact of association.

The current "commonwealth" status of Puerto Rico, though it is translated into Spanish as something akin to "Free Associated State," is not free association as recognized by the U.S. or the international community. Free association based on a bilateral pact requires separate sovereignty, nationality and citizenship.

The Congress of the United States has the constitutional power to terminate the current statutory citizenship of persons born in Puerto Rico if separation of sovereignty occurs. That which Congress creates by statute it can end by statute, as long as due process and equal protection rights of those affected are respected.

The irrevocable citizenship which U.S. citizens born or naturalized in the states have under the 14th Amendment does not extend to persons who have statutory U.S. citizenship based on birth in Puerto Rico as an unincorporated territory. The statutory U.S. citizenship which Congress conferred on people born in Puerto Rico in 1917 is not full, equal, guaranteed, or irrevocable constitutional citizenship.

That means that except as Congress in its discretion may provide the "dual citizenship" rules that apply to a person with full U.S. citizenship who acquires another nationality do not apply to person with statutory citizenship based on birth in Puerto Rico. If the people of Puerto Rico exercise self-determination in favor of separate sovereignty and nationality they must expect their U.S. citizenship will come to an end.

So in the most simple terms, there is a choice to be made between U.S. nationality and Puerto Rican nationality. Upon recognition of a separate sovereign nation of Puerto Rico, in order to give effect to that new status the Congress will require an election between retention of statutory U.S. citizenship and the new Puerto Rican nationality and citizenship. Mass dual citizenship would frustrate the succession of state process and undermine the national sovereignty of both nations.

In order for a bilateral pact to establish a free association status and relationship to the U.S. based on international law, the pact would have to replace common nationality and citizenship with separate nationality and citizenship, in which the citi-

zens of each nation will be aliens when present in the sovereign territory of the other.

While special residence, travel and employment exceptions can be made to the immigration laws, citizens of Puerto Rico will have the status of non-immigrant aliens for purposes of U.S. law under a free association treaty. Even such limited special rights or privileges, like the overall relationship of free association, will be terminable at will by either of the governments concerned acting unilaterally in the exercise of its sovereignty.

Birth in Puerto Rico or relationship to a person with U.S. citizenship due to birth in Puerto Rico will not provide a basis for acquisition or continuation of U.S. citizenship by naturalization.

These are not arbitrary requirements. For without adherence to these principles free association consistent with the U.S. political system would become merely another form of colonialism in which persons with common citizenship but residing in different jurisdictions have less than equal rights.

In addition, based on the precedents established by the U.S. in its relations with the associated republics of the Pacific, it is clear the U.S. Congress will never approve an arrangement in which virtually 100% of the population of a foreign nation has U.S. citizenship.

This would usurp and undermine U.S. sovereignty, as well as make a mockery of Puerto Rican nationality and a fraud of Puerto Rican sovereignty. As clever as some may try to be in arguing that such mass dual citizenship is possible, the Congress quite properly will be even more determined and resourceful in protecting U.S. sovereignty by preventing mass dual citizenship.

If Puerto Rico is to make free association the vehicle of full self-government, it must face reality and not simply try to transform the ambiguity of the last foggy years into a new false doctrine or postical status myth. Those who truly believe in separate Puerto Rican sovereignty will realize that dual citizenship is not compatible with the goal of separate nationhood for Puerto Rico.

Like independence, free association means leaving the U.S. political union to become a member of the international community. Even if you have a special close relationship under a free association treaty it is temporary and can be terminated at any time.

In order to support this summary I am attaching hereto a brief background paper describing free association in a more generic way as it relates to the self-determination process in Puerto Rico.

This letter and the attachments are due, again, to my concern that in Puerto Rico and the record before Congress there is accurate information available about true legal nature and political effects of the decolonization process which the U.S. successfully implemented with respect to the former Trust Territory of the Pacific Islands.

In closing, I wish you every success in your attempt to reverse the effects of decades of anachronistic territorial administration in Puerto Rico in a way that enables the people to redeem their dignity by making a determined choice between real options that can be implemented free of perverse ambiguities. Only in that way will the citizenry of the island, in the same manner as all the citizens in this nation, be enabled to realize their human and cultural potential, and protect their God-given liberty.

Whether that is accomplished through integration leading to statehood, independence, or independence with free association (associated republic status), history calls on the Congress and the people of Puerto Rico to end the current temporary status and achieve full self-government as the new century begins.

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#### UNDERSTANDING FREE ASSOCIATION AS A FORM OF SEPARATE SOVEREIGNTY AND POLITICAL INDEPENDENCE IN THE CASE OF DECOLONIZATION OF PUERTO RICO

BY AMBASSADOR FRED M. ZEDER, II

Consistent with relevant resolutions of the U.N. General Assembly, Puerto Rico's options for full self-government are: Independence (Example: Philippines); Free Association (Example: Republic of the Marshall Islands); Integration (Example: Hawaii). See, G.A. Resolution 1514 (1960); G.A. Resolution 1541 (1960); G.A. Resolution 2625 (1970).

For purposes of international law including the relevant U.N. resolutions international conventions to which the U.S. is a party, the current status of Puerto Rico

is best described as substantial but incomplete integration. This means that the decolonization process that commenced in 1952 has not been fulfilled.

As a matter of U.S. domestic constitutional law, a territory within U.S. sovereignty which has internal constitutional self-government but is not fully integrated into the national system of political union on the basis of equality remains an unincorporated territory, and can be referred to as a "commonwealth." (Example: Puerto Rico and the Northern Mariana Islands).

For purposes of U.S. constitutional law, independence and free association are status options which are created and exist on the international plane. Thus, instead of the sovereign primacy of Congress under the territorial clause, the sources of constitutional authority with respect to nations with separate sovereignty include the article II, section 2 treaty-making power and the applicable article I, section 8 powers of Congress such as that relating to nationality and immigration law.

Relations between the U.S. and a nation which is independent or in free association are conducted on the basis of international law. Thus, independence and free association are status options which would remove Puerto Rico from its present existence within the sphere of sovereignty of the United States and establish a separate Puerto Rican sovereignty outside the political union and federal constitutional system of the United States.

Instead of completing the integration process through full incorporation and statehood, either independence or free association would "dis-integrate" Puerto Rico from the United States. This would terminate U.S. sovereignty, nationality and citizenship and end application of the U.S. Constitution in Puerto Rico. In other words, the process of gradual integration which began in 1898, and which was advanced by statutory U.S. citizenship in 1917 and establishment of constitutional arrangements approved by the people in 1952, would be terminated in favor of either independence or free association.

Under either independence or free association the U.S. and Puerto Rico could enter into treaties to define relations on a sovereign-to-sovereign basis. Free association as practiced by the U.S. is simply a form of independence in which two sovereign nations agree to a special close relationship that involves delegations of the sovereign powers of the associated to the United States in such areas as defense and other governmental functions to the extent both parties to the treaty-based relationship agree to continue such arrangements.

The specific features of free association and balance between autonomy and interdependence can vary within well-defined limits based on negotiated terms to which both parties to the arrangement have agreed, but all such features must be consistent with the structure of the agreement as a treaty-based sovereign-to-sovereign relationship. In U.S. experience and practice, even where free association has many features of a dependent territorial status the sources and allocation of constitutional authority triggered by the underlying separation of sovereignty, nationality and citizenship causes the relationship to evolve in the direction of full independence rather than functional re-integration.

Free association is essentially a transitional status for peoples who do not seek full integration, but rather seek to maintain close political, economic and security relations with another nation during the period after separate sovereignty is achieved. Again, this could be accomplished by treaty between independent nations as well. Thus, free association is a form of separate sovereignty that usually arises from the relationship between a colonial power and a people formerly in a colonial status who at least temporarily want close ties with the former colonial power for so long as both parties agree to the arrangements.

Free association is recognized as a distinct form of separate sovereignty, even though legally it also is consistent with independence. Specifically, free association is consistent with independence because, as explained below, the special and close bilateral relationship created by a free association treaty or pact can be terminated in favor of conventional independence at any time by either party.

In addition, the U.S. and the international community have recognized that a separate nation can be a party to a bilateral pact of free association and be an independent nation in the conventional sense at the same time. For example, the Republic of the Marshall Islands is party to the Compact of Free Association with the United States, but has been admitted to the United Nations as an independent nation.

Thus, the international practice regarding free association actually is best understood as a method of facilitating the decolonization process leading to simple and absolute independence. Essentially, it allows new nations not prepared economically, socially or strategically for emergence into conventional independence to achieve separate nationhood in cooperation with a former colonial power or another existing nation.

