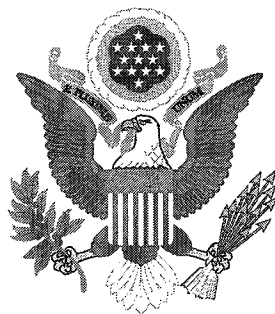


REPORT BY THE  
PRESIDENT'S TASK FORCE  
ON PUERTO RICO'S STATUS



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# LEGAL ANALYSIS OF OPTIONS FOR PUERTO RICO'S STATUS

The 2005 Task Force Report explained that the U.S. Constitution allows for three options for the future status of Puerto Rico: continuing territorial status, statehood, and independence. In so doing, the Task Force did not break new ground. The Department of Justice affirmed the Commonwealth's territorial status in 1959, shortly after the enactment of Public Law 600, and the Supreme Court has held the same. *See, e.g., Harris v. Rosario*, 446 U.S. 651 (1980). Since 1991, the Executive Branch, through the Department of Justice, has further emphasized that the Constitution contemplates only three options for Puerto Rico's future status. (See Appendices E and F.)

This section reiterates and summarizes the conclusions of the 2005 Task Force Report.

## 1. Continuing Territorial Status

The existing form of government in Puerto Rico is often described as a "Commonwealth," and this term recognizes the significant powers of self-government Puerto Rico enjoys under current law. As discussed above, Congress established this arrangement through the passage of Public Law 600 and through the subsequent approval of the constitution drafted and amended by the people of Puerto Rico.

The constitution of Puerto Rico establishes a republican, popularly elected government with significant authority over local affairs, and since 1953, the people of Puerto Rico have exercised significant powers of self-government. As the Supreme Court has recognized, under the commonwealth system, Puerto Rico currently exercises "a measure of autonomy comparable to that possessed by the States." *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 597 (1976).

When "Commonwealth" is used to describe the substantial political autonomy enjoyed by Puerto Rico, the term appropriately captures Puerto Rico's special relationship with the United States. The commonwealth system does not, however, describe a *legal* status different from Puerto Rico's constitutional status as a "territory" subject to Congress's plenary authority under the Territory Clause "to dispose of and make all needful Rules and Regulations respecting the Territory ... belonging to the United States." Congress may continue the current commonwealth system indefinitely, but it necessarily retains the constitutional authority to revise or revoke the powers of self-government currently exercised by the government of Puerto Rico. Thus, while the commonwealth of Puerto Rico enjoys significant political autonomy, it is important to recognize that, as long as

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Puerto Rico remains a territory, its system is subject to revision by Congress.

Both before and since the issuance of the 2005 Task Force Report, some have questioned whether Puerto Rico's status as a United States territory is consistent with statements that the United States made to the United Nations in 1953 following the adoption of Puerto Rico's constitution, in requesting that Puerto Rico be removed from the list of non-self-governing territories. In its official request to the United Nations, the United States stated that Congress had given Puerto Rico the freedom to conduct its own internal government subject only to compliance with federal law and the U.S. Constitution. The official request did not state that Congress could make no changes in Puerto Rico's status without its consent. It is true that, prior to the submission of this official request, the U.S. representative to the U.N. General Assembly indicated orally that common consent would be needed to make changes in the relationship between Puerto Rico and the United States. Notwithstanding this statement, however, the Department of Justice concluded in 1959 that Puerto Rico remained a territory, and as noted above, the Supreme Court, while recognizing that Puerto Rico exercises substantial political autonomy under the current commonwealth system, has held that Puerto Rico remains fully subject to congressional authority under the Territory Clause. *See Harris*, 446 U.S. at 651-52.

The 2005 Task Force Report also explained why existing constitutional principles foreclose the so-called "New Commonwealth" status, which would

purport to adopt a covenant between Puerto Rico and the United States that could not be altered without the "mutual consent" of both entities. Although the Executive Branch had once taken a different view, the Task Force endorsed the constitutional understanding that the Executive Branch has maintained across Administrations since 1991.

The U.S. Constitution would not permit the "New Commonwealth" proposal because land under United States sovereignty must either be a State or a territory. As the Supreme Court stated over a hundred years ago, if land is "not included in any State," it "must necessarily be governed by or under the authority of Congress." *First Nat. Bank v. Yankton County*, 101 U.S. 129, 133 (1879). Thus, although Congress is free to allow a territory to exercise powers of self-government (as Congress has done with respect to Puerto Rico), it may not restrict the authority of a future Congress over that territory.

This limitation on the power of Congress reflects the general rule that one legislature cannot bind a subsequent one. Each Congress may repeal or amend laws that a previous Congress enacted, and Congress may pass laws inconsistent with treaties. By the same token, a future Congress must have the power to disavow commitments contained in a covenant between the Federal Government and one of its territories, regardless of the terms of that covenant.

Accordingly, the "New Commonwealth" proposal that some have proposed contemplates a political status for Puerto Rico that is not permitted by the United States

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Constitution. As long as Puerto Rico remains a territory of the United States, Congress may not impair the constitutional authority of later Congresses to alter the political powers of the government of Puerto Rico by entering into a covenant or compact with Puerto Rico or its residents.

## 2. Statehood

A second option for the future status of Puerto Rico is statehood. If admitted as a State, Puerto Rico would stand on equal footing with the existing States in all respects.

At present, Puerto Rico is an “unincorporated” territory, subject only to the most fundamental provisions of the Constitution. One notable consequence of this status is that the Constitution’s Tax Uniformity Clause is not applicable to Puerto Rico, allowing Congress to exempt the Puerto Rican people from most federal income tax laws and to provide them with other tax preferences not provided to residents of the States. These tax preferences would become impermissible under the Constitution if Puerto Rico were “incorporated” into the country as part of the process of being admitted as a State.

Statehood would, of course, confer upon Puerto Rico and its citizens certain political rights they do not currently possess. Puerto Rican citizens would be entitled to vote for President, and, as a State, Puerto Rico would elect two U.S. Senators and full voting Members in the U.S. House of Representatives. The number of Members in the House would be determined based on Puerto Rico’s population at the next congressional reap-

portionment, following the 2010 census. In the interim, Congress could temporarily increase membership of the House to allow Puerto Rico to elect one or more Members.

## 3. Independence

Another option for the future status of Puerto Rico is independence from the United States. Congress’s power under the Constitution’s Territory Clause includes the power to relinquish its sovereignty over a territory. *See* U.S. CONST., Art. IV, Cl. 2. Congress thus may determine whether and under what conditions a territory may receive independence and may regulate those conditions until the point of independence.

Independence would have significant legal consequences for Puerto Rico. As an independent nation, Puerto Rico would not be subject to the authority of the United States and would be free to direct its own relations with foreign nations. By the same token, Puerto Rico would not automatically be entitled to receive monetary support or military protection from the United States. Additionally, independence from the United States could affect the citizenship of Puerto Rico’s residents. Individuals born in Puerto Rico are citizens of the United States by statute, 8 U.S.C. § 1402. The general rule is that citizenship follows sovereignty. So if Puerto Rico were to become an independent nation, Puerto Rico’s residents could become citizens of the newly independent nation and cease to be citizens of the United States, unless a different rule were prescribed by legislation or treaty.

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There are a variety of different paths that Puerto Rico could take to independence. For example, the Territory of the Philippines received its independence by the Philippine Independence Act of 1934. The Act authorized the Philippine government to draft a constitution for an interim Commonwealth, which upon approval by the people of the Philippines and the U.S. President initiated an interim Commonwealth. The Act provided that, after a transition period of ten years, the President, by proclamation, would withdraw and surrender United States jurisdiction and sovereignty and "recognize the independence of the Philippines as a separate and self-governing nation." In 1946, President Harry S Truman did proclaim independence, and the two nations entered into a Treaty of General Relations.

Another possible model of independence is that of the "freely associated states" of Micronesia, the Marshall Islands, and Palau. These states, which the United

States had administered since World War II, became independent after Congress approved negotiated "compacts of free association" with the territories. The freely associated states retained close ties to the United States, however, and the United States continues to provide security, defense, and various other types of financial assistance and services. Citizens of the freely associated states may generally enter the United States as non-immigrants and may establish residence and work here.

Among the constitutionally available options, freely associated status may come closest to providing for the relationship that advocates for "New Commonwealth" appear to desire. But it would need to be made clear to the people of Puerto Rico that freely associated status is a form of independence from the United States and cannot be made immune from the possibility of unilateral termination by the United States.

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## RECENT DEVELOPMENTS

Section 4 of Executive Order 13183 (as amended by Executive Order 13319) directs the Task Force to “report on its actions to the President ... on progress made in the determination of Puerto Rico’s ultimate status.” Following the issuance of the 2005 Task Force Report, the former co-chair of the Task Force, Deputy Assistant Attorney General C. Kevin Marshall, testified before the House Committee on Natural Resources, its Subcommittee on Insular Affairs, and the Senate Committee on Energy and Natural Resources on the Task Force Report and proposed legislation. (See Appendix G.)

Since the issuance of the 2005 Report, Members of Congress have proposed several measures to address the future status of Puerto Rico. Each of these proposals seeks to allow the Puerto Rican people to express their will regarding the future status of the island, although they would do so in different ways. These proposals fall into three general categories:

- The first category of legislation would seek to ascertain the views of the Puerto Rican people through a plebiscite. Some of the proposed bills would sanction a plebiscite similar to the one recommended in the 2005 Task Force Report. Those bills include S. 2661 (sponsored by Senator Martinez) and H.R. 4687 (co-sponsored by Representatives Fortuño and Serrano), both of which were introduced in the 109th Congress. Other bills, such as S. 1936 (sponsored by Senator Salazar), would authorize a single plebiscite in which the

Puerto Rican people would choose among four status options (continuing the current status, statehood, independence, and independence as a freely associated state).

- The second category, represented in H.R. 1230 (sponsored by Representative Velázquez), would support the convening of a constitutional convention in Puerto Rico, the purpose of which would be to develop a proposal for the future status of the island to be voted upon by the Puerto Rican people.
- A third category would combine elements of the first two categories. An example of such legislation is H.R. 900 (sponsored by Representative Serrano), which was passed by the House Natural Resources Committee on October 27, 2007. As amended, H.R. 900 would direct Puerto Rico to hold a plebiscite by December 31, 2009, in which voters would be asked to decide whether Puerto Rico should “consider a constitutionally viable permanent non-territorial status” or “continue to have its present form of territorial status and relationship with the United States.” If voters favor the first option, the bill would recognize the right of the people of Puerto Rico either to conduct an additional plebiscite “to consider a self-determination option with the results presented to Congress” or to call a constitutional convention for the purpose of proposing a “self-determination option” to the Puerto Rican people.

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# TASK FORCE RECOMMENDATIONS

As detailed earlier and in the 2005 Report, the Task Force concludes that there are only three options available under the U.S. Constitution for the future status of Puerto Rico:

- Continue as a territory. The current status of Puerto Rico as a commonwealth may continue indefinitely but remains subject to future modification by Congress.
- Statehood. Under this option, Puerto Rico would become the 51st State with standing equal to the other 50 States.
- Independence. Under this option, Puerto Rico would become a sovereign nation, independent from the United States.

The democratic will of the Puerto Rican people is paramount for determining the future status of the territory. To this end, the 2005 Task Force Report recommended a two-stage plebiscite to determine whether the Puerto Rican people wish to retain the status quo, and if not, which of the two available options they prefer. The Task Force concluded that such a process would be the best way to ascertain the popular will in a way that provides clear guidance for future action by Congress.

The Task Force acknowledges the pending legislative measures that would provide similar or alternative procedures through which the people of Puerto Rico

might express their will regarding the future status of the island. The Task Force continues to believe that the two-stage plebiscite would provide clearer guidance for Congress than other procedures in which it is possible that none of the available options would win a majority of votes. At the same time, there are other ways to proceed, and the Task Force's recommendations do not preclude alternative action by Puerto Rico itself to express its views to Congress.

The following are the recommendations of the Task Force:

1. The Task Force reiterates its prior recommendation that Congress provide for a Federally sanctioned plebiscite as soon as practicable in which the people of Puerto Rico will be asked to state whether they wish to maintain the current territorial status or to pursue a constitutionally viable path toward a permanent non-territorial status. Congress should provide for this plebiscite to occur on a date certain.

2. The Task Force reiterates its prior recommendation that if the people of Puerto Rico elect to pursue a permanent non-territorial status, Congress should provide for an additional plebiscite to allow the people of Puerto Rico to choose between one of the permanent non-territorial options permitted by the Constitution: statehood or independence. Once the

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people of Puerto Rico have selected one of the two options, we would encourage Congress to begin a process of transition consistent with that option.

3. If the people elect to maintain Puerto Rico's current status, the Task Force

recommends, consistent with the 1992 memorandum of President George H.W. Bush, that a plebiscite occur periodically as long as that status continues, to keep Congress informed of the people's wishes.