

[Laughter.]

The CHAIRMAN. Thank you very much, Mr. Marshall.

STATEMENT OF C. KEVIN MARSHALL, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. MARSHALL. Thank you, Mr. Chairman and Ranking Member Bingaman, for inviting me to discuss the working report of the President's task force on Puerto Rico's Status. I'm a Deputy Assistant Attorney General in the Justice Department's Office of Legal Counsel. As the Attorney General's designee on the task force, I serve as its co-chair along with the Deputy Assistant to the President and Director for Intergovernmental Affairs, Rubén Barrales.

The status of Puerto Rico and the options regarding that status have been issues for many years. President George H. W. Bush, in a 1992 memorandum, recognized that Puerto Rico's current commonwealth stature grants it significant self-government authority, described Puerto Rico as a territory, and directed that it be treated like a State.

President Clinton, in establishing the task force in 2000, made it the policy of the executive branch to help answer the questions that the people of Puerto Rico have asked for years regarding the options for the island's future status and the process of realizing an option.

The task force was required to consider and develop positions on proposals, without preference among the options, for the commonwealth's future status. Its recommendations are limited, however, to those options permitted by the Constitution.

In establishing the task force, President Clinton also expressly recognized that Puerto Rico's ultimate status has not been determined and noted the different visions for that status within Puerto Rico.

Although Puerto Rico held a plebiscite in 1998, none of the proposed status options received a majority. Indeed, none of the above prevailed because of objection to the ballot definition of the commonwealth option.

Some in Puerto Rico have proposed a new commonwealth status. That, among other things, could not be altered without the mutual consent of Puerto Rico and the Federal Government. In October 2000, a few months before President Clinton established the task force, William Treanor, who held the same position in the Office of Legal Counsel that I now hold, testified that such a proposal was not constitutional.

Seeking to determine the constitutionally permissible options and recommend a process for realizing one of the options, the task force considered all status options objectively, without prejudice. We sought input from all interested parties and met with anyone who requested a meeting.

The task force issued its report last December and concluded that there were three general options under the Constitution for Puerto Rico's status: One, continue its current status as a largely self-governing territory; two, admit Puerto Rico as a State; or three, make Puerto Rico independent.

The primary question regarding options is whether the Constitution allows a commonwealth status that could be altered only by mutual consent.

Since 1991, the Justice Department has consistently taken the position the Constitution does not. The task force report reaches that conclusion as well. The report, of course, is not a legal brief, but it does outline the reasoning and includes, as appendixes, two extended analyses by the Clinton Justice Department, one of which was sent to this committee in 2001. Thus, the new commonwealth position, as the task force understands it, is not consistent with the Constitution.

Any promises that the United States might make regarding Puerto Rico's status as a commonwealth would not and could not be binding on a future Congress. Puerto Rico may remain in its current status indefinitely, but it would remain subject to Congress's authority under the Constitution to regulate U.S. territories.

The report provides additional details on the other two permissible options, statehood and independence. Additional copies of the report have been provided to the committee for your convenience.

With regard to process, the task force sought to ascertain the will of the people of Puerto Rico in a way that provides clear guidance for future action by Congress. The key is to provide clear guidance, first to speak unambiguously about the constitutional options and second, to structure the process so that popular majorities are likely.

The task force therefore recommends a two-step process. The first step is simply to determine whether the people of Puerto Rico wish to remain as they are. We recommend that Congress provide for a federally sanctioned plebiscite on this question. If the vote is to remain as a territory, then the second step would be periodic plebiscites to inform Congress of any change in views.

If the first vote is to change Puerto Rico's status, then the second step would be another plebiscite in which the people would choose between statehood and independence.

Consistent with our presidential mandate, this recommended process does not seek to prejudice the outcome, even though it is structured to produce a clear outcome. Puerto Ricans have before voted by a majority to remain as a commonwealth. They may do so again. In addition, the process does not preclude action by Puerto Rico itself to express its views.

At the first step, the task force recommends a plebiscite to occur on a date certain. If Congress wished to ensure that some action occurred, but not preclude local initiative, it could allow a sufficient period before that date certain.

Thank you for this opportunity to share the views of the task force. I have submitted my written statement for the record and I look forward to taking your questions.

[The prepared statement of Mr. Marshall follows:]

PREPARED STATEMENT OF C. KEVIN MARSHALL, DEPUTY ASSISTANT ATTORNEY
GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Thank you, Mr. Chairman and Ranking Member Bingaman, for inviting me to discuss the work and report of the President's task force on Puerto Rico's Status. President Clinton established the Task Force in December 2000, and President Bush has

continued it through amendments of President Clinton's Executive Order. The Task Force consists of designees of each member of the President's Cabinet, and the Deputy Assistant to the President and Director for Intergovernmental Affairs, Rubén Barrales. I am a Deputy Assistant Attorney General in the Justice Department's Office of Legal Counsel. As the Attorney General's designee on the Task Force, I serve as its Co-Chair, along with Mr. Barrales.

The status of Puerto Rico, and the options regarding that status, have been issues for many years. In 1992, for example, President George H.W. Bush issued a Memorandum that recognized Puerto Rico's popularly approved Commonwealth structure as "provid[ing] for self-government in respect of internal affairs and administration," described Puerto Rico as "a territory," and directed the Executive Branch to treat Puerto Rico as much as legally possible "as if it were a State." He also called for periodically ascertaining "the will of its people regarding their political status" through referenda.

President Clinton, in his order establishing the Task Force, made it the policy of the Executive Branch "to help answer the questions that the people of Puerto Rico have asked for years regarding the options for the islands' future status and the process of realizing an option." He charged the Task Force with seeking to implement that policy. We are required to "consider and develop positions on proposals, without preference among the options, for the Commonwealth's future status." Our recommendations are limited, however, to options "that are not incompatible with the Constitution and basic laws and policies of the United States."

On the same day that he issued his Executive Order, President Clinton also issued a Memorandum for the Heads of Executive Departments and Agencies regarding the Resolution of Puerto Rico's status. That memorandum added that "Puerto Rico's ultimate status has not been determined" and noted that the three major political parties in Puerto Rico were each "based on different visions" for that status. Although Puerto Rico held a plebiscite in 1998, none of the proposed status options received a majority. Indeed, "None of the Above" prevailed, because of objection to the ballot definition of the commonwealth option.

Some in Puerto Rico have proposed a "New Commonwealth" status, under which Puerto Rico would become an autonomous, non-territorial, non-State entity in permanent union with the United States under a covenant that could not be altered without the "mutual consent" of Puerto Rico and the federal Government. In October 2000, a few months before President Clinton established the Task Force, the House Committee on Resources held a hearing on a bill (H.R. 4751) incorporating a version of the "New Commonwealth" proposal. William Treanor, who held the same position in the Office of Legal Counsel that I now hold, testified that this proposal was not constitutional.

Thus, the Task Force's duties were to determine the constitutionally permissible options for Puerto Rico's status and to provide recommendations for a process for realizing an option. We had no duty or authority to take sides among the permissible options.

The Task Force considered all status options, including the current status and the New Commonwealth option, objectively and without prejudice. We also attempted to develop a process for Congress to ascertain which of the constitutional options the people of Puerto Rico prefer. We sought input from all interested parties, including Governor Acevedo-Vila. The members met with anyone who requested a meeting. I myself had several meetings with representatives of various positions, and also received and benefited from extensive written materials.

The Task Force issued its report last December and concluded that there were three general options under the Constitution for Puerto Rico's status: (1) continue Puerto Rico's current status as a largely self-governing territory of the United States; (2) admit Puerto Rico as a State, on an equal footing with the existing 50 States; or (3) make Puerto Rico independent of the United States.

As indicated in my discussion of the 1998 plebiscite and the origins of the Task Force, the primary question regarding options was whether the Constitution currently allows a "Commonwealth" status that could be altered only by "mutual consent," such that Puerto Rico could block Congress from altering its status. Since 1991, the Justice Department has, under administrations of both parties, consistently taken the position that the Constitution does not allow such an arrangement. The Task Force report reiterates that position, noting that the Justice Department conducted a thorough review of the question in connection with the work of the Task Force. The report is of course not a legal brief. But it does outline the reasoning, and it includes as appendices two extended analyses by the Clinton Justice Department. The second of these is a January 2001 letter to this Committee, a copy of which was sent to the House Committee on Resources on the same date. The report

also cites additional materials such as Mr. Treanor's testimony and the 1991 testimony of the Attorney General.

The effect of this legal conclusion is that the "New Commonwealth" option, as we understand it, is not consistent with the Constitution. Any promises that the United States might make regarding Puerto Rico's status as a commonwealth would not be binding. Puerto Rico would remain subject to Congress's authority under the Territory Clause of the Constitution "to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." Puerto Rico receives a number of benefits from this status, such as favorable tax treatment. And Puerto Rico may remain in its current Commonwealth, or territorial, status indefinitely, but always subject to Congress's ultimate authority to alter the terms of that status, as the Constitution provides that Congress may do with any U.S. territory.

The other two options, which are explained in the report, merit only brief mention here. If Puerto Rico were admitted as a State, it would be fully subject to the U.S. Constitution, including the Tax Uniformity Clause. Puerto Rico's favorable tax treatment would generally no longer be allowed. Puerto Rico also would be entitled to vote for presidential electors, Senators, and full voting Members of Congress. Puerto Rico's population would determine the size of its congressional delegation.

As for the third option of independence, there are several possible ways of structuring it, so long as it is made clear that Puerto Rico is no longer under United States sovereignty. When the United States made the Philippines independent in 1946, the two nations entered into a Treaty of General Relations. Congress might also provide for a closer relationship along the lines of the "freely associated states" of Micronesia, the Marshall Islands, and Palau. The report explains, with a few qualifications, that, "[a]mong the constitutionally available options, freely associated status may come closest to providing for the relationship between Puerto Rico and the United States that advocates for 'New Commonwealth' status appear to desire."

With regard to process, the Task Force focused on ascertaining the will of the people of Puerto Rico. In particular, we sought to ascertain that will in a way that, as the report puts it, "provides clear guidance for future action by Congress." The keys to providing clear guidance are, first, to speak unambiguously about the options the Constitution allows and, second, to structure the process so that popular majorities are likely. The inconclusive results of the 1998 plebiscite, as well as an earlier one in 1993, did not strike us as providing clear guidance to Congress.

We therefore have recommended a two-step process. The first step is simply to determine whether the people of Puerto Rico wish to remain as they are. We recommend that Congress provide for a federally sanctioned plebiscite in which the choice will be whether to continue territorial status. If the vote is to remain as a territory, then the second step, one suggested by the first President Bush's 1992 memorandum, would be to have periodic plebiscites to inform Congress of any change in the will of the people. If the first vote is to change Puerto Rico's status; then the second step would be for Congress to provide for another plebiscite in which the people would choose between statehood and independence, and then to begin a transition toward the selected-option. Ultimate authority of course remains with Congress.

Two points about this recommended process merit brief explanation. First, consistent with our presidential mandate, it does not seek to prejudice the outcome; it is structured to produce a clear outcome. At least once before, Puerto Ricans have voted by a majority to retain their current Commonwealth status. They may do so again. But it is critical to be clear about that status. Second, our recommended process does not preclude action by Puerto Rico itself to express its views to Congress. At the first step, we recommend that Congress provide for the plebiscite "to occur on a date certain." We did not, of course, specify that date. But if Congress wished to ensure that some action occurred but not preclude the people of Puerto Rico from taking the initiative, it could allow a sufficient period for local action before that "date certain." If such action occurred and produced a clear result, there might be no need to proceed with the federal plebiscite.

The Task Force knows well the importance of the status question to the loyal citizens of Puerto Rico and to the nation as a whole. We appreciate the Committee's commitment to this matter and the opportunity to share our views.

Senator CRAIG [presiding]. Well, Kevin, thank you very much for that statement. I'm sure my colleagues have questions. Senator Domenici has stepped out and will be back in a few moments, but we'll continue to proceed through the panel and to build this record.