

Mr. Attorney General, thank you very much for coming. It elevates the status of this legislation that you are here. Please proceed.

STATEMENT OF HON. RICHARD THORNBURGH, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, ACCOMPANIED BY STUART GERSON, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

Attorney General THORNBURGH. Mr. Chairman, Members of the committee, let me first express our appreciation for your stalwart support for the process of self-determination and your role as a champion of this particular legislation, the Puerto Rico Status Referendum Act. I appreciate also your accommodation of my somewhat tight schedule today, and I assure you that through Mr. Gerson and others who are here we will exert ourselves to provide you and the committee with a full view of the administration on this important legislation.

I am pleased to be here today to testify on behalf of the administration regarding S. 244. This important bill provides for a referendum to be held in Puerto Rico to allow residents of Puerto Rico to express their preference of political status from among the options of Statehood, Independence, and continued Commonwealth status. Congress would then consider appropriate legislation to implement the status option chosen. This implementing legislation would take effect upon ratification by the people of Puerto Rico in a separate vote.

This President and his administration strongly favor the right of the people of Puerto Rico to choose their political status by means of a referendum. The President has repeatedly declared that the people of Puerto Rico should have the right to determine their political future. In his view, it is inconsistent for us to "applaud the exciting and momentous movements toward freedom in Eastern Europe, Latin America, and elsewhere while refusing to grant to our own citizens the right to self-determination."

The people of Puerto Rico should have the right to chart their own political future by engaging in the fundamental act of democracy, a free election. We believe that the approach of S. 244, with certain necessary modifications that I will discuss in a moment, can be an appropriate vehicle to achieve this goal. The modifications are important but are in large part less of a policy nature than of a purely legal or constitutional character.

I would wish to make it clear from the outset that my observations should in no way obscure the fact that the administration supports moving Puerto Rican status legislation forward.

The recent events in Eastern Europe remind us of the central importance, and the historical rarity, of political self-determination through democratic means. The belief that a people have the right to determine their own political fate through a free election, following free debate, has shown enormous power in Eastern Europe and has motivated great acts of courage by reformers in that part of the world. What has happened there has given hope that the ideals of freedom might sweep aside decades of repression. Yet recent events in that region also bring to mind that, in fact, relatively few peoples in history have been allowed to exercise a right of self-de-

termination through democratic means and that that right, where it exists, must be vigilantly guarded.

In our hemisphere, I am reminded of the democratic tide that swept Violeta Chamorro into office in Nicaragua. Although the turn to democracy in Nicaragua was dramatic, we should not overlook that there have been numerous free elections in the region over the past several years, underscoring the significance of democratic principles throughout Latin America and the Caribbean. Most recently, Puerto Rico's Caribbean neighbor Haiti committed itself to the democratic process through free and fair elections which result in the inauguration of a new president today.

In this context it is fitting that the people of Puerto Rico should be afforded the opportunity to determine their future relationship with the United States through democratic means. By honoring this right in our own hemisphere, we can continue to serve as a model of liberty, inspiring others all over the globe.

Moreover, Congress should allow the people of Puerto Rico to determine their own political future because it is simply fair and right. The people of Puerto Rico know better than anyone else which political path offers the most hope for achieving the kind of society that the Puerto Rican people desire. It would be an affront to deny them the opportunity to choose that path or to force them to follow a path that others think best for them.

At present, Puerto Rico is a commonwealth under the sovereignty of the United States. It has been given the right to organize a government pursuant to a constitution of its own adoption. Puerto Rico boasts a rich cultural heritage hundreds of years old. The contributions of Puerto Ricans in industry, music, literature and the arts have enriched American culture and have made Puerto Rico one of the most prosperous areas in all of the Caribbean and Latin America.

The residents of Puerto Rico have enjoyed United States citizenship since 1917, and Puerto Rico's sons and daughters have contributed to American society in every walk of life. Puerto Ricans have served honorably in our armed forces in both world wars as well as the Korean and Vietnam conflicts. Many Puerto Ricans are currently serving as members of our courageous armed forces as part of Operation DESERT STORM in the Persian Gulf. We truly owe these Puerto Rican men and women a tremendous debt of gratitude, and our thoughts and prayers are with them today as they are with all of our armed forces in the Gulf.

Puerto Ricans have long cherished the ideals of democracy and individual liberty as articulated in the Declaration of Independence and our United States Constitution. They govern themselves through a freely elected commonwealth government and actively participate in United States presidential primaries and national party conventions. Not until 1967, however, have the people of Puerto Rico had the opportunity to vote on the form of their continuing relationship with the United States. Dramatic changes in the island's economic, political, and social environment have shaped the political climate during the ensuing 24 years.

The electorate of Puerto Rico has more than doubled since the last referendum. Over one-half of all voters today, all those under the age of 45, were too young to vote in 1967. The opportunity to

vote upon their future is long overdue, and the administration believes that such an opportunity should be expeditiously provided.

The administration has in the past expressed its support for the enactment of either S. 712 or H.R. 4765, the status referendum legislation introduced during the previous Congress. This new bill combines the two approaches, with the result that S. 244 also presents some of the technical and legal difficulties of both of the earlier proposals. We believe, however, that these difficulties are not insurmountable. The administration is eager to move legislation forward, and we look forward to working together with the Congress to address the legal and technical difficulties we have identified. Those concerns are addressed in the separate section-by-section comments that we are submitting today for the use of the committee. We hope that by providing these detailed comments the Department of Justice can assist the committee in quickly working toward a bill that will legally and effectively accomplish the historic purposes for which we are here today.

I would like briefly to sketch, on only the most general level, the difficulties we see in the bill as currently drafted and to leave the details to the section-by-section comments and to my colleagues who will follow me. Once again, let me stress that the administration's goal is to assist in providing a fair and just vehicle through which the Puerto Rican people can express their will. My comments are intended to improve the bill and should not detract at all from the administration's strong support.

The concerns that we have identified in S. 244 fall into two broad categories. First, there are technical and legal problems created by the two-stage approach of a referendum followed by implementing legislation; in particular, the inclusion in the bill of detailed proposals for future, implementing legislation that Congress is not and cannot be legally obliged to enact. While this approach has the advantage of providing the electorate of Puerto Rico with a more precise picture of the likely consequences of whichever status option is selected, it is vitally important that it be made clear that the detailed descriptions of proposed implementing legislation set forth in titles II, III, and IV of the bill are not self-executing or legally binding on Congress. Rather, they constitute proposals for implementing legislation that may be changed in some important particulars and, we believe, in some respects must be changed in order to be consistent with the United States Constitution. It must therefore be made clear that all that would be formally enacted by the bill is title I, which provides for the referendum itself, and that title I does not incorporate by reference or commit Congress to adopt in its present form any of the subsequent titles of the bill.

The CHAIRMAN. If I may interrupt there, General, that is exactly our intent. As I reread the language where it says "enactment of this section constitutes a commitment by Congress to implement the status," we really mean a moral commitment, and perhaps we should make that language more precise. I think your comments are well taken.

Please excuse the interruption.

Attorney General THORNBURGH. I appreciate that, Mr. Chairman. It is well to lay that on the record, I think, lest there be any

misunderstanding. I will be glad to offer our views as to how that might be made more explicit.

The second category of difficulty, Mr. Chairman, concerns the details of the specific substantive proposals themselves. While, as I have noted, these details would not themselves be enacted as law under the Puerto Rico Status Referendum Act, any description of options should be as fair and legally realistic as possible so as again not to mislead the electorate of Puerto Rico about the consequences that would attend each of the options. Certain provisions in titles II, III and, IV, for example, contain constitutional and other legal infirmities that in our view would preclude their adoption as implementing legislation. If the purpose of presenting a detailed draft bill is to provide the electorate of Puerto Rico with a reasonably clear picture of the likely shape of implementing legislation for whichever option is chosen by a majority in the referendum, we strongly recommend that these difficulties be addressed now in the immediate context of the pending bill. It would be a disservice to the people of Puerto Rico to postpone resolution of these issues until after a particular status option has been chosen in the plebiscite, expectations about that status option have been created, and Congress is considering actual implementing legislation.

The CHAIRMAN. If I may interrupt once more—and please excuse these interruptions—that is precisely my and Senator Wallop's view in introducing this legislation. The people of Puerto Rico ought to know what it is they are choosing, ought to know the precise nature of the choices. We will deal with your recommendations later, but that sums up as well as any of us could say exactly what we mean.

Attorney General THORNBURGH. Thank you, Mr. Chairman.

I would, however, like to highlight some aspects of the substantive proposals for statehood and commonwealth that we find troubling. More extensive discussion of these and other issues is included in our section-by-section comments.

Should the statehood option be chosen, we believe it is unnecessary and, indeed, inappropriate to delay the onset of statehood for 5 years following the adoption of implementing legislation. To do so would not achieve what we presume is the desired result; that is, to avoid constitutional concerns under the tax uniformity provisions of the Constitution, Article I, Section 8, Clause 1, which requires that all Duties, Imposts and Excises be uniform throughout the United States. The 5-year delay apparently would be aimed at permitting, before statehood, a transition from Puerto Rico's current, favored, tax status as an unincorporated territory to strict tax uniformity. This approach overlooks, I suggest, two crucial points.

First, it appears to assume that the Uniformity Clause would apply to Puerto Rico only after it actually became a State. This assumption, however, is incorrect. At present, Puerto Rico is exempt from the requirements of the Uniformity Clause only because it is an unincorporated territory; that is, a territory that has not been incorporated into the United States because it has not previously been anticipated that Puerto Rico would become a State.

Under the Supreme Court precedents, however, Puerto Rico would become an incorporated territory once it becomes destined for statehood. Puerto Rico, therefore, would become subject to the

requirements of the uniformity clause as soon as Congress passes implementing legislation to make Puerto Rico a State. For purposes of applying the uniformity clause, therefore, it makes no difference whatsoever whether statehood becomes effective immediately or is delayed for 5 years.

This does not mean, however, that Puerto Rico's tax status must be changed immediately once the decision is made to bring Puerto Rico into the Union as a State.

That brings me to the second important point. Whether Puerto Rico becomes a State or an incorporated territory, the uniformity clause permits tax transition provisions, provided they are narrowly tailored, to prevent specific and identified problems of economic dislocation that Congress concludes would otherwise result from the transition from a non-incorporated territorial status to either an incorporated territorial or State status.

As Assistant Attorney General Shirley Peterson of the Tax Division testified before the Senate Finance Committee on November 14, 1989, we believe that a phase-in of permanent tax status would satisfy the requirements of the Uniformity Clause, if supported by adequate congressional findings that such a transitional period was necessary to take into account localized problems unique to Puerto Rico. For example, any economic dislocation that Puerto Rico might suffer if the tax benefits currently enjoyed there were suddenly and immediately terminated and if narrowly tailored to the goal of avoiding such severe dislocation.

Thus, we believe it is clear that the Constitution equally permits such a transition period before or after Puerto Rico becomes a State. This being so, we must oppose any unnecessary delay in the enjoyment of the benefits of statehood if that is the option selected by the Puerto Rican people. While the terms of each status option must be carefully scrutinized to ensure their conformity with the Constitution, whatever political status option is chosen by the people of Puerto Rico should not be delayed by unfounded constitutional concerns.

We also have concerns with some of the provisions that define the commonwealth option. For example, section 402(a) would declare that Puerto Rico "enjoys sovereignty like a State to the extent provided by the Tenth Amendment," and that "this relationship is permanent unless revoked by mutual consent." These declarations, I suggest, are totally inconsistent with the Constitution.

Under the Territory Clause of the Constitution, Article 4, Section 3, Clause 2, an area within the sovereignty of the United States that is not included in a State must necessarily be governed by or under the authority of Congress. Congress cannot escape this constitutional command by extending to Puerto Rico the provisions of the Tenth Amendment, which by its terms provides only the to the relationship between the Federal Government and the States.

We also doubt that Congress may effectively limit, by a statutory mutual consent requirement its constitutional power under the Territory Clause to alter Puerto Rico's status in some respect in the future. Not even the so-called "enhanced commonwealth" can ever hope to be outside of this constitutional provision.

Mr. Chairman, let me once again stress that this President wholly supports a referendum that allows the people of Puerto Rico to determine what their continuing relationship with the United States shall be. To this end, the administration stands willing to work with the committee to address the remaining issues. With these concerns addressed, we would hope that this legislation can be moved toward quick passage so that the people of Puerto Rico may make the historic decision about their political destiny that S. 244 would permit.

Mr. Chairman, I appreciate the opportunity to appear before you and your colleagues this morning. I appreciate your indulgence in my schedule, and I would propose to relinquish the Chair to Assistant Attorney General Gerson and our colleagues so that more detailed examination of some of the matters that I have adverted to in my prepared statement can be entered into.

Thank you.

[The prepared statement of Mr. Thornburgh follows:]

PREPARED STATEMENT OF HON. RICHARD THORNBURGH, ATTORNEY GENERAL,
DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Committee: I am pleased to be here today to testify on behalf of the Administration regarding S. 244, the "Puerto Rico Status Referendum Act." This important bill provides for a referendum to be held in Puerto Rico to allow residents of Puerto Rico to express their preference of political status from among the options of (i) Statehood; (ii) Independence; and (iii) continued Commonwealth status. Congress would then consider appropriate legislation to implement the status option chosen. This implementing legislation would take effect upon ratification by the people of Puerto Rico in a separate vote.

This President and his Administration strongly favor the right of the people of Puerto Rico to choose their political status by means of a referendum. The President has repeatedly declared that the people of Puerto Rico should have the right to determine their own political future. In his view, it is inconsistent for us to "applaud the exciting and momentous movements toward freedom in Eastern Europe, Latin America and elsewhere while refusing to grant to our own citizens the right to self-determination." The people of Puerto Rico should have the right to chart their own political future by engaging in the fundamental act of democracy, a free election. We believe that the approach of S. 244, with certain necessary modifications that I will discuss in a moment, can be an appropriate vehicle to achieve this goal. The modifications are important and are in large part less of a policy nature than of a purely legal or constitutional character. However, I wish to make it clear from the outset that my observations should in no way obscure the fact that the Administration supports moving Puerto Rican status legislation forward.

The recent events in Eastern Europe remind us of the central importance, and the historical rarity, of political self-determination through democratic means. The belief that a people has the right to determine its own political fate through a free election, following free debate, has shown enormous power in Eastern Europe and has motivated great acts of courage by reformers in that part of the world. What has happened there has given hope that ideals of freedom might sweep aside decades of repression. Yet recent events in that region also bring to mind that, in fact, relatively few peoples in history have been allowed to exercise a right of self-determination through democratic means, and that the right, where it exists, must be vigilantly guarded.

In our own hemisphere, I am reminded of the democratic tide that swept Violeta Chamorro into office in Nicaragua. Although the turn to democracy in Nicaragua was dramatic, we should not overlook that there have been numerous free elections in the region over the last several years that underscore the significance of democratic principles throughout Latin America and the Caribbean. Most recently, Puerto Rico's Caribbean neighbor Haiti committed itself to the democratic process through free and fair elections. In this context it is fitting that the people of Puerto Rico should be afforded the opportunity to determine their future relationship with the United States through democratic means. By honoring this right in our own

hemisphere, we can continue to serve as a model of liberty inspiring others all over the globe.

Moreover, Congress should allow the people of Puerto Rico to determine their own political future because it is simply fair and right. The people of Puerto Rico know better than anyone else which political path offers the most hope for achieving the kind of society that the Puerto Rican people desire. It would be an affront to deny them the opportunity to choose that path or to force them to follow a path that others think best for them.

At present, Puerto Rico is a commonwealth under the sovereignty of the United States. It has been given the right to organize a government pursuant to a constitution of its own adoption. Puerto Rico boasts a rich cultural heritage hundreds of years old. The contributions of Puerto Ricans in industry, music, literature, and the arts have enriched American culture and have made Puerto Rico one of the most prosperous areas in all of the Caribbean and Latin America.

The residents of Puerto Rico have enjoyed United States citizenship since 1917, and Puerto Rico's sons and daughters have contributed to American society in every walk of life. Puerto Ricans have served honorably in our armed forces in both World Wars, as well as the Korean and Vietnam conflicts. Many Puerto Ricans are currently serving as members of our courageous armed forces as part of Operation Desert Storm in the Persian Gulf. We truly owe these Puerto Rican men and women a tremendous debt of gratitude, and our thoughts and prayers are with them today, as they are with all of our armed forces in the Gulf.

Puerto Ricans have long cherished the ideals of democracy and individual liberty as articulated in the Declaration of Independence and the United States Constitution. They govern themselves through a freely elected commonwealth government, and actively participate in United States presidential primaries and national party conventions. Not since 1967, however, have the people of Puerto Rico had the opportunity to vote on the form of their continuing relationship with the United States. Dramatic changes in the island's economic, political, and social environment have shaped the political climate during the ensuing twenty-four years. The electorate of Puerto Rico has more than doubled since this last referendum. Over one-half of all voters today—all those under the age of 45—were too young to vote in 1967. The opportunity to vote upon their future is long overdue and the Administration believes that such an opportunity should be expeditiously provided.

The Administration has in the past expressed its support for the enactment of either S. 712 or H.R. 4765, the status referendum legislation introduced during the previous Congress. This new bill combines the two approaches, with the result that S. 244 also presents some of the technical and legal difficulties of both of the earlier proposals. We believe, however, that these difficulties are not insurmountable. The Administration is eager to move legislation forward, and we look forward to working together with the Congress to address the legal and technical difficulties we have identified. Those concerns are addressed in the separate section-by-section comments that we are submitting today for the Committee. We hope that by providing these detailed comments, the Department of Justice can assist the Committee in quickly working toward a bill that will legally and effectively accomplish the historic purposes for which we are here today.

I would like briefly to sketch, on only the most general level, the difficulties we see in the bill as currently drafted, and to leave the details to the section-by-section comments. Once again, let me stress that the Administration's goal is to assist in providing a fair and just vehicle through which the Puerto Rican people can express their will. My comments are intended to improve the bill and should not detract at all from the Administration's strong support.

The concerns that we have identified in S. 244 fall into two broad categories. First, there are technical and legal problems created by the two-stage approach of a referendum followed by implementing legislation—in particular the inclusion in the bill of detailed proposals for future, implementing legislation that Congress is not and cannot be legally obliged to enact. While this approach has the advantage of providing the electorate of Puerto Rico with a more precise picture of the likely consequences of whichever status option is selected, it is vitally important that it be made clear that the detailed descriptions of proposed implementing legislation as set forth in titles II, III, and IV of the bill are self-executing or legally binding on Congress. Rather, they constitute proposals for implementing legislation that may be changed in some important particulars and, we believe, in some respects be changed in order to be consistent with the U.S. Constitution. It must therefore be made clear that all that would be formally enacted by the bill is Title I, which provides for the referendum itself, and that Title I does not incorporate by reference, or

commit Congress to adopt in its present form, any of the subsequent titles of the bill.

The second category of difficulties concerns the details of the specific substantive proposals themselves. While, as I have noted, these details would not themselves be enacted as law under the Puerto Rico Status Referendum Act, any descriptions of options should be as fair and legally realistic as possible, so as not to mislead the electorate of Puerto Rico about the consequences that would attend each of the options. Certain provisions in titles II, III, and IV, for example, contain constitutional and other legal infirmities that, in our view, would preclude their adoption as implementing legislation. If the purpose of presenting a detailed draft bill is to provide the electorate of Puerto Rico with a reasonably clear picture of the likely shape of implementing legislation for whichever option is chosen by a majority in the referendum, we strongly recommend that these difficulties be addressed now in the immediate context of the pending bill. It would be a disservice to the people of Puerto Rico to postpone resolution of these issues until after a particular status option has been chosen in the plebiscite, expectations about that status option have been created, and Congress is considering actual implementing legislation.

I would, however, like to highlight some aspects of the substantive proposals for statehood and commonwealth that we find troubling. More extensive discussion of these and other issues is included in our section-by-section comments.

Should the statehood option be chosen, we believe it is unnecessary and indeed inappropriate to delay the onset of statehood for five years following the adoption of implementing legislation. To do so would not achieve what we presume is the desired result, that is, to avoid constitutional concerns under the tax uniformity provision of the Constitution, U.S. Const. Art. I, § 8, cl. 1, which requires that "all Duties, Imposts and Excises . . . be uniform throughout the United States." The five-year delay apparently would be aimed at permitting, before statehood, a transition from Puerto Rico's current, favored, tax status as an unincorporated territory to strict tax uniformity. This approach overlooks two crucial points.

First, it appears to assume that the Uniformity Clause would apply to Puerto Rico only after it actually became a state. This assumption, however, is incorrect. At present, Puerto Rico is exempt from the requirements of the Uniformity Clause only because it is an "unincorporated" territory; that is, a territory that has not been incorporated into "the United States" because it has not previously been anticipated that Puerto Rico would become a state. Under the Supreme Court's precedents, however, Puerto Rico would become an incorporated territory once it becomes destined for statehood. Puerto Rico therefore would become subject to the requirements of the Uniformity Clause as soon as Congress passes implementing legislation to make Puerto Rico a state. Therefore, for purposes of applying the Uniformity Clause, it makes no difference whatsoever whether statehood becomes effective immediately or is delayed for five years.

This does not mean, however, that Puerto Rico's tax status must be changed immediately once the decision is made to bring Puerto Rico into the union as a state. That brings me to the second important point: Whether Puerto Rico becomes a state or an incorporated territory, the Uniformity Clause permits tax transition provisions, provided they are narrowly tailored to prevent specific and identified problems of economic dislocation that Congress concludes would otherwise result from the transition from a non-incorporated territorial status to either an incorporated territorial or state status. As Assistant Attorney General Shirley Peterson of the Tax Division testified before the Senate Finance Committee on November 14, 1989, we believe that a phase-in of permanent tax status would satisfy the requirements of the Uniformity Clause, if supported by adequate Congressional findings that such a transitional period was necessary to take into account localized problems unique to Puerto Rico—for example, any economic dislocation that Puerto Rico might suffer if the tax benefits currently enjoyed there were suddenly and immediately terminated—and if narrowly tailored to the goal of avoiding such severe dislocation.

Thus, we believe it is clear that the Constitution equally permits such a transition period before or after Puerto Rico becomes a state. This being so, we must oppose any unnecessary delay in the enjoyment of the benefits of statehood if that is the option selected by the Puerto Rican people. While the terms of each status option must be carefully scrutinized to ensure their conformity with the Constitution, whatever political status option is chosen by the people of Puerto Rico should not be delayed by unfounded constitutional concerns.

We also have concerns with some of the provisions that define the commonwealth option. For example, section 402(a) would declare that Puerto Rico "enjoys sovereignty, like a state, to the extent provided by the Tenth Amendment," and that

"[t]his relationship is permanent unless revoked by mutual consent." These declarations are totally inconsistent with the Constitution.

Under the Territory Clause of the Constitution, U.S. Const. Art. IV, § 3, cl. 2, an area within the sovereignty of the United States that is not included in a state must necessarily be governed by or under the authority of Congress. Congress cannot escape this Constitutional command by extending to Puerto Rico the provisions of the Tenth Amendment, which by its terms applies only to the relationship between the federal government and states. We also doubt that Congress may effectively limit, by a statutory mutual consent requirement, its constitutional power under the Territory Clause to alter Puerto Rico's commonwealth status in some respect in the future. Not even so-called "enhanced commonwealth" can ever hope to be outside this constitutional provision.

Mr. Chairman, let me once again stress that this President wholeheartedly supports a referendum that allows the people of Puerto Rico to determine what their continuing relationship with the United States shall be. To this end, the Administration stands willing to work with the Committee to address the remaining issues. With these concerns addressed, we would hope that this legislation can be moved toward quick passage, so that the people of Puerto Rico may make the historic decision about their political destiny that S. 244 would permit.

SECTION-BY-SECTION COMMENTS ON S. 244 *

These comments express the views of the Department of Justice with respect to S. 244, the "Puerto Rico Status Referendum Act."¹ The bill would provide for a status referendum to be held in December of 1991 in Puerto Rico to allow residents of Puerto Rico to express their preference of political status from among the options of (i) Statehood; (ii) Independence; and (iii) Commonwealth.

The approach of this bill differs from the approaches of status referendum legislation introduced during the previous Congress in the Senate ("S. 712") and in the House ("H.R. 4765"), but combines aspects of each. Under S. 244, legislation to alter the political status of Puerto Rico would proceed in two stages. First, a referendum would be held among the three political status options as described in titles II, III, and IV of the bill. Unlike the approach of S. 712, however, the selection of a particular status option in the referendum would not become self-executing. Rather, subsequent legislation would be required to implement whatever status option is selected by a majority in the referendum. The details of the particular status option as described in the applicable title of the Puerto Rico Status Referendum Act would not automatically be adopted by virtue of the referendum result; rather, that "title" would be in the nature of a legislative *proposal* to be introduced by the Chairman of the Senate Committee on Energy and Natural Resources and the Chairman of the House Committee on Interior and Insular Affairs as implementing legislation, which apparently can be modified or amended. The implementing legislation is to take effect following a second, ratifying vote of the electorate of Puerto Rico.

In providing for this two-stage process, S. 244 follows the approach of H.R. 4765 as reported by the House Committee on Interior and Insular Affairs in the 101st Congress. However, the draft bill provides considerably greater detail as to the type of implementing legislation envisioned by Congress for whatever status option is selected, and in this respect parallels the approach of S. 712 as reported by the Senate Committee on Energy and Natural Resources and the Senate Finance Committee in the 101st Congress.

The Department of Justice has in the past expressed its support for *either* the approach of S. 712 or the approach of H.R. 4765. In many respects, S. 244 combines the advantages of each approach. Of course, in combining the two approaches, the draft bill presents the technical and legal difficulties of both of the earlier proposals. We believe, however, that these difficulties should not be insurmountable.

The difficulties in S. 244 fall into two broad categories. First, there are certain technical and legal difficulties created by the two-stage approach, in particular the inclusion within legislation providing for the referendum detailed *proposals* for *future*, implementing legislation that Congress is not legally obliged to enact. While this approach has the advantage of providing the electorate of Puerto Rico with a more clear and detailed picture of the likely consequences of whichever status

* This document has been cleared by the Office of Management and Budget.

¹ We understand that other agencies may have comments on particular aspects of this bill. Our comments are limited to constitutional and other legal issues and to policy issues within the jurisdiction of the Department of Justice.

option is selected, we believe it is vitally important that it be made clear that the detailed descriptions of proposed implementing legislation as set forth in titles II, III, and IV of the bill, are *not* self-executing or in any way a legal commitment of Congress. Rather, they constitute *proposals* for implementing legislation that may be changed in some important particulars (and, we believe, in some respects *must* be changed in order to be consistent with the U.S. Constitution). It must therefore be made clear that all that would be formally *enacted* by the bill is Title I, which provides for the referendum itself, and that Title I does not incorporate by reference, or commit Congress to adopt in its present form, any of the subsequent titles of the bill.

The second category of difficulties concerns the details of the specific substantive proposals themselves. While, as noted, these details would not themselves be enacted as law under the draft Puerto Rico Status Referendum Act, we believe that it is important that any descriptions of the several status options be as fair and legally realistic as possible, so as not to mislead the electorate of Puerto Rico and create unrealistic expectations about the consequences that would attend each of the options. We have identified constitutional and other legal difficulties with certain of the provisions in each of titles II, III, and IV that we believe would preclude their adoption as implementing legislation. If the purpose of including such details in the draft bill—to provide the electorate of Puerto Rico with a reasonably clear picture of the likely shape of implementing for whichever option is chosen by a majority in the referendum—is to be achieved, we strongly believe that these difficulties must be addressed in the immediate context of the draft bill and not postponed until a particular title is introduced as actual implementing legislation.

These two major types of problems are interrelated and can tend to compound one another. For example, if it is *unclear* that titles II, III, and IV are merely proposals *and* the substance of those proposals is unrealistic or constitutionally improper, the greatest possibility for confusing or misleading the electorate of Puerto Rico would exist. Nonetheless, each type of problem is significant in its own right. It may be tempting to say that, so long as it is made clear that titles II, III, and IV are merely proposals for implementing legislation, the specifics of these proposals need not now be considered with care. On the other hand, it may be tempting to say that if the details of the substantive proposals are corrected to avoid constitutional difficulty, there is little danger in not clarifying that they are only proposals. We would strongly disagree with either suggestion. So long as the bill does not make the choice of a particular status option self-executing, it is misleading to suggest that Congress is "bound" in any legal sense to enact the title corresponding to that choice, even if the provisions of that title were made realistic and constitutional. Congress may not legally bind itself. Congress could always change the substance of proposed implementing legislation. If Congress intends to truly *commit* itself to implement whatever status option receives a majority in accordance with the details of whichever title is applicable, it should return to the self-executing approach and language of S. 712. Similarly, even if it is clear that titles II, III, and IV are mere proposals, it is misleading to include detailed proposals that have no realistic chance of being enacted into law or that are likely to be invalidated as unconstitutional. In such event, it would be better to return to the approach of H.R. 4765, in which the choice is purely one of political status, with the precise consequences and transitional arrangements attending each status outlined in only the most general terms in a committee report. The hybrid approach of S. 244 has many advantages, but it should address *both* types of problems.

The remainder of these comments addresses in detail particular legal difficulties in the bill, beginning with Title I and the problems associated with making clear the separate stages of the two-stage procedure envisioned by Title I, and continuing with the specific substantive proposals of titles II (statehood), III (independence), and IV (commonwealth).

PREAMBLE

Section (1) of the preamble preceding Title I of the draft bill provide that "the United States of America recognizes the principle of self-determination and other applicable principles of international law with respect to Puerto Rico." In view of the sovereignty of the United States over Puerto Rico, the clause "and other applicable principles of international law" should be omitted.

TITLE I—REFERENDUM

TITLE I—1. AMBIGUITIES IN THE TWO-STAGE PROCEDURE

Title I, section 101(a) provides for an island-wide referendum among three status options, which are to appear on the ballot as follows:

- "(1) Statehood as set forth in title II of the Puerto Rico Status Referendum Act;
- (2) Independence as set forth in title III of the Puerto Rico Status Referendum Act; and
- (3) Commonwealth as set forth in title IV of the Puerto Rico Status Referendum Act."

Section 101(e)(1) provides that if the referendum results in a majority for one of the three status options, the Chairman of the Senate Committee on Energy and Natural Resources and the Chairman of the House Committee on Interior and Insular Affairs "shall introduce the appropriate title of this Act" corresponding to the choice receiving a majority, in order "to implement the status selected by the People of Puerto Rico, pursuant to this Act[.]" Section 101(e)(2) provides that "[e]nactment of this section constitutes a commitment by Congress to implement the status receiving a majority."

We believe that these provisions would benefit from clarification. Taken together, the provisions may create the misleading impression that Congress has "commit[ed]" itself, § 101(e)(2) to "implement the status selected by the People of Puerto Rico," § 101(e)(1), "*as set forth*" in the appropriate title corresponding to that status option. Section 101(a) (emphasis added). This impression is further supported by the structure of the bill, which includes the proposals for implementing legislation as actual "titles" of the Puerto Rico Status Referendum Act, suggesting that they are in some sense enacted into law. Moreover, language within each of these subsequent titles references section 101(f) in terms of specifying when the terms of such provisions shall take effect.

Nonetheless, we believe that the bill as presently drafted must be understood as providing that the implementation of whatever status option is selected by a majority in the referendum would not be self-executing, nor impose upon Congress a legal or even moral obligation to enact that status option without any change. Section 101(e)(1) provides only that the chairmen of the respective Senate and House committees shall "introduce" the appropriate title and section 101(f) states that the implementation legislation is to take effect only following a ratification vote by the electorate of Puerto Rico. In order to avoid the confusion created by the draft's present language, however, we believe the following changes are necessary.

First, to make clear that titles II, III, and IV are not enacted as part of the Puerto Rico Status Referendum Act but are merely proposals for implementing legislation, section 101(a) (1), (2) and (3) should be changed to provide that the options shall appear on the ballot as simply "Statehood," "Independence," and "Commonwealth" and that the words "*as set forth in title*" should be deleted.

Second, we believe that section 101(f), concerning ratification of implementing legislation by a second plebiscite, should be deleted or modified. If implementing legislation is to be separately enacted, the event or events that will trigger the operation of its provisions should be specified in the implementing legislation, not in the original act providing for the holding of the referendum. Each status option should be self-contained and provide its own requirement of a ratification vote and state the steps by which it will go into effect after its enactment and approval by the people of Puerto Rico.

We therefore recommend that a section providing for ratification by the electorate of Puerto Rico be added to each separate title and that references to section 101(f) in each title be changed to refer instead to that new section. We note that the implementation of the prevailing option would be dated from the ratification vote. In view of the possibility that this schedule could be upset by challenges to that vote, we recommend that the implementation of the prevailing option should be dated from a Presidential proclamation certifying the outcome of the ratification vote, rather from the date of the election. We therefore recommend that the following section be incorporated in each of the titles containing the status options:

Section —

(a) After enactment, this Act shall be submitted to the people of Puerto Rico for approval in a ratification vote.

(b) If this Act is approved by a majority of the valid votes cast, the President of the United States shall proclaim the result of the ratification vote, and the remainder of this Act shall thereupon take effect according to its terms.

TITLE I—2. DATE OF REFERENDUM AND RUNOFF

Title I, section 101(b) provides that the first referendum shall occur on December 2, 1991 "or on a date during the autumn of calendar year 1991 as may be mutually agreed by the three principal political parties of Puerto Rico." This provision unconstitutionally vests federal authority in persons other than officers of the United States appointed pursuant to the Appointments Clause of the Constitution. U.S. Const. Art. II, § 2, cl. 2. The change of the referendum date from the date stated in an Act of Congress would constitute the exercise of "significant authority pursuant to the laws of the United States" or the "performance of a significant governmental duty exercised pursuant to a public law." *Buckley v. Valeo*, 424 U.S. 1, 126, 141 (1976). Such authority can be exercised and such duty can be performed only by an officer of the United States appointed pursuant to the Appointments Clause, *Id.* at 126, 141, not by local political parties. We recommend that this function be vested in the President alone. We would have no objection, however, to a provision that permitted the three principal political parties to recommend to the President an alternative referendum date.

The balance of section 101(b) provides that if there is no majority in favor of one of the three options, "there shall be, within thirty days, a runoff referendum between the two status options which had received the largest number of votes. Such referendum shall also include an option of 'Neither of the Above.'" The draft bill is silent as to how or by whom the precise date of the runoff referendum is set. We again recommend that this function be vested in the President alone, but would have no objection to a provision that permitted recommendations by Puerto Rico's principal political parties, though we question the need for or desirability of including the eliminated party in any such process.

It should be specified that the term "majority" means a majority of the votes cast, and not a mere plurality. It is not clear whether the "Neither of the Above" option applies only to the run-off referendum or also to the original referendum. The bill is also silent as to the effect of the failure of any status option to obtain a majority in the runoff election. We recommend that the bill provide in so many words that, if no majority is obtained by any status option, there will be no change in the status of Puerto Rico.

TITLE I—3. JUDICIAL REVIEW

Title I, section 101(d) would establish a three-judge court to resolve disputes arising out of the referendum. We do not oppose this mechanism as a means of dispute resolution, but suggest that it be made clear that this is to be an extraordinary court of limited jurisdiction. In this regard, we believe that section 101(d)(2)(A) should be amended to read: "Any claims *regarding this Act* brought under the United States Constitution or a Federal statute . . .".

Title I, section 101(d)(1)(A) provides that "[a]ny aggrieved person (including, without limitation, and [sic] political party[])" may institute an action to challenge the outcome of the referendum certified by the governor, on the ground that significant electoral irregularities occurred that affected the outcome of the referendum. We understand this provision as intended to accord standing to litigate to the full extent permitted by Article III of the Constitution. We believe this purpose is fully accomplished by providing that "any aggrieved person" may institute such an action. We recommend that the parenthetical phrase "(including, without limitation, an[y] political party[])" should be deleted as raising an unnecessary and difficult legal question concerning whether political parties may possess Article III standing to litigate such questions. The provision could be amended to permit such parties to participate as *amicus curiae* in any litigation instituted by an "aggrieved" person having Article III standing.

Title I, section 101(d)(2)(B) also contains a minor technical error in providing for appellate review of judgments of the special three-judge court. The last sentence of this provision states that "[a]n appeal from a final judgment of the three-judge court will lie to the Supreme Court of the United States by way of certiorari." Technically, review by appeal is review as of right, while review by certiorari is review at the discretion of the Supreme Court. The two procedures are different. It is unclear which procedure is intended by section 101(d)(2)(B). The provision should be amended to use appropriate language specifying which procedure is to be used for obtaining Supreme Court review.

The term "local law" as used in section 101(d)(1)(E) is unclear. *See infra* at 14. This provision should be construed as inviting the three-judge court to accord due deference to precedents of Puerto Rico courts, but would not preclude independent determination by the court of all questions of law.

TITLE II—STATEHOOD

TITLE II—1. DELAY OF ONSET OF STATEHOOD FOR FIVE YEARS

Title II, section 201(a) provides for the President to issue a proclamation announcing ratification of statehood if such a result occurs in a ratification election. Section 201(b) provides that upon the issuance of that proclamation, Puerto Rico shall be declared a State of the United States of America effective on January 1 of the fifth calendar year following the calendar year in which the ratification occurs. In accordance with the discussion above, *supra* at 4-6, we believe that section 201 should be modified along the lines proposed in our comments on section 101(f).

We question the need for deferring the admission of Puerto Rico as a state for five years. The primary purpose of this provision appears to be to provide a five-year transition period during which the application of the Internal Revenue Code would be phased in and the benefits of section 936 would be phased out. The apparent purpose of this proposal is to avoid the constitutional concerns that the tax transition provisions create under the Uniformity Clause of the Constitution. U.S. Const. Art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."). We understand that Congress would have good reason to want to avoid subjecting Puerto Rico to the sudden withdrawal of its current beneficial tax status. However, we believe that Congress may provide for a period of tax transition without delaying the onset of statehood.

The Uniformity Clause issues presented by the tax transition provisions (discussed in the immediately following section) arise in the same manner whether the transition occurs before or after the formal proclamation of statehood, once Puerto Rico has been destined to become a state by virtue of the proclamation of the result of the ratification vote. As we shall demonstrate, the requirement of the Uniformity Clause that duties, impost, and excises be uniform throughout the United States is totally unaffected by delaying the onset of statehood, but hinges on whether or not an area under the sovereignty of the United States has been "incorporated" into the United States. Incorporation occurs as soon as it is decided that the area will become a state; it is not deferred until actual statehood. The question therefore is whether uniformity must be achieved at the moment of incorporation or whether it is permissible to provide for a transitional period to minimize the economic dislocation that may arise from the sudden imposition of the system of taxation governing throughout the United States. We shall discuss, first, the non-applicability of the Uniformity Clause to unincorporated territories; second, the definition of an unincorporated territory and transition to an incorporated territory; and finally, in the next section, the constitutionality of transitional provisions for unincorporated territories upon incorporation.

The Supreme Court has held that the requirement of the Uniformity Clause that duties, impost, and excises be uniform throughout the United States applies only to areas that have been "incorporated" into the United States. An "unincorporated" territory, i.e., a United States territory or possession that it is not anticipated eventually to become a state, is deemed not part of "the United States" within the meaning of the Uniformity Clause and is thus not subject to the clause; an "incorporated" territory forms part of the United States and is subject to the requirements of the clause.

The leading case for the incorporated territory/unincorporated territory distinction is *Downes v. Bidwell*, 182 U.S. 244 (1901). In *Downes*, the Court held that non-uniform customs treatment for Puerto Rico did not violate the requirements of the Uniformity Clause because Puerto Rico had not been incorporated as part of the United States. The concurring opinion of Justice White has come to be accepted as the controlling rationale of the case. See *Torres v. Puerto Rico*, 442 U.S. 465, 468-69 (1979); *Examining Board v. Flores de Otero*, 426 U.S. 572, 599-600 n.30 (1976); *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 5 (1955); *Balzac v. Porto Rico*, 258 U.S. 298, 311-313 (1922). Justice White's opinion reasons as follows:

In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.

... As Congress derives its authority to levy local taxes for local purposes within the territories, not from the general grant of power to tax as expressed in the Constitution, it follows that its right to locally tax is not to be measured by the provision empowering Congress "To lay and collect

Taxes, Duties, Imposts and Excises," and is not restrained by the requirement of uniformity throughout the United States. But the power, just referred to, as well as the qualification of uniformity, restrains Congress from imposing an impost duty on goods coming into the United States from a territory which has been incorporated into and forms a part of the United States.

Downes, 182 U.S. at 292 (White, J., concurring).

For purposes of the applicability of the Uniformity Clause, the question then becomes whether a territory has been "incorporated" into the United States. Though the exact parameters of this incorporation doctrine have been the subject of continuous debate in Supreme Court opinions, it is clear that at least one dispositive factor in determining that a territory has been "incorporated" is that it is anticipated or intended that the territory will eventually become a state. *United States v. Verdugo-Urgudez*, 110 S. Ct. 1056, 1062 (1990) (unincorporated territory is "one not clearly destined for statehood") *Examining Board v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976) (incorporated territories are "those Territories destined for statehood from the time of acquisition" and unincorporated territories are "those Territories not possessing that anticipation of statehood."); *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 5 (1955) ("A vital distinction was made between 'incorporated' and 'unincorporated' territories. The first category had the potentialities of statehood like unto continental territories. The second category described possessions of the United States not thought of as future States."). See also *Downes*, 182 U.S. at 293-294 (White, J., concurring).

Other cases discuss the question of "incorporation" in terms of whether Congress's *intention* to make a territory an incorporated territory. Cf. *Balzac v. Porto Rico*, 258 U.S. 298, 311-313 (1922); but see *Rasmussen v. United States*, 197 U.S. 516, 523-25 (1905) (looking to objective criteria as indicia of intention to incorporate a territory). But while explicit statements of intention "to incorporate" or not to incorporate may be relevant where a territory is not anticipated to become a state, it is clear that where eventual statehood is contemplated, the relevant intention is not any expression of intention "to incorporate" or not to incorporate, but the intention that the territory be made a state.

Under the reasoning of the Supreme Court's precedents, we believe that Puerto Rico would be effectively "incorporated" as part of the United States for purposes of application of the Uniformity Clause either (i) at the time a referendum majority for statehood is certified, given the bill's stated proposal to implement the status option selected by the people of Puerto Rico, or, certainly, (ii) by the time legislation putting into implementation the statehood choice is ratified or otherwise becomes operative. At whichever of these points a court would conclude Puerto Rico has become destined for statehood," *Verdugo-Urgudez*, 110 S. Ct. at 1062; *Flores de Otero*, 426 U.S. at 599 n.30, Puerto Rico will have become "incorporated" into the United States for purposes of Uniformity Clause analysis. Thus, the Uniformity Clause issues presented by the transitional tax provisions of the draft bill are not in any meaningful way affected by delaying the onset of statehood, once it is decided that Puerto Rico shall become a state. In our view, then, the delay of the onset of statehood is in no way justified by Uniformity Clause concerns.

TITLE II—2. PHASE-OUT OF SECTION 936 BENEFITS; PHASE-IN OF TAX LIABILITY GENERALLY

Title II, section 214 provides for numerous transition provisions concerning federal taxation and revenue transfers, including transitional provisions for phasing-out the current tax preference for Puerto Rico contained in section 936 of the Internal Revenue Code. See § 214(d). As noted in Assistant Attorney General Peterson's testimony before the Senate Finance Committee on November 14, 1989 on S. 712 in the 101st Congress, we believe that the retention and phase-out of the section 936 preference as a transitional measure could satisfy the requirements of the Uniformity Clause, if supported by adequate Congressional findings that such a transitional period was necessary to take into account localized problems unique to Puerto Rico—particularly, the economic dislocation that would result to an already economically depressed state from a sudden and immediate termination of the section 936 benefits—and if narrowly tailored to the goal of avoiding such severe dislocation. There is no evidence that the Uniformity Clause was intended to so constrain the exercise of Congress' power under Article IV to admit new states to the Union as to disable Congress from fashioning reasonable and necessary transition measures. Assistant Attorney General Peterson emphasized that such a provision "must represent a direct, tailored response to a geographically isolated problem: namely,

the economic dislocation that would otherwise occur upon Puerto Rico's admission to the Union."

We again emphasize the necessity for Congress to make detailed additional findings supporting its determination as to any transitional tax measure it adopts. This analysis applies with equal, if not increased, force to the proposed phase-in of tax liability generally, such as is provided by section 214(a). Such a phase-in of the federal income tax would have much broader application than a phase-out of benefits under section 936. As we have indicated previously, in our letter of July 18, 1990 to Chairman Bentsen of the Committee on Finance with respect to S. 712, the greater the number and value of tax transition benefits provided to Puerto Rico under the statehood option, and the longer the transition period, the more difficult will be the task of making findings that would support a conclusion that the measures are narrowly tailored to addressing a unique, geographically isolated problem and do not constitute an "undue preference" for Puerto Rico in violation of the Uniformity Clause.

At present, section 213 contains only the general statement that "the provisions of section 214 are enacted pursuant to Congress's power to admit new States, in recognition of the unique Federal tax provisions and programs affecting the Commonwealth of Puerto Rico which differ from those which applied to any other newly admitted State, and solely for the purposes of effecting a smooth and fair transition for the new State with a minimum of economic dislocation and to permit Federal agencies to assume or expand responsibilities for the administration and enforcement of Federal taxes and programs affecting the citizens residing in the new State." § 213. While we believe this statement appropriately summarizes the features underlying a legitimate, nondiscriminatory purpose for the various transitional tax provisions contained in section 214, *see United States v. Ptasynski*, 462 U.S. 74, 84-86 (1983); *cf.* Regional Rail Reorganization Act Cases, 419 U.S. 102, 159-161 (1974), it is in our view critical that the overall effect of the transitional provisions also be narrowly-tailored to these constitutionally legitimate objectives in order to satisfy the "close examination" the Supreme Court requires of geographical distinctions in taxation. *See Ptasynski*, 462 U.S. at 75-80, 85 (emphasizing congressional findings concerning unique geographical circumstances justifying geographical tax classification).

We believe that implementing legislation can be fashioned that provides for a constitutionally sound transition in tax status; that is, one that is narrowly tailored to prevent economic dislocation resulting from the change in tax status from arrangements appropriate to an unincorporated territory to permanent arrangements appropriate to an incorporated territory or a state of the union. Moreover, we support the concept of a five-year tax transition as a constitutionally permissible period of time for which such a transition to take place, either before or after Puerto Rico becomes a state.

TITLE II—3. CONSTITUTION

Title II, section 202, states that the Constitution adopted by the people of Puerto Rico on June 4, 1951, was accepted, ratified, and confirmed through Public Law 447 of the 82nd Congress, March 3, 1952, and that the Constitution of Puerto Rico as ratified by the people of Puerto Rico in the referendum held on June 4, 1951 is hereby accepted as the Constitution of the State. This provision contains several technical errors which need to be corrected. First, Public Law 447 was approved by Congress in July (not March) 1952. Second, Public Law 447 did not unconditionally accept, ratify, and confirm the June 4, 1951 Constitution but mandated several amendments that became effective on January 29, 1953. Third, since then, there has been at least one constitutional amendment to the Constitution of Puerto Rico. To "accept" the current Constitution of Puerto Rico as ratified by the June 4, 1951 referendum would ignore the subsequent amendments to the Constitution, including those mandated by Congress in 1952. In any event, the current Constitution of Puerto Rico is not identical with the one ratified in the 1951 plebiscite. As drafted, section 202 could be understood to nullify the amendments to the 1951 Constitution.

We therefore recommend that this section be reworded as follows:

Section 202. The Constitution of the Commonwealth of Puerto Rico shall always be republican in form and shall conform to the Constitution of the United States and the principles of the Declaration of Independence. The Constitution of the Commonwealth of Puerto Rico in effect on January 1, 1991, is hereby found by Congress to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted as the Constitution of the State.

TITLE II—4. ELECTIONS AND ADMISSION REFERENDUM

We suggest the following technical corrections for Title II, section 206. First, section 206(a)(1)(A) should be modified to delete the reference to section 101(f) of the Puerto Rico Status Referendum Act and to set a triggering date keyed to the date of passage of the implementing legislation. If Congress chooses not to delay the onset of statehood, *see discussion supra* at —, we recommend that the first line be modified to read: "Not later than January 1st of the *first* calendar year . . .".

Second, on the fifth line of section 206(a)(1)(A), between the words "election" and "of," insert: "of officers of all State election offices provided for in the Constitution of the proposed State of Puerto Rico and". The purpose of this insertion is to provide for the election of the officers referred to in the second sentence of paragraph (b)(3). *Compare* Section 6 of the Hawaii Statehood Act. 48 U.S.C. Chapter 3, note.

Third, in the last sentence of this subparagraph insert between "Tuesday" and "in" the words "after the first Monday" to adjust this sentence to the time for general elections provided for under federal as well as Puerto Rican law. 2 U.S.C. § 7; 16 L.P.R.A. § 3.

Fourth, the first sentence of section 206(a)(1)(B) appears to duplicate the first sentence of subsection (b)(1). We recommend that the content of subsection (b)(1) be substituted for the first sentence of section 206(a)(1)(b). Subsection (b)(1) could then be deleted.

Fifth, section 206(b)(3) could be read as providing that the officers of the Commonwealth holding office on the effective day of the Act would be frozen in their offices until statehood, even if their statutory terms expired sooner. We recommend that this provision be clarified.

TITLE II—5. LAWS IN EFFECT

Title II, section 208(a) deals with the topic of "Laws in Effect." The subsection provides generally that, upon admission, all of the "local laws" in force in Puerto Rico shall continue in force and that "the laws of the United States" shall have the same force and effect within Puerto Rico as prior to admission. The section does not define the term "local laws" and "laws of the United States," leaving it open to question whether laws enacted by Congress with respect to Puerto Rico under the Territorial Clause of the Constitution are considered local laws or laws of the United States. Section 15 of the Hawaiian Statehood Act obviates this ambiguity by defining the terms "Territorial [Local] laws" and "laws of the United States." We therefore recommend the inclusion in Section 208(a) of a definition, similar to Section 15 of the Hawaiian Statehood Act, Pub. L. No. 86-3, 73 Stat. 4, 11 (1959), as follows:

As used in this subsection, the term 'local laws' includes (in addition to the laws enacted by the legislature of Puerto Rico) all laws or parts thereof enacted by Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Puerto Rico prior to its admission into the Union, and the term 'laws of the United States' includes all laws or parts thereof enacted by the Congress that (1) apply to or within Puerto Rico at the time of its admission into the Union, (2) are not "local laws" as defined in this subsection, and (3) are not in conflict with other provisions of this Title [Act].

TITLE II—6. COMMISSION ON FEDERAL LAWS

Title II, section 208(b) provides for the appointment by the President of a Commission on Federal Laws to survey the laws of the United States and to make recommendations to Congress as to which laws should be made applicable or inapplicable to Puerto Rico after becoming a state.² The Commission is to consist of seven persons, at least four of whom are to be residents of Puerto Rico who are or have been domiciled in Puerto Rico continuously for five years.

Because the Commission appears to be given no executive duties, but is charged solely with making legislative recommendations to Congress (a duty Congress constitutionally may not impose on executive branch agencies),³ in the absence of clarify-

² The opening clause of this subsection should be modified along the lines proposed in our comments on Title I, section 101(f).

³ The Constitution explicitly vests in the President the discretion to decide whether and when executive branch officials should propose legislation. Article II, section 3 provides that the President "shall from time to time . . . recommend to [Congress] Consideration such Measures as he shall be necessary and expedient." U.S. Const. Art. II, § 3 (emphasis added). Accordingly, executive branch bodies may not be required to submit legislative recommendations.

ing language we would construe this provision as creating a legislative branch commission. We note that Congress has provided for certain legislative officers to be appointed by the President. See *Bowsher v. Synar*, 478 U.S. 714, 727-28 (1986) (Comptroller General appointed by President with advice and consent of Senate).

TITLE II—7. CONTINUATION OF SUITS AND APPEALS

Title II, sections 209 and 210, contain provisions relating to the continuation of suits and appeals. They apparently have been copied from other admission acts in which those provisions were necessary because the admission of those States resulted in changes in the jurisdiction of courts. Such change would not occur in connection with the admission of Puerto Rico as a State, because the United States District Court for the District of Puerto Rico already has the jurisdiction of a District Court of the United States. Admission therefore will not bring about any change in the jurisdiction of the federal courts and the courts of Puerto Rico. We therefore recommend that section 210 be eliminated and that section 209 be modified to read as follows:

No writ, action, indictment, cause, or proceeding of a civil, criminal, appellate or other nature pending in any court of the Commonwealth of Puerto Rico, or in any court of the United States shall abate by reason of the admission of the Commonwealth of Puerto Rico into the Union, but shall continue in the court in which it shall be pending at the date of such admission.

TITLE III—INDEPENDENCE

TITLE III—1. ELECTORATE FOR THE PUERTO RICAN CONSTITUTIONAL CONVENTION ⁴

Title III, section 301(b) of the bill would establish qualifications for voting in the election of delegates to the constitutional convention. It would in substance deny the vote to those residents of Puerto Rico who were not born in Puerto Rico or who do not have at least one parent or a spouse born in Puerto Rico, unless they have resided in Puerto Rico for a period of twenty years at the time of the adoption of the Act.

We believe that these provisions are unconstitutional. As long as Puerto Rico is under the sovereignty of the United States, it is bound by the equal protection principles embodied in the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 7-8 (1982). Voting qualifications based on place of birth, parentage, or an excessively long residence requirement would plainly violate equal protection requirements. See *id.* at 10 (“[W]hen a state or the Commonwealth of Puerto Rico has provided that its representatives be elected, ‘a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.’ *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).”).

The fact that the election is to take place after Puerto Rico has opted for independence does not change this analysis. So long as the election takes place before Puerto Rico is actually declared an independent, sovereign nation, the Constitution of the United States continues to apply, and requires that all United States citizens in the jurisdiction have the same right to participate in the election of delegates to the constitutional convention as do other citizens of the United States within the jurisdiction.

For the same reason, we object to section 303(d), which would limit the right to vote on the Constitution adopted by the convention to those who were entitled to vote for delegates to the Constitutional Convention.

TITLE III—2. CHARACTER OF THE CONSTITUTION

Title III, section 302(b) would require an independent Puerto Rico to guarantee as fundamental rights both political rights and economic and social rights. The latter are not guaranteed in the U.S. Constitution, and in our view, it would be unreasonable to demand that Puerto Rico, with its limited resources, guarantee rights not guaranteed by our Constitution. We suggest deleting the words, “and economic, social and cultural rights such as the right to education, adequate nutrition, health services, adequate housing, and work or employment.”

⁴ In accordance with the discussion above, *supra* at 4-6, we believe that section 201(a) should be modified along the lines proposed in our comments on section 101(f) of Title I.

TITLE III—3. JOINT TRANSITION COMMISSION

Title III, section 305 provides for the appointment of a Joint Transition Commission. The Joint Transition Commission must be appointed in equal numbers by the President and by the presiding officer of the Constitutional Convention of Puerto Rico. The Commission would have responsibility for "expediting the orderly transfer of all functions currently exercised by the Government of the United States," to an independent Puerto Rico, "including the recommendation of appropriate legislation to the appropriate officials of each government." Further, the Commission would be required to establish several "task forces" which would be responsible for negotiating various agreements between the United States and Puerto Rico. See §§ 312, 313, 314, 315, and 317.

Section 305 is silent as to the time when the appointment of the Joint Transition Commission would take place. To avoid ambiguity and resulting confusion, the section should specify the time of the appointment of the Commission.

We do not oppose the Commission in principle. However, several points with respect to the Commission, and to the Task Forces appointed by the Commission, must be clarified to avoid constitutional problems. First, it must be made clear that *only* those members duly appointed by the President may represent the United States in the negotiation of agreements with Puerto Rico, and that those members remain subject to the President's direction and control as officers of the United States. Second, it must also be made clear that only the members of the Commission representing the United States may appoint the representatives of the United States on each of the various task forces to be appointed by the Commission, and that the U.S. representatives on the task forces likewise remain subject to the President's direction and control as officers of the United States. Third, it must be made clear that the Commission itself, comprising members appointed by the President and members selected by the Presiding Officer of the Constitutional Convention of Puerto Rico (who are not officers of the United States because not appointed pursuant to the requirements of the Appointments Clause, U.S. Const. Art. II, § 2, cl. 4), may exercise no governmental power on behalf of the United States, *Buckley v. Valeo*, 424 U.S. 1, 126-141 (1976), but may merely make recommendations and provide advice to the legislative and executive branches. At present, section 305(b)'s language providing that the Commission "shall be responsible for expediting the orderly transfer of all functions currently exercised by the Government of the United States in Puerto Rico, or in relation to Puerto Rico," could be construed to improperly grant the Commission actual executive authority. This language should be modified accordingly. Finally, each provision of the bill which provides for the negotiation of an agreement must contain the language that appears in Title III, section 312 (regarding defense agreements): "and approved in accordance with the constitutional processes of the United States."

TITLE III—4. DISPUTE RESOLUTION AFTER CERTIFICATION OF THE REFERENDUM

We object to Title III, section 306, which would stay actions arising under this title filed after the election is certified, and refer any such disputes to the Joint Transition Commission for resolution. Given that the United States still retains sovereignty over Puerto Rico and its residents until the proclamation of independence, resolution of disputes leading up to independence must remain in the federal courts. It would violate Article III of the Constitution to vest final power to adjudicate claims arising under the laws of the United States in the Joint Transition Commission.

TITLE III—5. EFFECTS OF PROCLAMATION OF INDEPENDENCE ON LEGAL AND CONSTITUTIONAL PROVISIONS

Title III, section 307(a) would make independence of Puerto Rico contingent on the prior conclusion of the agreements dealing with defense and federal programs provided for in sections 312 and 313. It is our view that the list of those treaties should not be limited to the areas of defense and federal programs, but that it should include recognition of judgments, extradition, law enforcement assistance, federal auditing of funds provided for by the United States, and such additional topics as other agencies might consider necessary. The independence of Puerto Rico should be made contingent on the prior conclusion of those treaties.

This subsection also would provide that:

The President of the United States shall by proclamation *withdraw* and surrender all rights of possession, supervision, jurisdiction, control or *sovereignty* then existing and exercised by the United States over the territory and people

of Puerto Rico, and shall furthermore *recognize* on behalf of the United States of America the *independence* of the Republic of Puerto Rico and the authority of the government instituted by the people of Puerto Rico under the Constitution of their own adoption. The proclamation shall state the effective date of *withdrawal of the sovereignty* of the United States and the *recognition of independence* shall be the same as the date of the proclamation of independence, as provided in subsection (d).

Section 307(a) (emphasis added).

It is not clear whether the deferment of the effective date of the Presidential proclamation to the date of independence is limited to the withdrawal of sovereignty and recognition of independence, or whether it applies to all aspects of the proclamation. We believe that the latter reading is preferable and consider it advisable that this point be clarified. Moreover, it will be noted that the proposed proclamation would provide for the withdrawal in surrender of "*all* rights of possession, supervision, jurisdiction, [and] control over the territory . . . of Puerto Rico." This is inconsistent with the need for the United States to retain continued use and unrestricted access to military and Coast Guard installations and facilities.⁵ Finally, the phrase "*recognize* on behalf of the United States of America" could be taken as suggesting an interference with the President's prerogatives in the area of foreign relations with the newly independent nation of Puerto Rico, *see infra* at 26-30, rather than as merely carrying into execution the grant of independence to what is presently a United States territory subject to Congress' legislative power under the Territory Clause.

We therefore recommend that Section 307(b) be redrafted as follows:

Sec. 307(b). When the President of the United States is satisfied that the agreements set forth in Sections 112 through — have been concluded and approved pursuant to the constitutional processes of the United States of America and Puerto Rico and that they will be binding on the Republic of Puerto Rico after its independence, but not sooner than one month after the official certification of the elected officers of the Republic of Puerto Rico under Section 304, the President of the United States shall proclaim on behalf of the United States the independence of the Republic of Puerto Rico and the authority of the government instituted by the People of Puerto Rico under the Constitution of their own adoption. The effective date of that proclamation shall be the same as the date of the proclamation of independence provided for in subsection (d).

Title III, section 308(a) (2) and (3) provides that upon independence all laws of the United States applicable to Puerto Rico shall cease to apply to Puerto Rico, and that all laws and regulations of the Commonwealth shall continue in force until replaced with new legislation.⁶ It is not clear what is meant by "the laws of the United States applicable to Puerto Rico." This provision could refer to all laws enacted by Congress, or only to those laws the validity of which does not depend solely upon the authority of Congress to provide for the Government of Puerto Rico. We recommend that this provision be clarified.

TITLE III—6. JUDICIAL PRONOUNCEMENTS

Title III, section 309 provides that, "[u]nless otherwise agreed by the Governments of United States and Puerto Rico in accordance with their respective constitutional processes[.]" certain provisions shall take effect concerning the effect of U.S. court proceedings and judgments in cases that were initiated prior to independence taking effect but that are in some sense not completed at the time of independence. For several reasons, we believe that this section should be amended to provide simply that the United States and Puerto Rico should enter into agreements addressing the issues that are the subject of section 309.

Section 309(3) presents difficult constitutional issues under Article III of the Constitution. It is unclear whether, in many cases, the federal courts of the United States would continue to have jurisdiction over cases that no longer arise under federal law once Puerto Rico ceases to have the status of a United States territory. It is also unclear whether federal courts constitutionally may render judgments that cannot be executed by the authority of the United States government, unless a valid treaty or executive agreement so provides. We believe that these very difficult

⁵ It should be noted that section 10(a) of the Philippine Independence Act of 1934, Pub. L. No. 127, § 10(a), 48 Stat. 456, 463 (1934), on which section 307(a) of this bill apparently was modeled, in part, expressly excepted from the withdrawal and surrender the military facilities reserved to the United States under that legislation.

⁶ We recommend that section 308 omit "(a)" because there is no subsection (b).

issues should be addressed as part of a negotiated agreement or treaty with respect to judgments of the courts of the respective sovereigns, and cannot effectively be accomplished by statute. Because of the importance of the issues involved, we believe that an agreement on these points, like agreements in other areas, should be a condition precedent to independence. See discussion *infra* at 21-22.

TITLE III—7. REQUIRED AGREEMENTS

Title III contains a number of provisions requiring that agreements be negotiated before Puerto Rico is declared independent. For example, section 312 provides for the negotiation of certain defense agreements; sections 313 and 314 provide for the negotiation of agreements relating to the continuation of various federal programs and the Social Security System in Puerto Rico after independence; section 317 provides for the negotiation of an agreement relating to the establishment of a Puerto Rican deposit insurance system.

As noted above, it is our view that independence should be conditional not only on the conclusion of the Defense and Federal Programs Agreements, but also on agreements concerning the effect of judgments of U.S. courts in cases involving Puerto Rico, on agreements providing for extradition and law enforcement assistance, especially in the field of narcotics, and of other agreements considered crucial by other agencies, in particular, the conclusion of an agreement providing for the auditing by U.S. officials of the use of all funds provided by the Government of the United States to the Republic of Puerto Rico. The several agreements negotiated pursuant to this Title should also provide that, in the event an agreement is unilaterally terminated by Puerto Rico, the United States has the power to suspend or withhold in whole or in part the payment of any of its obligations or grants to the Republic of Puerto Rico.

We believe that the agreements called for under Title III may be negotiated before Puerto Rico is declared independent, and concluded in such a way as to bind Puerto Rico upon its becoming an independent nation. The ability of an inchoate government to bind the government for the period after it gains full independence was recognized in connection with the evolution of the Freely Associated States (Federated States of Micronesia and the Republic of the Marshall Islands). See *Juda v. United States*, 13 Cl. Ct. 667 (1987), *aff'd sub. nom. People of Enewetak v. United States*, 864 F.2d 134 (Fed. Cir. 1988), *cert. denied*, 109 S. Ct. 3198 (1989); *Antolok v. United States*, 873 F.2d 369 (D.C. Cir. 1989). We believe that such an arrangement could be placed on even firmer ground by requiring as a condition for the grant of independence that Puerto Rico's constitution contain a provision that would accept as binding international agreements under the constitution and laws of the newly independent Commonwealth of Puerto Rico the agreements entered into between the United States and Puerto Rico, as negotiated by the various task forces established by the Joint Transition Commission and approved according to the constitutional processes of the United States.

The "constitutional processes" of the United States should also be clarified in this regard. Agreements made with Puerto Rico prior to its becoming independent would not clearly have the status of "treaties," as they would not be made with a foreign nation. The approval of 2/3 of the Senate would not, in our view, be the appropriate constitutional process for approval of such agreements. Rather, the agreements partake of the nature both of conditions attached by Congress to the grant of independence, under Congress' ordinary legislative powers under Article IV, § 3, cl. 2 (prior to the grant of independence), and of the President's power to conduct foreign relations (after the grant of independence). To avoid confusion over the source of power to conclude these agreements and their subsequent status as legally valid international agreements, Congress should make an explicit delegation to the President of its authority under the territorial power of Article IV, section 3, clause 2 of the Constitution, to conclude agreements containing certain specified terms. In such event, the President's power to conclude those agreements would flow not only from his foreign relations power but also from the territorial authority of Congress, and the resulting agreement would, upon the proclamation of independence by the President, have the familiar status of an "executive agreement," which has the same force of law as a treaty. We understand this to be the approach intended by the present bill. We recommend that these provisions be amended explicitly to reflect such an intention.

TITLE III—8. STATE SUCCESSION

Title III, section 310(b) provides that "[u]pon proclamation of independence the President of the United States shall notify the governments with which the United

States is in diplomatic correspondence . . .” of the recognition of independence and the consequences of such recognition on those nations’ relations with Puerto Rico. As discussed more fully below, *see infra* at 26-28, the conduct of United States foreign policy is a presidential prerogative that cannot be controlled by statute. We recommend that section 310 be recast as a “sense of the Congress” statement.

TITLE III—9. CITIZENSHIP

Title III, section 311 provides that persons born in Puerto Rico after the effective date of the Act shall not become citizens of the United States, and that Puerto Ricans who are citizens of the United States cannot transmit their United States citizenship to their children, born outside the United States. The section fails to address two important issues.

First, this section is silent as to whether citizens of a newly independent Puerto Rico eventually would be required to give up their United States citizenship. This could create the impression that independence would not have any effect on the continued United States citizenship of the residents or citizens of Puerto Rico. Most of the citizens thus would have dual, i.e. United States and Puerto Rican citizenship, at least for one generation.⁷ We object to this aspect of the bill.

While Congress has the power to allow such an arrangement, we strongly oppose allowing dual citizenship for the entire Puerto Rican population. Allowing approximately 3.4 million Puerto Ricans to maintain a dual citizenship differs fundamentally from the isolated cases of individual dual citizenship that the United States currently tolerates. Overall, we seriously doubt whether the creation of an independent nation-state whose population consists almost entirely of United States citizens is in the interests of the United States. Such an arrangement potentially could lead to significant United States intervention in Puerto Rican affairs in the exercise of the President’s responsibility to protect the safety, rights, and welfare of U.S. citizens abroad.

Moreover, as then Acting Deputy Attorney General Edward S.G. Dennis stated in his July 11, 1989, testimony before the Senate Energy and Natural Resources Committee on S. 712, we believe that each status option offered must be both clear and realistic. *Political Status of Puerto Rico: Hearings on S. 712 Before the Senate Comm. on Energy and Natural Resources*, 101st Cong., 1st Sess. 13, 16-17 (1989). Independence for Puerto Rico must mean real independence, which must include a loss of United States citizenship for residents of Puerto Rico. Therefore, we believe that if the independence option is chosen, the residents of Puerto Rico should be required to elect between retaining United States citizenship (ultimately taking up residence within the United States to perfect their status), and citizenship in the new republic.

Requiring the Puerto Rican population to elect between allegiances would be consistent with the rule of international law that the transfer of sovereignty of a territory transfers the allegiance of those who remain in the territory from the former sovereign to the new sovereign. *American Insurance Company v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828); *United States ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898, 902 (2d Cir. 1943) and the authorities there cited; O’Connell, *The Law of State Succession* 246 (1956).⁸

We recognize that the well established international rule that a change in sovereignty works a change in citizenship must still be tested against the municipal law of the United States, especially the first sentence of the Fourteenth Amendment to the Constitution which provides (emphasis added):

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

⁷ Section 301(b) which would prevent the future devolution of United States citizenship on the descendants of citizens of Puerto Rico would not solve this problem. As long as citizens of Puerto Rico remain citizens of the United States, they can freely enter the United States, in particular the nearby Virgin Islands, to have their children born there. Those children would be citizens of the United States and perpetuate dual citizenship of Puerto Ricans.

⁸ Within the framework of this general rule, specific treaties affecting the transfer of territory do frequently permit that the transfer of nationality ought to take place only with the consent, express or implied, of the persons affected. Hence, such agreements frequently give the inhabitants of the territory an option under which they can retain their former nationality, but usually at the “heavy” price of leaving the territory. Those who remain behind as a rule acquire the new nationality and lose their original one. Whiteman, 2 *Digest of International Law* 934-935 (1963).

We do not believe, however, that as an original matter the first sentence of the Fourteenth Amendment was intended to protect citizenship which is lost by virtue of a rule of international law recognized at the time of the Amendment's adoption.

Moreover, because Puerto Rico has never been "incorporated" into the United States,⁹ individuals born in Puerto Rico are United States citizens by statute, and not pursuant to the constitutional definition of citizenship in the Fourteenth Amendment. The citizenship of native Puerto Ricans is based on the Jones Act of March 2, 1917, which conferred United States citizenship on persons born in Puerto Rico. Codified at 8 U.S.C. § 1402.

The Supreme Court has held that Congress may deprive individuals of statutory citizenship under certain circumstances. See *Rogers v. Bellei*, 401 U.S. 815 (1971) (individual born abroad and entitled to United States citizenship by statute may lose citizenship by failing to comply with statutory residency requirements).¹⁰ We believe that, under the Court's analysis in *Bellei*, a requirement that residents of a newly independent Puerto Rico elect between citizenship in the new nation, and retaining their United States citizenship (by residing in the United States for a number of years, for example) would pass constitutional muster.

Second, the question of Puerto Rican citizenship is one of great importance and should be the subject of an agreement required as a condition of independence. Previous proposals have suggested that Puerto Rican citizenship extend only to persons born in Puerto Rico, or whose parents or spouse were born in Puerto Rico. All other persons would acquire Puerto Rican citizenship only as provided by the Constitution and laws of the Republic of Puerto Rico. Section 301(b)'s proposed restrictions on the franchise suggest that Puerto Rican citizenship might be limited to those persons born in Puerto Rico and those who have resided there for a period of twenty years or more. It is our view that Puerto Rico citizenship should be made available to all citizens of the United States who are bona fide residents of Puerto Rico at the time of independence.

Under section 311(a), the new republic of Puerto Rico would be able to restrict citizenship as in the original bill, rendering deportable United States citizens living in Puerto Rico (perhaps for a considerable number of years) who were not born on the island, or who are not married to someone born on the island. We believe that provision should be made to protect the rights of United States citizens who wish to continue to reside in Puerto Rico after independence to acquire Puerto Rican citizenship. Thus, there should be a corresponding provision in section 311(a) to the effect that citizens of the United States who moved from the mainland to Puerto Rico should not lose their Puerto Rican citizenship as the result of independence.

TITLE III—10. TERMINATION OF AGREEMENT INVOLVING MILITARY COOPERATION AND DEFENSE

Title III, section 312, provides that the United States and Puerto Rico must reach certain binding agreements relating to military cooperation and defense, which shall come into effect simultaneously with the proclamation of independence, before independence may be proclaimed. Section 312 states certain specific matters that must be included in these agreements. Section 312 further provides that "any alteration, modification, amendment, limitation, termination, or other change in such agreement . . . shall occur only pursuant to a specific Act of Congress." We believe section 312 unconstitutionally intrudes on the authority of the President to conduct

⁹ Puerto Rico was not "incorporated" within the United States upon its acquisition from Spain, see *Downes v. Bidwell*, 182 U.S. 244 (1901), and Congress has never purported to effect such an incorporation. For the same reasons that Puerto Rico is currently not considered to be incorporated within the meaning of the phrase "the United States" for purposes of application of the Uniformity Clause of the Constitution, see discussion *supra* at 8-10, Puerto Rico is not incorporated within the meaning of "the United States" for purposes of the citizenship provisions of the Fourteenth Amendment. Cf. *Downes v. Bidwell*, 182 U.S. at 313 (Opinion of White, J.) (noting serious problems that would arise if, upon the acquisition of foreign territory, all the inhabitants thereof would automatically and as a matter of right become citizens of the United States).

¹⁰ We recognize that in *Afroyim v. Rusk*, 387 U.S. 253, 260 (1967), the Supreme Court held that a citizen of the United States has a constitutional right to remain a citizen unless he voluntarily relinquishes his citizenship. The *Bellei* court, however, held that the statement in *Afroyim* that United States citizenship cannot be lost unless voluntarily relinquished, was limited to citizenship acquired pursuant to the Fourteenth Amendment, i.e., by birth or naturalization in the United States, and therefore did not apply to *Bellei*, who had acquired his United States citizenship by statute, having been born to a U.S. citizen outside the United States. See *Bellei*, 401 U.S. at 815.

foreign affairs, which includes the authority to terminate, suspend, or limit the application of treaties and executive agreements with foreign nations.

It is axiomatic that under our Constitution the President has been given broad authority over the conduct of the Nation's foreign relations. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936); see *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); cf. *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In the leading case of *United States v. Curtiss-Wright Export Corp.*, *supra*, the Supreme Court described this power as "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations," 299 U.S. at 320 (emphasis added), a power which "does not require as a basis for its exercise an act of Congress." *Id.* at 320.¹¹ While this power is subject to the specific limitations set forth in other provisions of the Constitution, *id.* at 320, such as Congress' power to declare war and the Senate's advice and consent role with respect to the making of treaties and the appointment of ambassadors, U.S. Const. Art. II, § 2, cl. 2, these provisions "which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication. . . ." *Myers v. United States*, 272 U.S. 52, 164 (1926). See also *Jefferson's Opinion on the Powers of the Senate Respecting Diplomatic Appointments*, April 24, 1790, in 16 *The Papers of Thomas Jefferson* 378, 379 (J. Boyd ed. 1961) ("The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.") (emphasis in original).

Thus, while the Senate shares in the power to appoint ambassadors, it does not share in the President's power to remove them. *Myers v. United States*, 272 U.S. 52 (1926). Similarly, we believe that the role granted the Senate in the treaty-making process by Article II, section 2, clause 2, cannot be construed to imply a similar role in the termination of treaties or executive agreements. That power, we believe, belongs to the President alone.

This position is supported by the only recent judicial case on the issue, and by the views of constitutional scholars from Alexander Hamilton to the present. In *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.) (*en banc*), *vacated and remanded with directions to dismiss the complaint*, 444 U.S. 996 (1979) (per curiam) the full *en banc* Court of Appeals for the District of Columbia Circuit held that the President's plenary authority in the field of foreign relations includes the power to terminate treaties, and thus rejected a challenge brought by members of Congress to President Carter's termination of a mutual defense treaty with the Republic of China (Taiwan). 617 F.2d at 703-709. The Supreme Court did not reverse this holding, but, acting on the petition for certiorari and without full briefing and argument, vacated the appellate court judgment and directed that the complaint challenging President Carter's action be dismissed. No opinion commanded a majority of the Court. Four justices thought that President Carter's action was not subject to judicial review because it involved "the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President," 444 U.S. at 1002, and was thus a nonjusticiable "political question." Justice Brennan would have affirmed the judgment of the Court of Appeals on the merits. Justice Brennan concluded that the President's power to terminate a defense treaty flows from the President's power to recognize and withdraw recognition from foreign governments. *Id.* at 1006-07 (Brennan, J., dissenting). Justice Powell concluded that the issue was not "ripe" for judicial review. *Id.* at 997-1002 (Powell, J., concurring in the judgment). And two justices voted to grant certiorari and would have scheduled the case for plenary consideration. *Id.* at 1006 (Blackmun, J., dissenting). While the import of the Supreme Court's action is subject to varying interpretations, none of the Justices suggested that the Constitution supplied a legal principle for invalidating the President's termination of the treaty in question. The Court of Appeals' opinion thus remains the most authoritative judicial pronouncement on the respective powers of the President and Congress in this area.

¹¹ As the U.S. Court of Appeals for the District of Columbia has recognized, the President's status as the nation's sole organ in the field of international relations "is not confined to the service of the President as a channel of communication . . . but embraces an active policy determination as to the conduct of the United States. . . ." *Goldwater v. Carter*, 617 F.2d 697, 707 (D.C. Cir.) (*en banc*), *vacated other grounds*, 444 U.S. 996 (1979). Accord L. Tribe, *American Constitutional Law* § 4-4, at 219 (2d ed. 1988); L. Henkin, *Foreign Affairs and the Constitution* 47 (1972). We discuss the *Goldwater v. Carter* case at length presently.

Moreover, the Court of Appeals' conclusion in *Goldwater v. Carter* is consistent with the overwhelming weight of constitutional scholarship on the subject. See 15 The Papers of Alexander Hamilton 33, 42 (H. Syrett ed. 1969) (first "Pacificus" essay) (while "treaties can only be made by the President and Senate, their activity may be continued or suspended by the President alone."); L. Henkin, *Foreign Affairs and the Constitution* 136 (1972) (Senate lacks "any authoritative voice in interpreting a treaty or in terminating it"); L. Tribe, *American Constitutional Law* 220 (2d ed. 1988) (President has "exclusive responsibility . . . for negotiating, administering, and terminating treaties or executive agreements.").

Accordingly, we conclude that section 312(b), providing that any limitation or termination of agreements between the United States and an independent Commonwealth of Puerto Rico involving defense shall occur only pursuant to an Act of Congress, is unconstitutional. While Congress has broad power to legislate with respect to United States Territories under Article IV, section 3, clause 2, Congress may not use this authority in such a way as to assume powers that the Constitution has distributed in other ways. Section 312(b) improperly attempts to project Congress' authority to legislate with respect to the territories into the future, after Puerto Rico has ceased to have territorial status, in order to control in certain respects the future foreign relations between the United States and the independent nation of Puerto Rico. Congress may not employ the territorial power in such a manner as to violate other provisions of the Constitution, including the President's power over foreign affairs. Cf. *United States v. Louisiana*, 363 U.S. 1, 35 (1960) ("The power to admit new States resides in Congress. The President, on the other hand, is the constitutional representative of the United States in its dealings with foreign nations."). See also *Coyle v. Smith*, 221 U.S. 559, 568, 573 (1911).

TITLE III—11. FEDERAL PROGRAMS

Title III, section 313(b) (2) and (3) provides that the Comptroller General shall determine the total amount of grants, programs, and services provided by the federal government in Puerto Rico for the fiscal year in which independence is proclaimed, and that a grant equal to the amount determined by the Comptroller General shall be paid annually to the Republic of Puerto Rico for each of the nine following fiscal years.

We believe that this procedure is unconstitutional under *Bowsher v. Synar*, 478 U.S. 714 (1986). In *Bowsher*, the Supreme Court held unconstitutional the provisions of the Gramm-Rudman-Hollings Act that provided for the Comptroller General, an officer of the legislative branch, to make calculations of revenues and expenditures which had the ultimate effect of determining what budget cuts the President was then required to implement. The Court held that such a function was an exercise of executive power which could not be vested in an officer of the legislative branch, not subject to the President's direction or control. 478 U.S. at 721-33. The function of the Comptroller General under Title III, section 313 (b) (2) is constitutionally indistinguishable from that held invalid in *Bowsher*: The Comptroller General would be making a calculation concerning government grants, which calculation the executive would then be required by statute to implement. This provision should be modified to vest the contemplated calculations in an executive branch officer, such as the Director of the Office of Management and Budget.

TITLE III—12. TRADE RELATIONS

Title III, section 315 (e) and (f) authorizes the President to enter into trade agreements with Puerto Rico. These subsections specify in certain respects the content of agreements made under these subsections and special congressional procedures for implementing legislation. As noted above, the President has the authority under the Constitution to determine the form and manner in which the United States will maintain relations with foreign nations. See *Haig v. Agee*, 453 U.S. 280, 291 (1981); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936). See also *supra* at 26-28. This includes the authority to negotiate agreements with foreign powers for objectives that the President deems desirable. While Congress possesses legislative power with respect to commerce with foreign nations, Art. I, § 8, cl. 3, that power may not be employed in such a manner as to interfere with the President's power to conduct foreign relations or to negotiate treaties or executive agreements. Section 315(e)(1) readily may be clarified to avoid any constitutional difficulty in this regard. We recommend that the words "under this section" be inserted between the word "agreement" and the word "with" in line four of section 315(e)(1) in order to clarify that the content specifications and procedures for special legislative consideration are applicable only to agreements entered into pursuant to the

particular authorization of that section, and do not limit or preclude the entering into agreements (including agreements on the same subject matter) through other constitutionally appropriate means.

TITLE IV—COMMONWEALTH

TITLE IV—1. PRINCIPLES OF COMMONWEALTH ¹²

Title IV, section 402(a) provides:

The Commonwealth of Puerto Rico is a unique juridical status, created as a compact between the People of Puerto Rico and the United States, under which Puerto Rico enjoys sovereignty, like a State, to the extent provided by the Tenth Amendment of the United States Constitution and in addition with autonomy consistent with its character, culture, and location. This relationship is permanent unless revoked by mutual consent.

This subsection is quite problematic and in our view presents an unrealistic view of what the commonwealth political relationship constitutionally means. We consider it imperative that it be made clear beyond peradventure that the Commonwealth is and must remain under the sovereignty of the United States. This is necessary in order to avoid the continuation of the uncertainties and controversies that have plagued the existing commonwealth relationship.

According to this subsection, Puerto Rico would possess "sovereignty, like a State, to the extent provided by the Tenth Amendment to the United States Constitution." This clause would purport to confer on Puerto Rico a status not permitted by the Constitution. Under the Constitution, an area under the sovereignty of the United States that is not included in a State "must necessarily be governed by or under the authority of Congress," *National Bank v. County of Yankton*, 101 U.S. 129, 133 (1880), i.e., pursuant to the Territory Clause of the Constitution. U.S. Const. Art. IV, § 3, cl. 2. The Supreme Court held as recently as 1980 in *Harris v. Rosario*, 446 U.S. 651 (1980) (*per curiam*), that Puerto Rico is subject to the Territory Clause. Congress cannot escape this constitutional command by extending to Puerto Rico the provisions of the Tenth Amendment which, according to its own terms, apply only to the relationship between the federal government and *states*. To the extent this section purports to describe "autonomy" "in addition" to that of the states, it is even more clear that the relationship described is not constitutionally consistent with the idea of a commonwealth status.

We likewise have reservations about the last sentence of this subsection, which would provide that the commonwealth relationship between the United States and the Commonwealth "is permanent unless revoked by mutual consent." This clause may improperly attempt to impose a *statutory* limitation on Congress' power under the Territory Clause of the Constitution (Art. IV, § 3, cl. 2) to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." While there are statutory precedents for attempting to make such limitations in certain restricted circumstances—commitments which this Administration believes must be honored—it remains subject to serious legal question whether one Congress may create a statutory limitation on Congress' power to legislate in the future with respect to the status of what remains, for constitutional purposes, a territory subject to Congress' authority under the Territory Clause.

As a practical matter, it is unlikely in the extreme that Congress would legislate a major change in the political status of Puerto Rico—such as a grant of independence or of statehood—without the consent of the people of Puerto Rico. Section 402(a) could be read, however, as purporting to limit Congress' power to adjust the political status relationship between the United States and Puerto Rico in other respects, such as changing Puerto Rico's status from that of an unincorporated territory to that of an incorporated territory, though still under the label of "commonwealth" status. In any event, we believe that the fundamental constitutional principle of congressional authority under the Territory Clause to make certain changes in the political relationship of a territory to the United States must be maintained, and that the language of section 402(a) may create confusion in that regard.

The broad assertion that Congress may by "compact" eviscerate a future Congress's constitutional powers over a territory by giving the residents of that territory "vested rights" in a political status raises the question of whether Congress has the power to vest any such rights other than through a grant of independence or admission into the union as a state. Residents of a territory can acquire no "vested

¹² As noted earlier, we believe that section 401 should be modified along the lines proposed in our comments on section 101(f) of Title I.

rights" in a political status the creation of which is, inconsistent with a provision of the Constitution (the Territory Clause). This contrasts with the situation where persons may acquire vested economic rights or interests by virtue of arrangements that are undoubtedly within Congress' constitutional power to adopt. See, e.g., *Lynch v. United States*, 292 U.S. 571 (1934); *Perry v. United States*, 294 U.S. 330 (1935). Cf. *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (Congress may create such an obligation only if it has done so in "unmistakable terms."); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) (same). In such cases, the creation of a "vested interest" is not inconsistent with the exercise in the future of a power, but merely obliges the government to act in accordance with the constitutional limitation that *private* property not be taken for public use "without just compensation." U.S. Const. Amend. V.¹³

We recognize that in the past the Department of Justice has taken the position that Congress can agree not to exercise its legislative authority in a limited number of narrowly defined areas. The instances in which the legislative authority in fact has been exercised in such a manner do not include a situation such as is proposed here, where a mutual consent requirement is proposed to be attached to the status relation. To the extent the Department's earlier opinions could be construed as endorsing such an application of Congress' power under the Territory Clause, we believe they are subject to serious question.

Section 402(b) would provide that:

The policy of the United States shall be to enhance the Commonwealth relationship enjoyed by the Commonwealth of Puerto Rico and the United States to enable the people of Puerto Rico to accelerate their economic and social development, to attain maximum cultural autonomy, to seek fair treatment in Federal programs, and in matters of government to take into account local conditions in Puerto Rico.

We question the wisdom of including in legislation statements as vague as the ones included in this subsection, even if they are styled as "policy" and considered as only hortatory in nature. Moreover, section 404 requires federal agencies to apply this vague policy statement in its administration of federal laws and programs and provides for judicial review of agency determinations as to how this policy affects the applicability of certain administrative regulations. Section 402 is therefore highly likely to give rise to serious controversies and litigation.

Section 402(c) provides that "[t]he United States citizenship of persons born in Puerto Rico shall continue to be guaranteed and indefeasible to the same extent as that of citizens born in the several States." This statement is very seriously misleading. It is inaccurate as a description of the present citizenship status of residents of Puerto Rico. Moreover, it is highly questionable as a legal matter whether Congress *could* by statute bestow a citizenship status that is "indefeasible to the same extent as that of citizens born in the several States."

Unlike residents of the several states, whose United States citizenship is based on section one of the Fourteenth Amendment of the Constitution, the United States citizenship of residents of Puerto Rico is granted by federal statute, the Jones Act of March 2, 1917 (codified at 8 U.S.C. § 1402), and, in theory, could be revoked or modified by a subsequent statute. It is therefore inaccurate to describe the citizenship status of residents of Puerto Rico as "guaranteed and indefeasible to the same extent as that of citizens born in the several states."

While it is true that the *quality* of the statutory U.S. citizenship held by persons born in Puerto Rico is equal to that of the constitutional citizenship of persons born in the several states, in the sense that the rights appertaining specifically to citizenship are the same whether citizenship flows directly from the Constitution or instead from a federal statute,¹⁴ the proposed language misleadingly suggests that the

¹³ Nor in our view may such an arrangement constitutionally be justified as the granting of a "measure of independence" or a partial relinquishing of United States sovereignty. Either the United States retains sovereignty over a territory or it does not. While the United States theoretically could grant independence to a territory and simultaneously enter into a treaty or executive agreement with that nation establishing a new political relationship, such an arrangement would require special constitutional procedures. We do not understand this to be what is intended by the Commonwealth proposal.

¹⁴ Of course, the fact that the *citizenship* of persons born in Puerto Rico is equal in quality to that of citizens of the several states does not mean that Puerto Rican citizens have, in all respects, the same political and civil *rights* as citizens of the several states. For example, only by becoming residents of a state would U.S. citizens born in Puerto Rico acquire the right to vote in national elections and to voting representation in Congress. Moreover, not all of the provisions of the Constitution apply to Puerto Rico at present, because of its status as an unincorporated territory.

two types of citizenship have (or would have in the future) equivalent constitutional status. The citizenship of persons born in the several states is *constitutionally* guaranteed by section one of the Fourteenth Amendment. The citizenship of persons born in Puerto Rico is (and, under the Commonwealth option, would remain) "guaranteed" and "secured" by *statute*. In the former case, a constitutional amendment would be required to modify the status of one's citizenship acquired by virtue of the Fourteenth Amendment. In the latter case, citizenship status could be modified or revoked by statute. No provision of law bestows a constitutional *status* on the U.S. citizenship held by persons born in Puerto Rico.

Of course, as a practical matter, the fact that the United States citizenship of persons born in Puerto Rico is based on a statute, rather than the Constitution, is probably not of much consequence. It seems highly unlikely that Congress would enact a statute that would revoke or modify the United States citizenship status of residents of Puerto Rico other than in the event Puerto Rico were to become an independent nation.

The statutory United States citizenship of residents of Puerto Rico can be placed on the same constitutional footing as the United States citizenship of residents of the several states only by making Puerto Rico a state (or perhaps an incorporated territory) thereby bringing the citizenship of Puerto Ricans within the terms of the first section of the Fourteenth Amendment. Thus, the proposed language is confusing and potentially misleading on this point.

TITLE IV—2. REGULATORY REVIEW

Title IV, section 404(c) provides that when an agency publishes a final rule that applies to the Commonwealth of Puerto Rico, the Governor of the Commonwealth may submit to the agency within a prescribed time period the Governor's determination that such rule is inconsistent with the policy of promoting maximum cultural autonomy for Puerto Rico, set forth in section 402. Thereupon, the agency is directed to reconsider the question of the consistency of its rule with the policy set forth in section 402(b) and make further findings accordingly. The power granted the Governor under this provision to delay and force reconsideration of the implementation of executive agency regulations is significant governmental authority under the laws of the United States. Such authority may be vested only in an officer of the United States, appointed pursuant to the requirements of the Appointments Clause of the Constitution. *Buckley v. Valeo*, 424 U.S. 1, 126-141 (1976). We therefore object to any provision permitting the Governor of Puerto Rico to intervene in the administration of federal regulations because the Governor is not appointed pursuant to the procedures of the Appointments Clause, but instead is elected by the people of Puerto Rico.

We believe the purposes of permitting participation by the Governor are readily accomplished in a constitutionally unobjectionable manner, simply by the usual requirements of a period of notice and comment before a published rule takes effect. The Governor (and any other interested person) could submit his views that such rule is inconsistent with the policy of section 402 and the agency could take those views into account in deciding whether to allow the rule to take effect or to revoke it.

We also have doubts whether it is appropriate to permit the Governor of the Commonwealth to petition for judicial review of an agency finding. It is not clear that the Governor in his official capacity suffers a cognizable personal injury from any such agency finding sufficient to confer Article III standing to challenge the agency action in federal court. We believe that the purposes of this section are best served, without constitutional difficulty, simply by permitting any aggrieved person who incurs injury as a consequence of the agency's determination to challenge that action in federal court.

The provision is also unclear in its reference to rules or regulations that "by [their] terms" apply in the Commonwealth of Puerto Rico. It is not clear whether this phrase includes all rules and regulations that are interpreted as applicable to the Commonwealth, or only those which explicitly and directly mention their applicability to Puerto Rico in the text of such rule or regulation. The provision is also unclear as to what procedure, if any, applies to regulations that apply to Puerto Rico but do not "by [their] terms" apply to Puerto Rico. Finally, the provision is unclear in its reference to "any final rule" "other than a rule issued after notice and hearing required by statute." Section 404(c) (emphasis added). It is unclear precisely to what categories of administrative rulemaking this section applies. We recommend that this language be clarified.

TITLE IV—3. APPOINTMENTS OF FEDERAL OFFICIALS

Title IV, section 408, would require the President, and the heads of departments or agencies making federal appointments, to consult with the Governor of Puerto Rico, or other appropriate Puerto Rican official, "as to whether there are any special circumstances or qualifications which should be considered in deciding on a nomination." We object to a requirement that the President "consult" with Puerto Rican officials before making appointments of principal officers. The Appointments Clause of the Constitution, U.S. Const. Art. II, § 2, cl. 2, does not permit Congress to fetter the President's power to appoint principal officers with a requirement that the appointment come from persons on a particular list or be made in consultation with some particular person or group, thereby allowing non-federal officers to share in the appointment power. See generally *Public Citizen v. United States Department of Justice*, 109 S. Ct. 2558, 2580-84 (1989) (Kennedy, J., concurring in the judgment); *Buckley v. Valeo*, 424 U.S. 1, 126-141 (1976).

We would have no objection, however, to a provision that would simply recognize the right of the Governor of Puerto Rico to provide the President with advice and information with respect to any "special circumstances or qualifications which should be considered in making" certain federal appointments in Puerto Rico, without a formal requirement of consultation.

TITLE IV—4. COMMUNITY VALUES

Under Title IV, section 411, an exception to the antitrust laws would be made for discussions or agreements among persons in the entertainment industry for the purpose of developing voluntary guidelines designed to alleviate the negative impact of violence, pornography, and drug use in all audio or visual entertainment in Puerto Rico. This exception would be activated by a declaration by the Governor of Puerto Rico. The Department of Justice has no substantive legal objection to the proposed exception.¹⁵

The Department does, however, object to section 411(c)(2). This section would limit the applicability of the antitrust exception to 36 months after the bill is enacted, and would allow it to be extended for another 36 months upon "declaration by the Governor of Puerto Rico." This would allow the Governor of Puerto Rico to exercise significant federal authority. As explained above, only officials appointed pursuant to the requirements of the Appointments Clause may exercise such authority. The Governor of Puerto Rico is not appointed in this manner, and, therefore, may not exercise this authority consistent with the Constitution.

TITLE IV—5. SAN JUAN NATIONAL HISTORIC SITE ADVISORY COMMISSION

Title IV, section 413 provides for the establishment of the San Juan National Historic Site Advisory Commission to advise the Secretary of the Interior on the operation, management, and administration of the San Juan National Historic Site. The commission is to consist of the Governor of Puerto Rico (or his designee), the Director of the National Park Service (or his designee), three members appointed by the Governor and three members appointed by the Secretary. The Secretary of the Interior is required to meet at least annually with the Commission at a public meeting.

We object to this provision on constitutional policy grounds, as such a hybrid advisory commission would not be clearly answerable to either the executive branch or to the Commonwealth government. Moreover, while we have no objection to a provision authorizing the Secretary's consultation with an advisory commission, we believe it is inappropriate to require that such consultation occur in any specific manner or at specific times, such as the provision's requirement of an annual public meeting.

The CHAIRMAN. Thank you very much, Attorney General Thornburgh, for your excellent, eloquent, and ringing endorsement of self-determination. And I was particularly struck by your awareness and, therefore, the administration's and the President's, awareness of the ticking time clock, the importance of getting this legislation out by the July the 4th recess. And I know your state-

¹⁵ Care should be taken that the exception provided for in section 411(b) is limited to activities in and related to Puerto Rico. The provision should be clarified so that the last six words of this subsection clearly refer to all three numbered clauses and not only to the last one.