

**STATEMENT OF MARY V. MOCHARY, DEPARTMENT OF STATE  
PRINCIPAL DEPUTY LEGAL ADVISER, ACCOMPANIED BY  
DAVID COLSON, ASSISTANT LEGAL ADVISER, LATIN AMERICAN  
AFFAIRS**

Ms. MOCHARY. I have submitted a longer version of my testimony for the record and if you will permit I have a somewhat shorter—

The CHAIRMAN. That is in the record.

Ms. MOCHARY. I am pleased to be here to give the views of the Department of State regarding the foreign policy implications of Senate bill 712, which would provide for referendum on the status of Puerto Rico.

Joining me at the table is Mr. David Colson, who is assistant legal adviser of the Department of State in charge of Latin American Affairs.

The Department of State's purpose is not to take a position as to the merits of the status options, but rather to point out those positions in S. 712 which pose significant questions and problems in the area of foreign policy, foreign relations and implementation.

Of great concern are those provisions which raise constitutional separation of powers issues and related questions of Federalism. I will address today the general bases of our concerns. These views are further set out at length in particularity in our written statement which I asked to be incorporated into the record and which you kindly agreed to.

Mr. Chairman, of the three options under consideration statehood poses the fewest foreign policy issues. Nonetheless, that provision which grants to Puerto Rico special use and jurisdiction over maritime resources raises substantial issues of national policy with potentially significant constitutional, international and trade policy implications.

This provision creates untenable distinctions between Puerto Rico and other states and places the United States in violation or potential violation of its international obligations.

Turning now to Title III, the proposal for independence, I would like to articulate some broad concerns. The most prominent problem raised under Title III is the extent to which U.S. foreign policy towards a new country would be determined by this bill rather than through the normal process of bilateral relations, including treaties and other international agreements.

As a matter of law, this is a basic constitutional separation of powers issue. As a matter of policy, any or all of the arrangements proposed in these sections may be premature. Furthermore, if S. 712 were to become law, it could not direct how an independent Puerto Rico would negotiate with the United States.

If there are issues we seek to protect in respect of an independent Puerto Rico, we should perhaps make that part of the arrangements leading to independence not something which is subject to future negotiation. In other words, it would appear prudent to resolve these issues pertaining to U.S. national security interests prior to independence.

The separation of powers problem arises most prominently under Section 6.1, which provides that all of the provisions of Title III be

enshrined in a treaty of friendship and cooperation. A statutory requirement that there be a treaty on any subject runs afoul of Article II of the Constitution, which delegates treaty-making power to the President with the advice and consent of the Senate.

Moreover, there are many specific legal and policy problems inherent in some of the language of Title III. Of these, those related to our national defense posture are most problematic. The sections covering disarmament and demilitarization would lock the United States into pursuit of specific foreign policy objectives many of which are inconsistent with current policy.

Insofar as it would broadly and vaguely codify policy formulation, these measures clearly pose the separation of powers problem I spoke of earlier. Given the strategic importance of existing military installations and operations in Puerto Rico, it would be clearly contrary to our global military interests for us to legislate the exclusion of our military forces from Puerto Rican soil. Moreover, if these operations have to be relocated, it raises the specter of enormous financial expenditures.

The proposed legislative creation of one-way free trade, even if time constrained, would adversely affect the current international trade regime to which the U.S. subscribes. At a minimum, a waiver would have to be negotiated on the general agreement on tariffs and trade. USTR has made it clear that it is unlikely that such a waiver could be negotiated.

The bill also prohibits trade barriers on goods coming from Puerto Rico regardless of their ultimate point of origin. This provision would allow entry into the U.S. of products from any other country in the world so long as the goods were transshipped through Puerto Rico. This is a wholly unacceptable curtailment of Federal authority to regulate international trade.

Mr. Chairman, I want to turn next to the Enhanced Commonwealth Option. The proposal for an enhanced commonwealth detailed under Title IV of the bill would create an unprecedented political status for Puerto Rico. It would grant to Puerto Rico significant attributes of sovereignty which would be incompatible with remaining a part of the United States.

Many provisions require important transfers of authority from the Executive to the Puerto Rican Government. These new powers would extend well beyond those currently enjoyed by the Commonwealth of Puerto Rico or other nonfederated U.S. commonwealths and territories.

Many of these provisions addressed specifically in our prepared statement are open to attack on two different constitutional grounds: their impact on separation of powers as a result of legislative inroads on the Executive Branch prerogative over foreign policy, and their impact on federalism, owing this time to inroads by the Puerto Rican Commonwealth on this same area.

The Department objects to any delegation to another entity such as a state or territorial commonwealth of the authority vested in the Executive by the Constitution to conduct and oversee U.S. foreign relations. The Department does not agree to any language which implies a derogation of the President's power to negotiate for and represent the United States, including Puerto Rico, in the area of foreign relations.

Moreover, if Puerto Rico were given broader power, however limited, to conduct an independent foreign policy while remaining part of the United States, the functions and authorities of the Department of State and other Executive agencies with foreign operations and responsibilities, would be significantly impaired.

In this regard, the most objectionable sections of the bill are subparts 4(d) (i) and (ii), which respectively expand Puerto Rico's capacity to enter into so-called international agreements in its own name and authorize the governor of Puerto Rico to pursue an independent foreign policy.

Under our system of federalism and in keeping with the sovereignty of the United States it is the Federal Government which must be responsible for undertaking and implementing international obligations. Subpart (d)(ii) is particularly objectionable in its grant of broad and undefined power to the governor of Puerto Rico in this area.

Allowing a subentity of the United States to pursue its own foreign policy derogates the President's authority and raises obvious constitutional and political questions. We note in this regard that in respect of subparts 4(b) and (c), all laws touching on U.S. foreign relations including treaties and executive agreements should apply to Puerto Rico unless Puerto Rico is specifically exempted from those laws.

Other provisions of Title IV grant to Puerto Rico broad powers to make its own international air transport agreements, limited independent tariff authority, an effective right to participate in virtually all U.S. trade negotiations, broad authority over the administration of certain U.S. maritime affairs and coastal waters, a special regime for Puerto Rico in the area of intellectual property, and certain powers and special status in the administration of U.S. passports and visas. In all of these areas, countervailing constitutional principles of federalism and uniformity loom large and are compelling.

With respect to the issuance of U.S. passports and visas, these functions have been strictly relegated to the Department of State. The United States under no circumstances should cede its power to determine citizenship by the issuance of U.S. passports and to relegate and control its borders to any other authority.

Apart from constitutional concerns, there are foreign policy concerns and sound practical reasons for opposing these provisions so that control over the issuance of U.S. passports and immigration remains in the hands of a Federal authority. Chief among these are law enforcement interests and the need to promote the uniform issuance of passports.

A final matter of concern flowing from this bill is the likely impact it will have on U.S. positions in international organizations. Puerto Rico has a longstanding desire for greater freedom to participate in international organizations under its own auspices. The United States cannot cede greater freedom for participation in international organizations than Puerto Rico already enjoys. This participation is currently limited, subject to U.S. agreement, to observer status, associate status, or to U.S. delegation participation in approved organizations. This circumscribed participation has been carefully crafted over many years to maximize Puerto Rico's free-

dom without unacceptably compromising other U.S. objectives and prerogatives.

Finally, Mr. Chairman, I would like to note that the northern Marianas is also a commonwealth, and Guam is interested in commonwealth status as well. In considering changes in the commonwealth status of Puerto Rico, therefore, it is also necessary to consider the impact on other areas.

On the other hand, it should be emphasized that the status of the freely associated states, the federated states of Micronesia and the Marshall Islands, is completely different from anything which is proposed here for Puerto Rico.

The freely associated states are separate, sovereign countries which have chose to enter into association with the United States. Thus, unlike a commonwealth, the freely associated states are not part of the United States but rather are separate countries.

At the same time, however, as associated states they are in a form of political partnership with the United States involving reciprocal rights and responsibilities different from those we would have with a wholly independent country. The freely associated state arrangement, therefore, is not relevant to this legislation in its current form.

I want to conclude by reiterating what I said at the outset: that the State Department wishes to work with you to see legislation prepared which will give the people of Puerto Rico workable status options. We would welcome the opportunity to work with you in an effort to remedy these problems and produce a bill that both addresses the concerns of the Puerto Rican people while protecting the overall interests of the United States.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Mochary follows:]