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Written Testimony
United States Senate Committee on Energy and Natural Resources
on the matter of
Political Status of Puerto Rico
August 14, 2013 * Washington, DC

Mr. Chairman, Ranking Minority Member Murkowski, and other Distinguished Members:

Thank you for holding this hearing on Puerto Rico's plebiscite on the territory's political status last November and the Obama Administration's response.

The territory's status is the central issue of the islands, which have a population of nearly 3.7 million. It is fundamental: whether Puerto Ricans will continue to be Americans and obtain equality within the country or become the people of a separate nation, and whether there is another alternative other than temporary, powerless, and unequal territory status. The issue defines our politics and political parties. It is a basic issue of democracy, which requires representative government -- a right we lack at the national government level. It raises questions about the appropriate Federal as well as territorial policies on many issues. It retards our economic and social development.

Puerto Rico has been under the U.S. flag since the United States took the islands in connection with the Spanish-American War and Congress has granted U.S. citizenship since 1917, but Congress has not yet determined the ultimate status of the territory.

The Federal government has professed a policy of 'self-determination' for decades. But Congress has unintentionally enabled a minority in Puerto Rico to confuse and frustrate a local decision among Puerto Rico's status options. Congress has let this happen by not acting clearly and as a whole on the questions of Federal law and policy that are the primary issues raised by the alternative to statehood, nationhood, and territory status for which a minority still hopes.

The plebiscite and some presidential and congressional actions since have made important strides towards resolution of the issue -- but the Obama Administration and the Congress need to do more in the interests of the Nation as well as of the territory.

According to the U.S. Supreme Court, Puerto Rico is an unincorporated territory under the broad powers of Congress to govern territories except to the extent that the fundamental rights of individuals would be infringed. Our people have been permitted to exercise self-government on local affairs similar to the authority that States possess.

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But we are only represented in the government that makes our national laws by a sole resident commissioner in the House of Representatives who can only vote in committees to which she or he is assigned.

Additionally, although Puerto Rico is considered to be a State under most laws, it -- and its residents -- can be -- and are -- treated differently than the States and the District of Columbia in some major programs. The differences disadvantage most Puerto Ricans, although there are some tax benefits for companies and individuals from the States and for the wealthy.

The United States did not make clear during the first half of the last century that Puerto Rico would eventually obtain equality within the Nation. It discouraged independence. Meanwhile, Puerto Ricans grew close to the United States and prized U.S. citizenship and other benefits of being a U.S. area.
These factors resulted in some nationalists seeking to create a new political status: a hybrid of statehood, nationhood, and territory status. Proposals for such a status have been made in every decade beginning in the 1950s.

Federal Executive and/or Legislative branch officials have always seriously considered the proposals. But, ultimately, the proposals have always been rejected as conflicting with the Constitution and basic laws and policies of the United States and impossible for structure of government reasons.

The proposals are called words in Spanish that literally translate as "Associated Free State" and are referred to as "Commonwealth" in English. The names come from the names of Puerto Rico's local government adopted with the territorial constitution.

In authorizing the constitution, Congress and the Federal Executive branch said that the territory's basic status and congressional powers regarding the territory would not change with the constitution. And Puerto Rico's governor and resident commissioner acknowledged this in congressional hearings at the time.

The confusion about an alternative to statehood or nationhood really began with the constitution giving the territorial government different official names in Spanish and English and language used in documents related to the constitution's approval.

The Spanish name strongly suggested to Puerto Ricans that there was a new status. Indeed, as you know, a freely associated state is very different from a territory -- and from Puerto Rico's status -- in U.S. and international law. A freely associated state is a nation that associates with another in a joint governing arrangement that either can end. It has usually been a territory that associates with its former national governing power as it attains nationhood.

The constitution's English name has no real status meaning. Four States use "Commonwealth" in their official names. Another territory does as well.

Federal officials could accept the meaningless English name of "Commonwealth" but would certainly not have approved "Associated Free State," which would have misleadingly suggested nationhood.

After the constitution was adopted, officials who controlled Puerto Rico's government from the political party that did not want true nationhood or statehood told Puerto Ricans that a new status had been established. Federal officials did not agree that Puerto Rico was no longer a territory or no longer subject to Congress' territory governing power, but they did not publicly contradict and, sometimes, contributed to the misimpression to counter foreign 'Cold War' criticism of U.S. colonialism.

The 'commonwealthers' also began to try to get Federal agreement to create a new status. Thus, the Federal rejections in every decade beginning with the Fifties that I noted.

All of the "Commonwealth" proposals had the same or similar constitutional and other deficiencies, leading to the Federal rejections.

So, "Commonwealth" and the words that literally translate as "Associated Free State" in Puerto Rico misleadingly have three distinct meanings in the islands -- the territorial government, Puerto Rico's current status, and the 'Commonwealth' party's proposal for a new status. The different meanings confuse Puerto Ricans as well as people outside the territory.
Under the 'Commonwealth' party's definition since 1998 for the new status, the United States would be bound to an arrangement with Puerto Rico under which the insular government could nullify the application of Federal laws and Federal court jurisdiction and the insular government could enter into international agreements and organizations that require national sovereignty.

The Federal government would also be obligated to grant the insular government a new subsidy and most of its lands in the islands and required to continue to grant all current program benefits to Puerto Ricans, U.S. citizenship, and free access to goods shipped from Puerto Rico.

Executive branch officials and congressional committee leaders -- including you, Mr. Chairman, and Senator Murkowski -- have said that this proposal is impossible for constitutional and other reasons during each the Clinton, George W. Bush, and Obama Administrations.

Each of these administrations recommended that Puerto Ricans choose among the Federally recognized status options. These include: statehood; independence; true nationhood in a free -- that is, unilaterally terminable -- association with the U.S.; and continuing territory status for a while longer.

Territory status, whether called "Commonwealth" or not, cannot resolve the status issue because it cannot provide for equal voting representation in the Federal government. As long as Puerto Rico is subject to congressional Territory Clause power, its U.S. citizens will have the right to petition for statehood. And as long as Puerto Rico is an unincorporated territory, Puerto Ricans will have the right to petition for nationhood.

Further, territory status is not supported by any of Puerto Rico's political parties or status factions. Even the "Commonwealth" party wants a fundamentally different governing arrangement than the present one; it just wants one that the Federal government cannot agree to under the Constitution and does not want to agree to because of basic United States policies and concepts. The party will only say that it accepts the current status until it can have what it wants under its false assumption that Puerto Rico is not subject to Congress' constitutional authority under the Territory Clause.

Puerto Ricans had voted on status before the past three Federal administrations recommended Puerto Ricans choose among the Federally recognized status options, but all of the votes were confused by impossible "Commonwealth" proposals.

With boycotts by the statehood and independence parties, a plebiscite in 1967 resulted in a 60% majority for a "Commonwealth" proposals different than the current governing arrangement. But, when its proposals were written as Federal legislation in the early 1970s, the bill was opposed by the President of the United States and defeated in the House subcommittee.

A second plebiscite was held in 1993. No proposal won a majority but another "Commonwealth" proposal different than the current governing arrangement obtained a slight plurality over statehood. It, too, however, was judged to not be viable by the President and U.S. House leaders.

Statehood won the most votes among the status options of a third vote in 1998 but a bare majority of the vote chose no status option. There were campaigns for not making a choice led by advocates of the current "Commonwealth" status proposal and by other neo-nationalists.

The confusion about a "Commonwealth" option other than territory status prompted President Clinton to take several actions.
One was to establish the President's Task Force on Puerto Rico's Status to make recommendations and answer questions regarding the options and process for determining the territory's ultimate status until that status is determined.

Another measure was to propose $2.5 million for a plebiscite on options proposed by Puerto Rico's tri-partisan Elections Commission that the Federal Executive branch determined were not incompatible with the Constitution and basic laws and policies of the United States. Despite quiet lobbying against the legislation by the

"Commonwealth" party, it was enacted into law in 2000. The plebiscite intended for 2001 was not held, however, because a "Commonwealth" party administration in Puerto Rico knew from positions of the Clinton and Bush Administrations that the new "Commonwealth" status proposal could not be an option.

So, the President's Task Force under President Bush recommended that Congress authorize a two-question Puerto Rican referendum status choice. The threshold question was to be whether Puerto Ricans wanted the current territory status to continue. If we did not, the second question would be whether we wanted statehood or independence, with nationhood in a free association with the U.S. an additional option if Congress wanted to add it.

Under the leadership of Resident Commissioner Pierluisi, now also president of our statehood party, the House in 2010 passed a bill for a referendum similar to that recommended by the Bush Task Force. There would have been a free association option, and territory status would have been an option on the second question as well as the first.

The "Commonwealth" party opposed the legislation, calling instead for a referendum on statehood -- including in testimony to this Committee.

For the past quarter century, congressional leaders and Federal Executive branch officials have consistently responded to Puerto Rican requests for legislation to enable a Puerto Rican status choice by trying to enact such a bill. All efforts -- except for President Clinton's in 2000 -- have been blocked in Congress at the request of the "Commonwealth" party. It has ultimately lobbied to prevent any law from being enacted because all bills have chipped away at the myth that a Puerto Rican statehood petition would be rejected because of who Puerto Ricans are and because none of the bills held the potential for becoming a law that would validate the idea of a new "Commonwealth" status.

In March 2011, President Obama's Task Force on Puerto Rico's Status recommended that Puerto Ricans be enabled as soon as possible to choose among Puerto Rico's options: continued territory status; statehood; independence; and nationhood in a free association with the U.S. The Obama Task Force did not recommend a choice process but expressed "a marginal preference" for one somewhat different from that recommended by the Bush Task Force, although still in a two-question format to increase the likelihood of a definitive result.

After trying to obtain a tri-partisan agreement on a plebiscite that proved to be unachievable because of "Commonwealth" party obstructionism, Governor Luis Fortuño proposed a vote similar to that recommended by the Bush Task Force with a true free association option labeled "Sovereign Associated Free State" out of deference to the "Commonwealth" party. As Speaker of Puerto Rico's House of Representatives, I

sponsored the final legislation for the plebiscite, which was enacted into law by the elected representatives of the people of Puerto Rico.

The "Commonwealth" party urged a vote for continuing territory status although it argued that Puerto Rico is not a territory despite determinations that it is subject to Congress' territory governing powers by the U.S. Supreme Court, successive presidential administrations -- including the Justice and State Departments, the full U.S. House of Representatives, the leaders of both national political parties of this Committee, the Government Accountability Office, and the American Law Division of the Congressional Research Service.

The plebiscite was held in conjunction with the territory's quadrennial elections. The results were 54% against continuing territory status and 61.2% for statehood among the alternatives to it. Nationhood in a free association with the U.S. obtained 33.3% and independence 5.5%. The vote petitioned Congress and President Obama to begin the transition of Puerto Rico to equality within the country.

Having lost the plebiscite and the representative to the Federal government position, "Commonwealth" party leaders, who very narrowly won control of the governorship and Puerto Rico's Legislative Assembly in the elections, are trying to subvert the democratic process by contending that the plebiscite was unfair and arguing that it was inconclusive.

They say that the plebiscite was unfair because it termed the current status "territorial" and because it did not include their proposed new "Commonwealth" status. But these complaints fly in the face of the Federal determinations I have referenced.

They say it was inconclusive because a minority of voters did not choose among the alternatives to territory status and they assert that these blank ballots should be counted in the percentage results although the blank ballots can represent no possible status option.

The percentage results I have cited were certified by the tri-partisan Puerto Rico Elections Commission in accordance with law and common election practice. The Supreme Court of Puerto Rico, in *Suárez Cáceres v. Comisión Estatal de Elecciones (CEE)*, 176 DPR 31, as recently as 2009, decided that blank ballots and void or not-adjudicated ballots are not to be counted for the purpose of determining majorities and the results of a race. The Court declared that

> "… such a vote may in no way be counted in order to influence or affect the result of an election, referendum or plebiscite, among other electoral events. As stated in *Burdick v. Takushi*, [504 U.S. 428 (1992)], '[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently'. " (*Suárez Cáceres v. CEE*, Page 74).

In fact, the idea of counting blank ballots in the determination of the results of a status plebiscite was specifically rejected in a concurrent majority opinion:

> "In a future plebiscite it is reasonably possible that one proposal for a change of political status may gain over 50% of the vote total. Adjudicating blank ballots and fictional votes artificially enlarges the electoral universe and diminishes the proportion of votes validly cast for the contending proposals. This hinders and interferes with the verification of a majority mandate for a change of status in the vote canvassing. Meanwhile it would only grant the advantage of inertia to the existing condition, which would remain in place by frustrating the majority will through a distorted vote count" (*Suárez Cáceres v. CEE*, Page 91).

The "Commonwealth" party's argument is that those who do not participate in a free and fair election should overrule those who do. Open elections are not determined by those who do not vote.

The Obama Administration has agreed with the people of Puerto Rico rather than the "Commonwealth" party. The President's spokesman embraced the plebiscite and recognized that there were majority votes to resolve the issue and for statehood. He also said that the Congress should act to enable the Puerto Rican self-determination and that the Administration would work with Congress to this end.

Understanding that "Commonwealth" party government opposition would probably prevent the Congress as a whole from implementing the plebiscite choice, the White House and the Justice Department proposed another vote but under Federal auspices so that it would be more difficult to dispute the will of the people.

The proposal is modeled after the plebiscite legislation that the Clinton White House got enacted in 2000. $2.5 million would be provided for a plebiscite on options that would "resolve" the status issue proposed by the tri-partisan Elections Commission to the extent that the Federal Justice Department agrees with the proposed options. This would exclude the current status because a territory status cannot resolve the issue and it would, of course, exclude the proposed new "Commonwealth" status.

As a Puerto Rican, I am deeply appreciative of the actions that the Obama White House has taken on Puerto Rico's status issue. But it is very disappointing and curious that the Administration has chosen to not testify at this hearing on the plebiscite and its response despite your request, Mr. Chairman. The Administration not testifying at any congressional hearing on the issue that the President's Task Force on Puerto Rico has reported is the territory's most important and key to addressing many of the islands' toughest challenges is a failure to fulfill a responsibility of office.

Executive branch advice and perspectives are essential to the legislative process in our system of government, which separates powers. Every previous Federal administration

that has been called upon to appear at hearings on the status issue has done so. The President's Task Force is co-chaired by a designee of the attorney general who can testify if it is desired that the White House co-chair not do so. The Executive order establishing the Task Force, which President Obama endorsed, requires the Task Force to answer questions and advise on the options and process for resolving Puerto Rico's status issue. The President's spokesman said that the Administration would work with the Congress to respond to the plebiscite. The Administration has a good story to tell. And there is no real political downside. It would embarrass Governor García Padilla -- but telling the truth about issues is an obligation of government.

Mr. Chairman and Members, the Puerto Rico status issue is a basic question of democracy, equality, and justice. Puerto Ricans have served side-by-side with other Americans in the Armed Forces in every conflict since World War I. In battle, the sacrifice, blood, and life of Puerto Ricans is equal to that of other Americans, but in peace, at home, Puerto Ricans are second class citizens unless they move to the States -- which we can freely do as U.S. citizens. In fact, almost three out of every 10 Puerto Ricans alive has obtained equality and statehood through an airline ticket simply by moving to the State. And there are 1.2 million more people of Puerto Rican origin in the States than there are people of any origin in the islands.

For decades, Puerto Ricans have been told to come back to Washington when they decided what they wanted among the possible options for the islands' status. Now, in a free, fair, open, and democratic election called by elected representatives, the people of Puerto Rico have voted to replace the territory status misleadingly known as "Commonwealth" and petition for a beginning of the transition to the equality and permanence of statehood. It is incumbent upon this Congress to act to ensure that the colonial status of Puerto Rico -- inconsistent with American values -- is finally replaced.