



# Department of Justice

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STATEMENT

OF

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ATTORNEY GENERAL

BEFORE

THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES  
UNITED STATES SENATE

CONCERNING

S. 244  
THE PUERTO RICO STATUS REFERENDUM ACT

ON

FEBRUARY 7, 1991

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<sup>1</sup> 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 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 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.