SENATE OF PUERTO RICO

Kenneth D. McClintock [1]
President

I appeared before this Subcommittee for the first time 31 years ago, on January 20th, 1976, at the age of 18.[2] Since then, two things have happened with complete certainty; first, I haven't gotten any younger, and secondly, the argument that I've heard the most to excuse 108 years of Congressional inaction is that the American citizens in Puerto Rico have to speak with one voice to resolve the status dilemma, a standard that hasn't kept you from dealing with other highly divisive domestic issues, such as racial segregation[3] –in the past- and, more recently, oil drilling in the ANWR,[4] the protection of the Everglades[5] and the very delicate issue of immigration reform.

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[1] I have been an at-large Senator from the New Progressive Party since 1993. I'm currently in my fourth term. From 1993 to 2000, I chaired the Committee on Federal and Economic Affairs and from 1994 to 2000 I also chaired the Government Affairs Committee. I served as the first Hispanic Chairman of the Council of State Governments during 1999 and as the second President of the Parliamentary Conference of the Americas in 2000. From 2001 to 2004 I was the Senate Minority Leader and in 2005 became the thirteenth President of the Senate.

[2] Hearings by the Territorial and Insular Affairs Subcommittee of the Committee on Interior and Insular Affairs, January 20, 1976, San Juan, Puerto Rico. Among numerous other appearances before Congressional committees, I also appeared before the full Committee on Resources of the United States House of Representatives on April 19, 1997 in San Juan, Puerto Rico regarding HR 856, known as the Young Bill.

[3] It's a well-known historical fact that when President Lyndon Johnson signed the 1964 Civil Rights Act, he would tell aide Bill Moyers that with a stroke of a pen he had just delivered the South to the Grand Old Party for the foreseeable future. As Senator Barack Obama has noted, President Johnson chose the "right side of the battle", notwithstanding the fact this was, and has been, the most divisive issue our Country has ever faced. Obama, Barack, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM. Crown Publishers, p. 27, 2006.

[4] See CRS-Issue Brief IB10111, Arctic National Wildlife Refuge (ANWR): Controversies for the 108th Congress, September 29th, 2004.

[5] See http://www.americanparknetwork.com/parkinfo/content.asp?catid=85&contenttypeid=14

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As President of the Senate, may I remind you that two years ago, Puerto Rico spoke with one voice when a historic tri-partisan unanimous vote in the Senate was followed by a unanimous vote in the House in favor of a measure[6], in which every one of Puerto Rico's elected senators and representatives voted for a referendum in which the People of Puerto Rico would ask the Congress to commit to resolve Puerto Rico's status dilemma. Unexpectedly, Governor Acevedo vetoed the bill, after having made the commitment that he would sign it as it was approved.

Since then, the White House issued its report, and, in spite of the Governor's inexplicable veto of the bill, two-thirds of Puerto Rico's Senate supports H.R. 900 and opposes H.R. 1230.

H.R. 900 would provide a "reality check" for Puerto Ricans to choose among the real status options that have support in the territory – continuing the current territory status, U.S. Statehood, independence, and nationhood in a true free association with the U.S.

The bill is based upon the findings and recommendations of the President's Task Force on Puerto Rico's Status established by President Clinton and comprised of senior appointees of President Bush who consulted with Puerto Rico's leaders and studied the issue anew. They generally agreed with the Clinton Administration on the options.

From the past Co-Chairman of the President's Task Force, Mr. Rubén Barrales, I know that the two step-choice process was proposed in deference to Gov. Acevedo, who wrongly insisted that the majority of Puerto Ricans had always supported "commonwealth", and who opposed the Puerto Rican people choosing among all the options.

"Commonwealth" is understood in Washington to refer to Puerto Rico's territory status. The evidence is that Puerto Ricans do not support it, but no one can be sure until there is a vote among real options. The only time that the status as it exists was on the ballot -- in 1998 -- it received less than one-tenth of one percent of the vote. Many commonwealthers voted for "None of the Above"

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[6] Substitutive of House Bills 1014, 1054 and 1058

along with many "independentistas"[7]. Commonwealthers did so because they were told by the current Governor that was the way to vote for the "Development of the Commonwealth" proposal. (See the article incorporated into my full statement.[8]) This demonstrated why federal action is needed to clarify the real status options and was the reason that President Clinton agreed to establish the Task Force during a meeting with leaders of all three local parties. In the 1952 referendum, there was no "commonwealth" status option on the ballot. A proposal for a "commonwealth" - different than the present - won the 1967 referendum, but it was rejected by this subcommittee's predecessor. Another proposal for a "commonwealth" different than the present obtained a slight plurality over statehood in 1993, but it was not accepted by the Clinton Administration or congressional leaders. As former Governor Hernández Colón has written, "all factions do agree on the need to end the present undemocratic arrangement"[9] -- and this is illustrated by the status proposals of the three parties and of the faction of the "commonwealth" party that supports free association.

The current political status of Puerto Rico is, without any doubt, subject to the Territorial Clause of the Constitution of the United States. Some "commonwealth" supporters defend the current political status stating that it just needs some development, in the direction to a non-territorial Commonwealth status. Since what they call "commonwealth" is a territorial status, a non-territory "commonwealth" status is by definition an oxymoron.

The fatal flaw of Governor Acevedo's H.R. 1230 is that it includes an impossible proposal as an option and excludes a real status. The excluded real status is free association, which Acevedo opposes but is supported by a growing faction within his party. The impossible proposal is the "commonwealth Status", as the testimony of the Congressional Research Services constitutional expert made clear at the last hearing and was not rebutted by Acevedo's constitutional expert at the hearing.

Repeated statements of Acevedo and his representatives and statements in the "Development of the Commonwealth" proposal itself, as to the purpose of the convention that H.R. 1230 would support, make clear that the non-territory

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[7] Spanish for Pro-Independence voters.

[8] "PDP unveils commonwealth definition", San Juan Star, October 17, 1998.

[9] "Doing Right by Puerto Rico: Congress Must Act", *Foreign Affairs*, August 1998.

"commonwealth status" is intended to be Governor Acevedo's "Development of the Commonwealth". This proposal has been rejected as impossible - for constitutional and basic policy reasons - by the Clinton Administration and every Congressional leader who has commented on it, as well as by President Bush's Task Force. Under the proposal, Puerto Rico would be a nation to which the U.S. is permanently bound, with the power to enter into international agreements; but the U.S. would also be permanently obligated to grant a subsidy, in addition to the present one, new incentives for U.S. investment, all current assistance to Puerto Ricans, free entry to any goods shipped from Puerto Rico, and U.S. citizenship. Federal laws would apply and the federal courts would rule but only to the extent agreed to by the local government[10].

Enacting a federal law listing a non-territory "commonwealth status" as an option, when the intent of the proponents is the "Development of the Commonwealth" proposal, would be to invite Puerto Rico to choose as its status preference a proposal that Congress cannot, and would not grant -- a cruel hoax.

Another fundamental flaw of H.R. 1230 is that it is designed to result in a "stacked deck" against one of the real options, statehood, and produce an artificial majority for the "commonwealth" nationhood proposal. As stated by local senators who support Gov. Acevedo's proposal,[11] the plan is to form a coalition with Pro-independence voters and other nationalists in a convention to outvote statehood delegates. "Independentistas" and other nationalists would probably agree, also knowing that the "commonwealth" proposal would be rejected in Washington, leaving true nationhood as the only option.

H.R. 1230 is also less democratic than H.R. 900. Under H.R. 900, the people would pick Puerto Rico's proposed status. Under H.R. 1230 a convention, likely to be comprised of politicians, would select among the status proposals for the people and the people would only be able to accept or reject the selected proposal. This is intended to corner the people into accepting a proposal that they would otherwise not choose by majority.

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[10] See Exhibit I, "Popular Democratic Party Development of the Commonwealth" approved by the Governing Board of the Popular Democratic Party On October 15, 1998.

The purpose of the "constitutional convention" in H.R.1230 is different from that of the constitutional conventions Puerto Rico held in the early 1950s, authorized under the Constitution of Puerto Rico, held by the United States, held by the 50 States, and held by all four other populated current territories. The purpose of those constitutional conventions was to organize governments under an already determined political status; the purpose of this "constitutional convention" would be to choose a status.

Finally, as the Congress decides whether to act to dispose of the territory or admit it as a new state, you should ask yourselves for how much longer do you believe that Congress should be empowered to make needful rules and regulations, and keep us as the territory we've been for over a century.

The segregationist vision that permeated the US Supreme Court majority opinion in Plessy versus Ferguson in 1896[12] spilled over into the first of the Insular Cases which suggests that Congress could keep colonies forever.[13] Justice Harlan, whose dissent in Plessy[14] became the unanimous opinion of the Court in Brown[15], stated in his Insular Case dissent his belief that the Territories Clause of the Constitution was never intended by its anti-colonial drafters to justify 108 years of colonialism[16]

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[12] 163 U.S. 537 (1896). Plessy, is the 1896 case in which the United States Supreme Court declared constitutional the separate and unequal treatment of Afro-American citizens, a case which was later struck down in several contemporary cases, notably Brown v. Board of Education of Topeka, 347 US 483 (1953), which held that separate is inherently unequal.

[13] The following are known as the Insular Cases: De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. New York & Porto Rico Steamship Co., 182 U.S. 392 (1901). For a critical discussion of the colonialist doctrine set forth in the Insular Cases, see Justice Torruella's dissent in Igartua-de la Rosa v. U.S., 417 F.3d. 145, 158-166 (2005).

[14] In Plessy v. Ferguson, *supra*, p. 559, Harlan's dissent stated that "[b]ut in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."

[15] *Supra* Footnote 12.

[16] In Downes v. Bidwell, *supra*, p. 380, Harlan's dissent stated that "[t]he idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere

Which constitutional interpretation do you support today; the segregationists' view that separate-but-equal forever, be it racial or geographical, is constitutional, or Justice Harlan's view that Puerto Rico cannot be treated differently forever?

As Justice Harlan, I believe that the Clause's drafters, who only five years before had won a war against colonialism, never intended for you to continue ruling indefinitely over Puerto Rico as a territory. If you share our belief, inaction is no longer an alternative. The only alternative is to establish a process that will allow you to dispose of the territory of Puerto Rico or admit us into the Union. HR 900 clearly sends Puerto Rico on that path.

Thank you.

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colonies or provinces, --the people inhabiting them to enjoy only such rights as Congress chooses to accord to them,--is wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution."