will bring the people of Puerto Rico together to build consensus in their own land. It puts the future of Puerto Rico in the hands of Puerto Ricans. It allows Puerto Ricans to tell Congress what they want rather than the other way around. And that, Mr. Chairman, is what I hope we would see.

I would remind everyone that the issue here is not whether you support statehood, independence or commonwealth. The issue is creating a process that is fair. The bottom line is that a rigged process creates a false outcome and the people of Puerto Rico deserve a fair process and a true outcome.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator. Now, we're going to have Senator Burr for half the time allotted, so that means 2½ minutes.

STATEMENT OF HON. RICHARD BURR, U.S. SENATOR FROM NORTH CAROLINA

Senator BURR. I thank the Chair. I thank the ranking member.

The CHAIRMAN. It's hard to breathe in 2½ minutes.

Senator BURR. But this Senator can do it.

The CHAIRMAN. All right. Let's go.

Senator BURR. I thank the Chair and I thank the ranking member for the opportunity to have such a distinguished group of witnesses here today.

The self-determination process for Puerto Rico must be a fair and transparent process. We have a very important responsibility to ensure that any process that leads to the consideration of the 51st State in the Union be conducted in a way that is fair to all involved. We owe it to our constituents and to our common citizens in Puerto Rico.

The sanctity of the Union and our commitment to the democratic principles must guide how we treat this sensitive and significant process of self-determination. While I have concerns about the task force report that we are here to examine today, I do respect Puerto Ricans' right to self-determination. S. 2304 simply recognizes Puerto Rico's right to self-determination. Our founding fathers' belief in the importance of a Constitutional Convention led to the formation of the United States of America. Therefore, we must recognize their wisdom and move this process forward through local consensus first and for congressional consideration thereafter.

I look forward to the hearing we are here to learn from. I pledge and look forward to working with the Governor and with the Resident Commissioner as further issues are explored in what I think is an extremely important issue about the Commonwealth of Puerto Rico.

I thank the Chair.

[The prepared statement of Senator Craig follows:]

PREPARED STATEMENT OF HON. LARRY E. CRAIG, U.S. SENATOR FROM IDAHO

To give some context to today's hearing the record should include some relevant history of the Committee's oversight role in support of status resolution for Puerto Rico.

On January 17, 1989, the Governor of Puerto Rico, acting as head of his political party, co-signed a letter with the heads of the other two major political parties in Puerto Rico, seeking federal support for and participation in a process to resolve the

"ultimate political status" of Puerto Rico. In response, from 1989 to 1991 the U.S. Congress expended a significant amount of time and effort trying to help our fellow American citizens in Puerto Rico resolve the political status question for that U.S. territory.

In 1994 the duly-constituted Legislative Assembly of Puerto Rico formally petitioned the U.S. to approve a commonwealth proposal that garnered less than a majority of votes in a locally sponsored vote conducted in 1993. The 1994 petition asked Congress to define what status options it was willing to consider. In 1997 the local legislature renewed its petition and asked Congress to sponsor a federally recognized vote based on legally valid status definitions Congress would be willing to consider.

In 1998 the House answered the petition when it debated and passed on a recorded vote legislation containing legally valid definitions of statehood, independence and commonwealth. However, the Senate never acted on similar bipartisan legislation I sponsored, and instead passed a resolution confirming the territorial clause power of Congress with respect to the status of Puerto Rico.

At that point the local Puerto Rican government called a plebiscite based on the general principles of status options contained in the House passed bill. In that vote statehood received 46.5%, the highest vote of any political status option on the ballot. Independence received 2.5%, and separate nationhood with a treaty of free association like the compact for Micronesia received .02%.

The commonwealth option on the ballot was based on governing U.S. Supreme Court rulings and federal law defining the current status as that of a U.S. territory, and this option received .01% of the vote. This represented a 99.9% rejection of the current commonwealth defined by federal law as a territory.

That left only one option on the ballot, which was "None of the Above", and it received 50.2% of the vote. Thus, a ballot option that did not define any political status got the most votes, and we will never know what the vote would have been for the actual status options if "None of the Above" had not been on the ballot.

What we do know is that the local pro-commonwealth Party in Puerto Rico rejected the House passed definition of commonwealth and the version thereof on the 1998 local plebiscite ballot. This was because both the House bill and 1998 ballot correctly stated that as a commonwealth Puerto Rico remains subject to the authority of Congress under the territorial clause in Art. IV, Sec. 3 of the U.S. Constitution.

The reason the local commonwealth party rejected the House passed definition of commonwealth is that in 1998 the Governing Board of that party adopted its official platform confirming that party's long held ideology that commonwealth is not territorial but is instead a form of separate sovereign nationhood. The 1998 party platform asserts that:

- Puerto Rico is not a U.S. territory and therefore is not subject to the power of Congress under the territorial clause
- Puerto Rico is a nation which conducts relations with the U.S. on "bilateral" basis under a "compact" formed by approval of the local constitution in 1952
- Commonwealth means Puerto Rico is a "free associated state" with separate national sovereignty that exists on a plane of international equivalence with the United States
- Commonwealth means Puerto Rico has its own separate international identity and can conduct its own foreign relations, including its own trade relations, even while it enjoys domestic status as a U.S. customs territory
- While not yet recognized by the United States, so that further development of the bilateral compact is required, federal powers in Puerto Rico are only those delegated by Puerto Rico or retained under the compact
- The compact is binding on the United States and cannot be altered without Puerto Rico's consent
- U.S. law applies in Puerto Rico only as provided consistent with the compact
- New federal laws do not apply unless consented to by Puerto Rico under the compact
- The compact guarantees federal programs, tax exemptions and U.S. citizenship in perpetuity under a political union that cannot be ended without consent of Puerto Rico

On the basis of that platform the commonwealth party declared the House passed bill and the commonwealth option on the 1998 plebiscite ballot biased in favor of statehood. In other words, since the House bill and 1998 ballot accurately defined commonwealth as it exists under federal law rather than conforming to the local party's platform, the House language was seen as biased towards statehood by some.

While I do not believe it is the job of Congress to choose sides in determining what form of political status the Puerto Ricans will decide, I do believe it is the responsibility of Congress to provide the legal framework for the decision they must make.

DEFINING STATUS OPTIONS

Given this history, it is clear that defining status options under federal law and determining which of these Congress is willing to consider is the single most imperative requirement for status resolution. The territorial clause vests Congress with the primary authority and responsibility to define options and sponsor an orderly and informed process of self-determination. Unfortunately, in 1991 and 1998, Congress was not willing to sustain the effort required to fulfill its constitutional role.

Congress has been determining the future status of territories since 1796, when the first U.S. territory outside of an existing state joined the union as a new state. After considering local status votes and petitions, the United States has subsequently admitted 32 territories as states, with one territory becoming an independent nation. Additionally, three U.S.-governed U.N. trust territories have become free associated states under a treaty with the United States.

Yet in 108 years of U.S. administration, there has never been a Congressionally-sponsored status referendum in Puerto Rico. Congress has yet to recognize a Puerto Rican vote on status as a legitimate and informed act of self-determination among options compatible with the U.S. Constitution.

The 1952 vote to adopt a local constitution did not present political status options to the voters and in fact was not a status vote at all. A 1967 vote favoring a now obsolete and non-viable commonwealth, the 1993 vote, and the 1998 vote, all failed to produce a majority for a status option that Congress would accept as compatible with federal law.

EXECUTIVE BRANCH INITIATIVES

Given this lamentable history of Congressional inaction, the efforts to resolve Puerto Rico's status advanced by President Bush in 1992, President Clinton in 2000, and President Bush in 2003, are to be commended. If these three Administrations had not provided leadership on this issue, we would not be as far along as we are building a record that provides a foundation for ultimate action by Congress.

The Report by the President's task force on Puerto Rico's Status is a mercifully condensed but fully complete and adequate summarization of the Puerto Rico status process to date. It makes sound recommendations as to next steps for further progress. Accordingly, this hearing on the White House report is timely and important if for no other reason than it adds the White House report and the views of the witnesses about it to the record before this Committee in anticipation of future legislation.

In addition to examining the White House report closely, we need to begin the process for considering legislation proposed to implement the recommendations in the Report, which was prepared by the Administration's senior officials responsible for policy relating to Puerto Rico's status. S. 2661, sponsored by Mr. Martinez and Mr. Salazar, represents a very restrained and even minimalist approach, essentially an up or down vote on continuing the current status or seeking a new status that is not territorial.

Instead of the relatively comprehensive self-determination process contained in the 1998 House-passed bill, S. 2661 is essentially a measure favoring gradualism in order to enable the political process to take it one step at a time. That is appropriate because the first goal and highest responsibility of Congress is not to promote statehood, independence, or continued territory status, but to facilitate informed self-determination.

Under this bill, there would never be the need for Congress or Puerto Rico to define or sponsor a vote on statehood, independence, or free association, unless there is first a majority vote to end the current status and seek a non-territory status. Since 1993, there has not been a majority vote for any political status option, and in 1998 virtually the entire population rejected commonwealth defined as territory status. So it is important to end minority rule on status, which refers to the 46.5% vote for statehood in 1998 or the 48.67% vote for an unrealistic and unconstitutional commonwealth option in 1993.

Those pluralities in local votes can and should be replaced by majorities in votes recognized by the United States, and the proposal to determine if a majority favor the current status as defined by federal law or seek a non-territory status is fair to all three status options and all three major political parties in Puerto Rico.

Of course, because the White House report and the Martinez-Salazar bill define the Commonwealth of Puerto Rico as a territory, some in the commonwealth party argue that the intent of the Martinez-Salazar bill and the report are both biased in favor of statehood. As a cosponsor of the Martinez-Salazar bill, I reject that label of bias, and believe that this bill would simply provide a mechanism for the people of Puerto Rico to determine a legally acceptable political status.

The local commonwealth party remains committed to the proposed development of commonwealth under the 1998 party platform described above. Indeed, on December 28, 2005, shortly after the White House report was issued, the Governor of Puerto Rico, in his capacity as head of the commonwealth party, stated that the 1998 platform for development of commonwealth "reflects our aspirations for autonomous development . . . We are ready to undertake this development when the United States demonstrates the maturity to recognize that this type of relationship is what . . . both countries need."

At a House hearing on the White House report conducted on April 27, 2006, the commonwealth party witnesses argued that a vote on remaining a territory or seeking a new non-territory status is biased in favor of statehood because supporters of statehood and independence could "gang up" and vote for a non-territory status.

The commonwealth party witnesses also asserted that a vote on the current status as defined by federal law is unfair because the commonwealth party does not accept the definition of the current status under federal law, and so their definition of commonwealth is unfairly excluded from the process.

To address these implausible arguments we begin with the fact that under Article VI of the U.S. Constitution federal law is the supreme law of the land. That includes federal law applicable to Puerto Rico as long as it is a territory under U.S. sovereignty. If federal law defines Puerto Rico as a territory, which it does, then a majority vote to seek a new non-territory status is a majority vote against the current status regardless of what new non-territory status the voters may prefer.

Further, it is the responsibility of the federal and local government to ensure that commonwealth proposals the U.S. Department of Justice has labeled "illusory" and "deceptive" are not allowed to appear on self-determination ballots.

What would be truly unfair and biased would be to include an unviable option on the ballot in a status vote. That is what happened in 1993, when a definition of commonwealth that was constitutionally unrealistic and legally invalid was presented to voters. This results in an "artificial plurality" for a commonwealth option that does not exist and is impossible.

In the history of U.S. territorial law, statehood and independence are the normative options. Territorial status is normative as a temporary status until the territory is ready for statehood or independence. What is not normative is for a territory to be granted U.S. citizenship, develop internal self-government under a locally adopted constitution, but remain in that status for an indefinite period lasting decades, without any action by Congress leading to incorporation and statehood, or even independence.

It is understandable that in the absence of a federal policy on status local political parties would begin to develop their own status definitions that would benefit their interests. At the same time, those definitions might not fit within U.S. federal law or under the constitutional definition of a territory.

For example, the United Nations recognized free association as an alternative to integration with another nation or full independence, but in international law that is based on separate sovereign nationhood, and the retention by each party of the right to full independence through unilateral termination of the association. If a majority of voters in Puerto Rico want free association, that is a legally valid and politically realistic status option. The same is true of statehood, it is a well-defined legally valid status.

FEDERAL RESPONSIBILITY FOR STATUS RESOLUTION

Historically, territory status was temporary until the conditions were right for statehood. That was the Northwest Ordinance incorporated territory model and it worked just fine for 30 territories that became states in that way. Then territorial law became a little more complicated when we acquired sovereignty over Alaska, the Philippines, Puerto Rico and Hawaii.

The organic laws Congress enacted to govern these territories created a good deal of confusion and ended up in the U.S. Supreme Court. The court decided that Alaska and Hawaii were incorporated territories under the U.S. Constitution, based on Northwest Ordinance model, because Congress had conferred U.S. citizenship to the people of Alaska and Hawaii. However, the Philippines and Puerto Rico were to be

governed by Congress without extension of the U.S. Constitution because Congress had not extended U.S. citizenship.

Accordingly, Congress adopted and eventually implemented a policy leading to independence for the Philippines. However, in the meantime Congress extended U.S. citizenship to Puerto Rico. This should have triggered the same result it did earlier for Alaska and Hawaii, including extension of the U.S. Constitution and incorporation into the union under a policy leading to eventual statehood.

However, instead of following its own precedent in the Alaska and Hawaii cases, the new Supreme Court justices who decided the Puerto Rico case ruled that Congress could extend citizenship but not the U.S. Constitution, and still govern Puerto Rico in the same manner as it did the Philippines when it had a non-citizen population and was on its way to independence.

More than anything else, that flawed judicial ruling is the source of the problem Congress is having on resolving the matter of political status for Puerto Rico. The White House report on Puerto Rico's status correctly calls on Congress to establish a self-determination process that restores the historical integrity of federal territorial law and policy by enabling Puerto Rico to choose a path leading to statehood or separate nationhood, which now can include either independence or a status recognized under later U.N. decolonization standards and known as free association.

In the meantime, we need to recognize that historically and legally Puerto Rico's status is a judicially imposed anomaly, and like most anomalies it has unintended consequences for the nation and the residents of Puerto Rico. Although ratified by Congress through statutory policies accepting the "unincorporated territory" doctrine created by court ruling, Congress has never come to grips with the fundamental question of what ordered scheme of liberty, what rights and duties, exist for U.S. citizens in an unincorporated territory.

Instead, because the courts gave Congress permission to govern U.S. citizens in unincorporated territories without extending the U.S. Constitution, and to govern U.S. citizens in Puerto Rico the same way Congress governed non-citizens in the Philippines prior to its independence, Congress went ahead an extended U.S. citizenship to the populations of other unincorporated territories.

And why not? The ruling of the U.S. Supreme Court in the case of Puerto Rico made conferral of U.S. citizenship a consequence free activity.

Or, did it? To understand what we have done by deviating from the Alaska and Hawaii precedents, to understand what Justice Taft did when he wrote an opinion based on his personal intellectual preferences instead of the doctrine of *stare decisis* embodied in the Supreme Court's ruling on Alaska and Hawaii, we need to look at exactly what we have wrought in Puerto Rico.

If Puerto Rico chooses separate nationhood, then conferral of U.S. citizenship will end. But if the people of Puerto Rico choose to retain American citizenship, Congress must enable, and perhaps even require, the residents of Puerto Rico and the nation to complete the transition to full and equal status through statehood.

I am pleased that the Chairman has called for this hearing today and I hope that we can move forward with legislation in the next Congress to address this difficult situation.

The CHAIRMAN. Thank you very much.

Senator BURR. Have it duly noted that I did not use all the time.

The CHAIRMAN. You didn't do it in half the time, but we're not going to argue. See, it just shows you with 32 seconds left, so we used a lot more than half of 5. Oh, all right.

Now, ladies and gentlemen, we're going to proceed now, in the following manner: Kevin Marshall, Deputy Assistant Attorney General, Office of Legal Counsel, is going to testify now; and then he will be followed by the Honorable Governor of the Commonwealth of Puerto Rico; and then there will be two witnesses with the Governor; and then the Congressman, two Congressmen will join together and they will become the next panel.

So we might proceed, Mr. Marshall, how much time do you need to explain the position of the executive branch?

Mr. MARSHALL. Five minutes, if I get it just right.

The CHAIRMAN. Oh, you don't need to be in that much of a hurry. This is very important. We're going to give you 10 minutes and you talk slow.