U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

July 24, 1989

Honorable J. Bennett Johnston
Chairman
Committee on Energy and Natural
Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter contains the preliminary views of the Department of Justice on the Johnston/McClure Amendment in the nature of a substitute to S. 712. In general, this bill contains far fewer substantive problems than S. 712 as originally drafted. Outlined below are some of the concerns the Department still has with the bill.

TITLE I - PROCESS OF REFERENDUM

1. Federal Monitoring.

We object to the requirement in Title I, section 101(d) that the Attorney General shall provide for adequate monitoring of the referendum by United States Marshals. Elections, including a status referendum such as a referendum on the question of statehood, are ordinarily conducted locally, overseen by local officials. Only in very extraordinary circumstances, for example, where there is a history of racial discrimination by actual exclusion from the polling places, has the Department become involved in monitoring elections. We are aware of no evidence that there is a history of such exclusion in Puerto Rico, and therefore would oppose the use of such extraordinary measures.

2. Three Judge Court.

Title I, section 101, would establish a three judge court to resolve disputes arising out of the referendum. We do not oppose this mechanism as a means of dispute resolution, but suggest that it be made clear that this is to be an extraordinary court of limited jurisdiction. In this regard, we believe that section 101(e)(2) should be amended to read "Any claim regarding this Act brought under the U.S. Constitution or a federal statute . . ."

3. Referendum Information Officer.

The Department does not oppose the appointment of a referendum information officer as provided in section 101(g) of the Johnston/McClure substitute. However, we strongly object to the provisions regarding the referendum information officer's appointment. Pursuant to Sec. 101(g) the President would be required to appoint the information officer from a list provided by the three principal political parties in Puerto Rico. The Referendum Information Officer would be responsible for translation and distribution of information and educational materials on the status referendum that would purport to represent the position of the United States. Thus, we believe he may well exercise a significant federal authority. It is well established that such authority may be vested only in an officer of the United States, appointed pursuant to the requirements of the Appointments Clause of the Constitution. Buckley v. Valeo, 424 U.S. 1, 126-141 (1976). We object to a requirement that the information officer be appointed from a list, because the creators of the list would then share in the President's power of appointment.

TITLE II - STATEHOOD

1. Puerto Rico's Territorial Waters.

Title II, section 203, defines the new state as consisting of the territory, together with the territorial waters of the Commonwealth of Puerto Rico. We believe that this formulation is ambiguous and may give rise to claims that Puerto Rico is entitled to the 12-mile wide territorial sea of the United States. The ambiguity is caused in part by the circumstance that while the United States has a territorial sea, the states and territories have a seaward boundary. The breadth of the present seaward boundary of Puerto Rico is three maritime leagues or nine nautical miles. 48 U.S.C. § 749. We assume that, pursuant to the last sentence of 43 U.S.C. § 1312, Puerto Rico will retain that seaward boundary if it becomes a State. We recommend, therefore, that section 203 be redrafted as follows:

> The State shall consist of all the territory together with the waters included in the seaward boundary of the Commonwealth of Puerto Rico.

The Department of Commerce concurs in this suggestion.

III. - INDEPENDENCE

1. Electorate for the Puerto Rican Constitutional Convention.

Title III, section 301(b) of the bill would restrict the electorate for delegates to the Puerto Rican constitutional convention to residents born in Puerto Rico, residents who have at least one parent born in Puerto Rico, 20 year residents, residents who established their residence before attaining voting age, and the spouses of voters who meet these qualifications.

We believe that these limitations are unconstitutional. As long as Puerto Rico is under the sovereignty of the United States it is bound by the Equal Protection Element of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. Rodriguez v. Popular Democratic Party, 457 U.S. 1, 7-8 (1982). Voting qualifications based on place of birth, parentage, or an excessively long residence requirement would violate the Equal Protection requirements. The fact that the election is to take place after Puerto Rico has opted for independence does not change this analysis. So long as the election takes place before Puerto Rico is actually declared an independent, sovereign nation the Constitution will apply.

2. Dispute Resolution after Certification of the Referendum.

We object to Title III, section 306, which would stay actions arising under this title filed after the election is certified, and refer any such disputes to the Joint Transition Commission for resolution. Given that the United States still retains sovereignty over Puerto Rico and its residents up to the proclamation of independence, resolution of disputes leading up to independence must remain in the federal courts.

3. Joint Transition Commission.

As soon as the referendum is concluded, and assuming independence is certified as the result, a Joint Commission must be appointed in equal numbers by the President and by the presiding officer of the Constitutional Convention of Puerto Rico. The Commission would have responsibility for "expediting the orderly transfer of all functions currently exercised by the Government of the United States," to an independent Puerto Rico, "including the recommendation of appropriate legislation to the appropriate officials of each government." Further, the Commission would be required to establish several "task forces" which would be responsible for negotiating various agreements between the United States and Puerto Rico.

Title III contains a number of provisions requiring that agreements be negotiated before Puerto Rico is declared independent. For example, section 312 provides for the negotiation of certain defense agreements, sections 313, 314, and 315 provide for the negotiation of agreements relating to the continuation of various federal programs, the Social Security System and Medicare in Puerto Rico after independence, and section 318 provides for the negotiation of an agreement relating to the establishment of a Puerto Rican deposit insurance system.

We do not oppose the Commission in principle. On the other hand, several points with respect to the Commission, and particularly with respect to the proposed agreements, must be clarified to avoid constitutional problems. First, it must be made clear that the task forces, which will be responsible for negotiating the several proposed agreements under the bill, are to be appointed in the same manner as the Commission itself, e.g., half by the President and half by the Presiding Officer of the Constitutional Convention of Puerto Rico. Second, it must be made clear that only those members duly appointed by the President may represent the United States in the negotiation of agreements with Puerto Rico. Third, each provision of the bill which provides for the negotiation of an agreement must contain the language that appears in Title III, section 312(1) (regarding defense agreements): "and approved in accordance with the constitutional processes of the United States." Finally, Title III, section 307(a) must be amended to make clear that the proclamation of independence is dependent upon the approval, according to constitutional means, of any such agreements.

We believe that such agreements can be negotiated before Puerto Rico is declared independent, following the precedent of the Compact with the Freely Associated States and the legislation approving them, Public Law 99-239. The ability of an inchoate government to bind the government for the period after it gains full independence was recognized in connection with the evolution of the Freely Associated States (Federated States of Micronesia and the Republic of the Marshall Islands). See, Juda v. United States, 13 Cl. Ct. 667 (Cl. Ct. 1987, aff'd sub. nom. People of Enewetak v. United States, 864, F.2d, 134 Fed. Cir. 1988). Antolok v. United States, 873 F.2d, 369 (D.C. Cir. 1989). We believe that the ability of the United States to enter into such agreements would be even stronger than in the case of the Freely Associated States, if Congress delegated to the President its authority under Article IV, sec. 3, cl. 2 of the Constitution. In that event the President's power to conclude those agreements would flow not only from his foreign relations power but also from the territorial authority of Congress.

4. Judicial Pronouncements.

Under Title III, section 309, the judicial authority of the United States would be withdrawn from Puerto Rico immediately upon independence, and pending cases would be transferred to the corresponding Puerto Rican courts. If Puerto Rico is to be independent, at some point the jurisdiction of the United States, including judicial power, over the Island must end. Further, the exact form of the transition, however, is principally a matter for negotiation between the United States and the new government, although the United States would certainly be able to impose certain requirements as a condition of independence. In order to effectuate a smooth transition to independence, we recommend that a transition period be established during which United States jurisdiction would continue and be wound up in a smooth and orderly fashion.

A recent precedent for the termination of United States judicial power over territory to be included in a foreign state is the Panama Canal Zone. Pursuant to Article XI of the Panama Canal Treaty, during a transition period of thirty months from the date the Treaty entered into force, the civil and criminal laws of the United States were to apply concurrently with those of the Republic of Panama in certain areas of the old Canal Zone. The United States retained the right to exercise jurisdiction in criminal cases relating to offenses under the laws applicable to the Canal Zone, committed prior to the treaty's entry into force. 1/ The courts of the United States were allowed to continue functioning during the transition period "for the judicial enforcement of the jurisdiction to be exercised by the United States of American in accordance with this Article." The courts of the United States were to have no jurisdiction over new private civil cases, but were allowed to retain jurisdiction during the transition period "to dispose of any civil cases, including admiralty cases, already instituted and pending before the courts prior to the entry into force of this Treaty." Additionally, the laws, regulations, and administrative authority of the United States, not inconsistent with the treaty, were to continue in force "for the purpose of the exercise of the Unites States of America of law enforcement and judicial jurisdiction only during the transition period. The parties agreed to further consultations with respect to the "disposition of cases pending at the end of the transition period." Finally, during the transition the United States retained the right to incarcerate individuals in certain facilities in Panama, or to transfer them to penal facilities in the United States to serve their sentences.

1/ See Article XI, Panama Canal Treaty.

5. Citizenship.

Under Title III, section 311, Puerto Ricans born before the certification of the referendum would be allowed to retain their American citizenship, as well as obtain citizenship in the new republic. While Congress has the power to allow such an arrangement, we strongly oppose allowing dual citizenship for the entire Puerto Rican population. As stated in the Administration's testimony, we believe that each status option must be both clear and realistic. Independence for Puerto Rico must mean real independence, which must include an eventual loss of American citizenship for residents of Puerto Rico. Under a venerable rule of international law, a transfer of sovereignty of a territory transfers the allegiance of those who remain in the territory from the former sovereign to the new sovereign. American Insurance Company v. Canter, 1 Pet. (26 U.S.) 511, 542 (1828); United States ex rel. Schwarzkopf v. Uhl, 137 F.2d 898, 902 (2d Cir. 1943) and the authorities there cited; O'Connell, The Law of State Succession 246 (1956). 2/

We recognize, of course, that the well established international rule that a change in sovereignty works a change in citizenship must still be tested against the municipal law of the United States, especially the first sentence of the Fourteenth Amendment to the Constitution which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside (emphasis added).

We doubt, however, that as an original matter the first sentence of the Fourteenth Amendment was intended to protect citizenship which is lost by virtue of a rule of international law recognized at the time of the Amendment's adoption.

In any event we believe that requiring citizens of a newly independent Puerto Rico to choose between remaining there as citizens of Puerto Rico and returning to the United States to

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2/ Within the framework of this general rule specific treaties affecting the transfer of territory do frequently permit that the transfer of nationality ought to take place only with the consent, express or implied of the persons affected. Hence, such agreements frequently give the inhabitants of the territory an option under which they can retain their former nationality, but usually at the "heavy" price of leaving the territory. Those who remain behind as a rule acquire the new nationality and lose their original one. Whiteman, Digest of International Law, Vol. 2 pp. 934-935 (1963).

retain U.S. citizenship is wholly consistent with the Supreme Court's jurisprudence on this clause of the Fourteenth Amendment. In this, the Department squarely disagrees with the analysis of Professor Tribe.

The Supreme Court has held that Congress has authority to impose certain requirements upon those who acquire citizenship outside the United States. In Rogers v. Bellei, 401 U.S. 815 (1971), the Court was confronted with a case involving a person, born abroad, who had acquired United States citizenship pursuant to 8 U.S.C. § 1481 because his mother was a citizen of the United States. Bellei, however had failed to comply with section 1401's residency requirement. 3/ The Department of State determined accordingly that he had lost his United States citizenship. The Court concluded that because Bellei had acquired citizenship abroad he was not a citizen by operation of the Fourteenth Amendment but only by operation of a statute that contained a condition subsequent, namely the requirement that he take up residence in the United States. Hence, notwithstanding the Fourteenth Amendment, the Court held that Bellei lost his citizenship by failing to comply with that condition. 4/

Under Bellei the issue thus appears to be whether the United States citizenship of persons born in Puerto Rico flows from the Fourteenth Amendment or from statute. Puerto Rico was not "incorporated" within the United States upon its acquisition from Spain, see Downes v. Bidwell, 182 U.S. 244 (1900), and Congress has never purported to effect such an incorporation. As a result, the citizenship of Puerto Rican residents is based on the Jones Act of March 2, 1917, which conferred United States citizenship on persons born in Puerto Rico. 8 U.S.C. § 1402

3/ This section provided, with respect to certain individuals born abroad, that a citizen would lose his citizenship unless, before the age of 23, he came to the United States and resided here continuously for at least 5 years. This five year period had to take place between the ages of 14 and 28.

4/ We recognize that in Afroyim v. Rusk, 387 U.S. 253, 260 (1967), the Supreme Court held that a citizen of the United States has "a constitutional right to remain a citizen of a free country unless he voluntarily relinquishes that citizenship." The Bellei court, however, held that the statement in Afroyim that United States citizenship cannot be lost unless voluntarily relinquished, was limited to citizenship acquired pursuant to the Fourteenth Amendment i.e., by birth or naturalization in the United States, and therefore did not apply to Bellei who had acquired his United States citizenship by birth to a U.S. citizen outside the United States.

(1917), rather than on the 14th Amendment. Indeed, the very fact that it required a statute to confer United States citizenship on the residents of Puerto Rico indicates that they were not considered citizens of the United States by virtue of the Fourteenth Amendment, for if they were, the Jones Act would not have been necessary.

It follows that, under the Bellei analysis, persons born in Puerto Rico are not born in the United States. Their citizenship therefore has a statutory, rather than a constitutional, basis, and consequently is subject to reasonable statutory regulations, especially one which is in accord with a generally recognized rule of international law. Hence, it would appear reasonable to assume that provisions to the effect that citizens of the United States who continue to reside in Puerto Rico after independence lose their United States citizenship, or would have to opt for one or the other citizenship, would pass constitutional muster.

TITLE IV - COMMONWEALTH

1. Presidential Consultation Regarding Trade Agreements.

Title IV, section 406(b), would amend section 1102 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. 2902, to require the President to seek the advice of the Commonwealth of Puerto Rico during the process of negotiating certain trade agreements affecting Puerto Rico, and to consult with the Governor of the Commonwealth of Puerto Rico concerning the potential impact on Puerto Rico's economy of any proposed tariff rate change. We object to the requirement that the President must seek the advice of Puerto Rico during ongoing negotiations.

As noted above, the Constitution vests the authority to formulate and implement the foreign policy of the United States in the President. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). In particular, the power to make treaties is vested in the President, with the advice and consent of the Senate. A requirement that the President seek the advice of Puerto Rico during negotiations, presumably with respect to specific treaty provisions under consideration, improperly intrudes upon his constitutional prerogatives.

Further, we object on policy grounds to the requirement that the President "consult" with the Governor of Puerto Rico with respect to the impact of tariff rate changes on Puerto Rico. While we are sure that the President would, in any case, carefully consider the interests of Puerto Rico before concluding any such agreement, we do not think it wise to attempt to require him to consult with Puerto Rico's governor.

2. Appointments of Federal Officials.

Title IV, section 408, would require the President, and the heads of departments or agencies making federal appointments, to consult with the Governor of Puerto Rico, or other appropriate Puerto Rican official, "as to whether there are special circumstances or qualifications which should be considered in making the appointment." We object to a requirement that the President "consult" with Puerto Rican officials before making appointments.

The President's appointment power under Article II, section 2, clause 2, is limited only by the requirement of Senate advice and consent, for principal officers. The appointment of inferior executive officers may be vested in the President alone, or the heads of executive departments who are directly answerable to the President. The Appointments Clause admits of no statutory restrictions on the President's discretion in exercising the appointment power, and no statutory restrictions or directions concerning persons with whom the President may, or must, consult. Washington Legal Foundation v. United States Department of Justice, 691 F.Supp. 483 (D.D.C. 1988) (unconstitutional for Congress to restrict President's appointment power under Art. II, § 2, cl. 2), aff'd on statutory grounds sub nom. Public Citizen v. United States Department of Justice, slip op. No. 88-429 (U.S., June 21, 1989) at 25 (noting that application of Federal Advisory Committee Act (FACA) to Justice Department's consultation with American Bar Association concerning possible appointments of the President to the federal courts "would present formidable constitutional difficulties"). Accord id. (Kennedy, J., concurring in the judgment), slip op. at 16-22 (FACA unconstitutionally interferes with President's exclusive power of nomination under Appointments Clause).

We would have no objection, however, to a requirement that the Governor of Puerto Rico provide to the President, or to the responsible department or agency head, advice and information with respect to any "special circumstances or qualifications which should be considered in making" certain federal appointments in Puerto Rico.

3. Community Values.

Under Title IV, section 411, an exception to the antitrust laws would be made for discussions or agreements among persons in the entertainment industry for the purpose of developing "voluntary guidelines designed to alleviate the negative impact of violence, pornography, alcohol and drugs in all audio or visual entertainment in Puerto Rico." This exception would be activated by a declaration by the Governor of Puerto Rico. This exception is very similar to a more general exception to the antitrust laws now under consideration in the

Congress, S. 593 and H.R. 1391, limited to violence. As with those bills, the Department of Justice has no substantive legal objection to the proposed exception.

The Department does, however, object to section 411(c)(2). This section would limit the applicability of the antitrust exception to 36 months after the bill is enacted, and would allow it to be extended for another 36 months upon "declaration by the Governor of Puerto Rico." This would allow the Governor of Puerto Rico to exercise significant federal authority. As explained above, only officials appointed pursuant to the requirements of the Appointment's Clause may exercise such authority. The Governor of Puerto Rico is not appointed in this manner, and, therefore, may not exercise this authority consistent with the Constitution.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

John P. Mackey
Deputy Assistant Attorney
General

cc: Honorable James A. McClure
Ranking Member
Senate Committee on Energy
and Natural Resources
United States Senate