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Before

The Committee on Natural Resources
Subcommittee on Insular Affairs
House of Representatives

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on

H.R. 900, "The Puerto Rico Democracy Act of 2007" and
H.R. 1230, "The Puerto Rico Self-Determination Act of 2007"

Madame Chairwoman and members of the Committee:

My name is Ken Thomas. I am a Legislative Attorney with the American Law Division of the Congressional Research Service at the Library of Congress. I'd like to thank you for inviting me to testify today regarding the Committee's consideration of H.R. 900, the "Puerto Rico Democracy Act of 2007" and H.R. 1230, the "Puerto Rico Self-Determination Act of 2007." I'd also like to thank Sam Garrett, an analyst with our Government and Finance Division, who helped me in my preparation for this hearing.

Today, I would like to discuss the specifics of these two bills, including how they might be interpreted by a court and how they would interact with United States Constitution. Let me start with H.R. 900, which would authorize various plebiscites to be held in Puerto Rico on the issue of status. Under H.R. 900, a plebiscite would be held to ask voters to choose between two different status options, both of which are specified in the bill. The first option would be to continue "the existing form of territorial status as defined by the Constitution, basic laws, and policies of the United States." The second option would be to pursue "a path toward a constitutionally viable permanent nonterritorial status." If a majority of voters in this first plebiscite were to choose the option of maintaining the status quo, H.R. 900 would then call for additional plebiscites to be held every eight years to reexamine the voters' status preferences. On the other hand, if a majority of voters chose the second option, "a path toward a constitutionally viable permanent nonterritorial status," H.R. 900 would authorize a second plebiscite. In this second plebiscite, voters would be asked to choose between:

(1) statehood or (2) becoming a "sovereign nation." The second option would include either complete independence or entering into a "free association" relationship with the United States.[1]

The process contemplated by H.R. 900 is based on the recommendations of the President's Task Force on Puerto Rico's Status (Task Force).[2] The Task Force was established by President Clinton in 2000 to, among other things, identify options for the territory's future political status and suggest a process for realizing such options.[3] In December of 2005, the Task Force issued a report on Puerto Rico's relationship with the federal government. The report asserted that there are only three constitutionally valid options available to the island: (1) independence; (2) statehood; or (3) continuation as a U.S. territory subject to the Territorial Clause of the U.S. Constitution. The provisions of H.R. 900 were drafted to be consistent with this finding.

By contrast, H.R. 1230 appears to contemplate a method for addressing the status relationship between Puerto Rico and the federal government that differs significantly from both the process and the status options suggested by the Task Force. One significant difference is that H.R. 1230 contemplates the convening of a Puerto Rican constitutional convention, which would formulate a status option to be considered by the people of Puerto Rico and the Congress. The convening of the convention, however, would be one part of a multi-step process. First, the Puerto Rican government would approve legislation establishing the number of delegates to the convention. Then, an election would be held in Puerto Rico to select those delegates. Once the constitutional convention was convened, the convention delegates would be asked to agree on a proposed "Self-Determination Option" for Puerto Rico. The convention's proposal would then be presented to "the People of Puerto Rico" in a referendum. Finally, if a majority of referendum voters approved the proposed status option, it would become a "Self-Determination Proposal," which would then be presented to Congress to be passed as a joint resolution.

The process suggested by H.R. 1230, however, would not necessarily end if the "Self-Determination Proposal" is passed or rejected by Congress. If Congress were to make any changes to the proposal before passage, then § 4(a)(1) of the bill provides that these changes would be submitted to the Puerto Rican voters for approval in another referendum before the proposal could take took effect. On the other hand, if Congress rejected the proposed status option outright, § 4(a)(2) provides that the constitutional convention may reconvene to develop a new proposal.

There are several aspects of H.R. 1230 that are of special note. First, a "Self-Determination Option" can involve Commonwealth status, statehood or independence. However, if the Commonwealth status is chosen, it must be a "new or modified" Commonwealth. This language appears to be related to the further requirement that, whatever status is chosen — Commonwealth, statehood or independence options — it must be "based on the sovereignty of the People of Puerto Rico and not subject to the plenary powers of the territorial clause of the Constitution of the United States." This language

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[1] A "free association" relationship generally entails negotiated legal and economic ties, severable by either side, between sovereign nations.

[2] *See* U.S. President's Task Force on Puerto Rico's Status, Report by the President's Task Force on Puerto Rico's Status (2005) (Task Force Report).

[3] Executive Order No. 13183, 65 FR 82889 (2000).

stands in contrast to the Task Force report, which suggests that at least one of the status options, Commonwealth, cannot be formulated in a way that is not subject to Congress' power under Territorial Clause.

Of additional interest is the process to be followed by the Congress in the event that a "Self-Determination Proposal" is sent to the Congress by the convention. H.R. 1230 provides that if such option is submitted to Congress, then a joint resolution "shall" be enacted approving both the terms of the proposal and any necessary implementing language. At first impression, the use of the term "shall" would appear to contemplate that Congress would be required, under the bill, to accept the status option submitted by the convention. As will be discussed later, such an interpretation of this language may raise constitutional concerns.

One thing that the two bills do have in common is that they would both allow Puerto Ricans living off the island to participate in the proposed status decision-making. H.R. 900 would allow "all United States citizens born in Puerto Rico" who satisfy eligibility requirements set by the Puerto Rico State Elections Commission to participate in the plebiscites. The bill would thus allow Puerto Ricans born on the island, but not living there today, to participate in the plebiscites. H.R. 1230, on the other hand, appears to allow even broader suffrage. Although "voter eligibility" is not as explicitly addressed as it is in H.R. 900, the bill specifies that the "People of Puerto Rico" would participate in electing constitutional convention delegates and in the referendum on the convention's self-determination proposal. The "People of Puerto Rico" is defined to include resident Puerto Ricans and nonresidents "who are either born in Puerto Rico or have one parent born in Puerto Rico."

At this point, I would like to briefly give some background on the political status of Puerto Rico. After the end of the Spanish-American War, the United States and Spain signed the Treaty of Paris, which resulted in Spain relinquishing its claims to various holdings in the Caribbean, including Puerto Rico. The island was then governed by a U.S. military governor from 1898 through1900.

In 1900, the Congress passed the Foraker Act, under which Puerto Rico became an organized territory of the United States.[4] This Act included numerous provisions to raise revenue, and it provided Puerto Rican citizenship for inhabitants of the island who chose not to remain Spanish citizens. The Act also established a civilian government in Puerto Rico, and provided for a non-voting Resident Commissioner to act as the island's representative in Congress.

Soon thereafter, the Supreme Court began a consideration of the island's constitutional status in what have become know as the *Insular Cases*.[5] For instance, in the case of *Downes v. Bidwell*,[6] the Court considered whether the constitutional requirement that duties, excises

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[4] Foraker Act of April 12, 1900, ch. 191, 31 Stat. 77 (1900).

[5] *See, e.g.,* Downes v. Bidwell, 182 U.S. 244 (1901); Dorr v. United States, 195 U.S. 138 (1904); Balzac v. Porto Rico, 258 U.S. 298 (1922).

[6] 182 U.S. 244 (1901).

and imposts were to be uniform throughout the United States[7] applied to Puerto Rico. Justice White, in concurrence, established the territorial incorporation doctrine, which was ultimately used in the other *Insular Cases*. Under this doctrine, incorporated territories would enjoy all of the Constitution's protections, but unincorporated territories, such as Puerto Rico, would only enjoy fundamental constitutional rights and those additional civil rights that Congress provided by statute.

In 1917, Congress passed an Organic Act for Puerto Rico, which is popularly known as the Jones Act.[8] Among other things, the Act granted a bill of rights and statutory citizenship to the people of Puerto Rico. In 1950, the Congress passed the Puerto Rican Federal Relations Act,[9] giving Puerto Rico the right to establish a government and a constitution. This law is considered to be the basis for the modern Commonwealth relationship. In 1951, a referendum was held which approved the provisions of this Act, and the island's electorate subsequently approved a new Puerto Rican constitution. The constitution was then amended and approved by Congress. Since that time, a series of local referendums and plebiscites have been held on the status issue, but no significant change in political status has occurred.

The nature of the existing Commonwealth relationship between Puerto Rico and the United States has long been controversial. It is clear that the creation of the Commonwealth was intended to establish a significant level of self-government for Puerto Rico. However, disagreement exists about whether this relationship, which was established in the "nature of a compact,"[10] was intended to be binding on both parties, so that changes to that relationship could only be made by mutual consent. A further question is whether, regardless of the intent of the parties, Congress can be constitutionally bound to observe such an agreement.

This debate is also important to the consideration of the status options provided for in the bills before the Committee. As noted, the Task Force has asserted that the only three constitutionally-recognized options available to the island are independence, statehood or continuation as a U.S. territory subject to the Territorial Clause. While H.R. 1230 also provides for three status options – independence, statehood or Commonwealth – it specifies that none of the status options shall be subject to the Territorial Clause. Assuming for the moment that the current Commonwealth status is subject to the Congress' power over territories, H.R. 1230 directly raises the issue of whether such a "new or modified" Commonwealth option not subject to the clause is constitutionally permissible.

Article IV, § 3, cl. 2, the Territorial Clause, provides that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . . ." The Supreme Court has held that Congress's power under the Territorial Clause is extremely broad:

> In the Territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state,

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[7] U.S. CONST. Art. I, § 8, cl. 1.

[8] Jones Act of March 2, 1917, ch. 145, 39 Stat. 951 (1917).

[9] Public Law 81-600, ch. 446, 64 Stat. 319 (1950).

[10] The preamble to the Puerto Rican Federal Relations Act provides that : "the Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption." *Id.*

> and has full legislative power over all subjects upon which the legislature of a State might legislate within the State; and may, at its discretion, intrust that power to the legislative assembly of a Territory.[11]

It should be noted, however, that the Supreme Court has also held that the Congress has wide discretion in how it can provide for self-government in those territories:

> It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories. We are accustomed to that generally adopted for the Territories, of a *quasi* state government, with executive, legislative, and judicial officers, and a legislature endowed with the power of local taxation and local expenditures, but Congress is not limited to this form. . . . It may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory.[12]

If Congress delegates authority to local authorities, however, this does not limit Congress' continuing power to act in that territory under the Territorial Clause. In *First National Bank v. County of Yankton*,[13] the Court said:

> All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The territories are but political subdivisions of the outlying dominion of the United States. . . . The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.[14]

Considering these parameters, the question arises as to how a court might interpret the language of H.R. 1230 which provides that all of the status options to be considered by the constitutional convention must "be based on the sovereignty of the People of Puerto Rico and not subject to the plenary powers of the territorial clause of the Constitution of the United States."

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[11] Simms v. Simms, 175 U.S. 162, 168 (1899).

[12] Binns v. United States, 194 U.S. 486, 491 (1904).

[13] 101 U.S. 129 (1879)(upholding congressional authority over issuance of bonds by counties under the authority of a territory).

[14] *Id.* at 132. *See also* Sere v. Pitot, 6 Cr. (10 U.S.) 332, 336 (1810); American Insurance Co. v. Canter, 1 Pet. (26 U.S.) 511, 542 (1828); Shively v. Bowlby, 152 U.S. 1, 48 (1894).

A preliminary question with which a court might be concerned is just how broad an assertion of sovereignty is contemplated by the bill, as the quoted language may be seen as ambiguous. For instance, an argument might be made this language provides only that, once a status option is chosen and approved by Congress, it was the agreement itself which was no longer subject to Congress's power under the clause. Another interpretation would be that, whatever status option is chosen, that once that option is approved, the Congress would no longer be able to exercise its territorial power over Puerto Rico.

If the first interpretation is correct, then this language would appear to be intended merely to "lock in" whatever status option was chosen by the Congress, by removing Congress' constitutional authority to amend the provisions of the enacted joint resolution. This interpretation would, of course, raise constitutional issues. In fact, it would appear to raise many of the same legal arguments that have been made over the course of years concerning the current Commonwealth status. In general, these arguments, while accepting the fact of continuing federal jurisdiction over the territory of Puerto Rico, have suggested that some essential portion of the existing political structure, such as the Puerto Rican Constitution, is beyond the Congress's power.

The fundamental controversy in this regard appears to be whether the Congress can be bound by political status agreements. For two of the status options provided under H.R. 1230, this would not be a problem. There is little disagreement with the suggestion that, if Congress granted Puerto Rico statehood or independence, these decisions could not be reversed, and that under either of these options, Puerto Rico would no longer be subject to the Territorial Clause. Nor is there any question that Congress, after endorsing a Commonwealth status proposal, could refrain from modifying that decision, so that no issue of constitutional consequence would arise. Thus, the main point at issue is how the legislation as it is constructed is to be interpreted.

It is not clear from H.R. 1230 what legal theory might be presented in this regard. Because of the similarity of the proposal to past theories regarding the Puerto Rican Commonwealth, one could postulate that some of the legal arguments made in that earlier context would be relevant. For instance, commentators have suggested that certain compacts granting self-governmental authority to a territory create "vested political rights." Under the Fifth Amendment, once the United States has vested a property right, then Congress cannot deprive a person of that property without due process of law; nor can that private property be taken for public use without providing just compensation. Under a "vested political rights" theory, a compact granting self-governmental authority to a territory could create such vested property rights, so that a subsequent Congress could not revoke the compact unilaterally.[15]

It is not clear, however, how this argument could be applied to the situation contemplated by H.R. 1230. As noted, the "vested political rights" theory relies on precepts of due process

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[15] This theory of vested rights was apparently adopted by the Department of Justice in a 1963 legal opinion, and was reiterated as late as 1975. *See* Task Force Report, *supra* note 2 at 6. The Department of Justice apparently reconsidered this opinion after the 1986 Supreme Court decision in Bowen v. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 54-56 (1986) (holding that a State's purported contractual right to withdraw its employees from Social Security was not a property right). Since that time, the Department of Justice has apparently held the opinion that a political compact cannot rise to the level of vested property rights. *Id.*

and the takings doctrine, both of which are found in the Fifth Amendment. H.R. 1230, rather than invoking the application of these constitutional protections, focuses on diminishing the authority of Congress under the Territorial Clause. Arguably, the provisions of H.R. 1230 may even work against the strength of the "vested political rights" argument. As noted, the *Insular Cases* found that the degree to which constitutional rights were applicable in the territories was often to be determined by Congress under the Territorial Clause. However, to the extent that the Territorial Clause was deemed no longer applicable to the "new or enhanced" Commonwealth, then this would appear to diminish the argument that the constitutional prohibition against the deprivation of "vested political rights" was still applicable to Puerto Rico.

Considering the constitutional problems with the "vested political rights" theory, one might consider an alternative interpretation of proposed language under H.R. 1230. Under this second interpretation, the passage of a "new or enhanced" Commonwealth would result, not just in a "locking in" of the status relationship, but also in a removal of all federal jurisdiction over the island of Puerto Rico. This interpretation, however, may raise more significant constitutional issues. As the Congress is limited to its enumerated powers, it must be determined under what authority the United States Congress could establish such a status relationship.

The portion of the Constitution which is most relevant to political status relationships is Article IV, § 3, which addresses three powers of Congress: the power to grant statehood, the power to regulate territories, and the power to dispose of territories. These three powers are consistent with the three status options of statehood, Commonwealth subject to the Territorial Clause, and independence. H.R. 1230 does not specify under that what alternative constitutional authority Congress could act to create a Commonwealth not subject to the Territorial Clause, and as noted above, the "vested political rights" theory that has been suggested in the past may not be applicable to H.R. 1230.

Further, this second interpretation would result in a significant change in the relationship between federal government and Puerto Rico. Currently, a significant number of criminal or civil federal laws are applicable to Puerto Rico. To the extent that a "new or enhanced" Commonwealth would mean that there is a total loss of federal jurisdiction over Puerto Rico, this would suggest a more significant change in the existing Commonwealth relationship between Puerto Rico and the federal government than has generally been contemplated in the past. While it is certainly the case that the federal government could choose to amend federal laws to exclude their application to the Puerto Rico, this would not eliminate Congress's authority to reinstate such statutory provisions.

Another issue is whether, under H.R. 1230, the Puerto Rican constitutional convention could evade some of these constitutional concerns by proposing an amendment to the United States Constitution. It seems clear that a constitutional amendment could be used to achieve the status option of a "new or enhanced Commonwealth" not subject to the plenary territorial powers of the Congress. Such a status is simply not achievable through a statutory route. Thus, to the extent that the constitutional convention were to provide a "new or enhanced Commonwealth" status option regarding Puerto Rico, it would appear likely that it would need to take the form of a constitutional amendment.

On its face, H.R. 1230 does not specifically appear to limit a status option from being proposed as a constitutional amendment. There are certain aspects of the bill language which

suggest that a proposed amendment to the Constitution would be appropriate. First, the bill provides that once a status proposal is submitted to Congress, that it shall be passed as a joint resolution, a legislative vehicle more commonly associated with special legislation such as constitutional amendments than with territorial legislation. Second, the bill itself speaks only in terms of Congressional approval of the joint resolution.[16] Normally, a joint resolution requires the approval of the President to become law. Thus, despite the failure to specify presidential participation, an interpretation of the bill would require either presidential participation or ratification by the states.

A final provision of H.R. 1230 that should be considered is the requirement that Congress "shall," by joint resolution, pass any proposal submitted by the Puerto Rican constitutional convention. The Supreme Court has held that a statute cannot bind a future Congress so that such statute cannot be repealed or altered.[17] As the Court long ago stated:

> The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted. [18]

Similarly, Congress could not mandate that a future Congress take a specified action such as the passage of a particular proposal.

Adding to the interpretational difficulties here is that, despite the requirement in H.R. 1230 that the Congress "shall" enact any status proposal, the bill specifically contemplates the possibility that Congress could either reject or modify (i.e., not pass) the status proposal. This brings into question whether the use of the term "shall" in this context is truly intended to be mandatory.

On a final note, if the Congress does fail to consider, pass or reject a status proposal, this may lead to other problems with the interpretation of the bill. For instance, as noted above, H.R. 1230 § 4(a)(1) and (2) contemplates additional procedures that can be taken in the event that Congress either modifies or rejects a status proposal. No such provision is made, however, in the event that Congress merely chooses not to consider a joint resolution containing the status options. One might argue that such a situation is contemplated by § 5 of the bill, which provides that the constitutional convention may remain in session until a self-determination proposal is enacted by Federal law. However, under the provisions of § 4(a) cited above, the Puerto Rican convention is only authorized to reconvene to propose another status option if Congress rejects the last one. If the Congress never considers the proposal, then it appears that the bill's language would not provide for the consideration of a second self-determination proposal by the convention.

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[16] *See, e.g.,* H.R. 1230, § 4(a)(1)("If Congress approves the Self-Determination Proposal with any changes or amendments, it shall be submitted in a referendum vote to the People of Puerto Rico for approval before it shall be effective.")

[17] See Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379.

[18] Fletcher v. Peck, 6 Cr. (10 U.S.) 87, 135 (1810)(Chief Justice Marshall).

Madam Chairwoman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Subcommittee may have, and I look forward to working with all Members and the staff of the Subcommittee on this issue in the future.