Testimony of Hon. Alejandro García-Padilla, Governor of the Commonwealth of Puerto Rico and President of the Popular Democratic Party, before the U.S. Senate Committee on Energy and Natural Resources
August 1, 2013

Dear members of the Senate Committee on Energy and Natural Resources:

You have requested my opinion on the plebiscite celebrated in Puerto Rico on November 6, 2012 and President Obama's proposal for an appropriation of $2,500,000 for the celebration of a new plebiscite. I will address the aforementioned matter in that order.

I. The 2012 Plebiscite was not a legitimate exercise of self-determination

On November 6, 2012, the day of the general elections, voters were given a ballot with two questions that read as follows:

First Question:

Do you agree that Puerto Rico should continue to have its present form of territorial status? (Emphasis added).

Yes _____ No _____

Second Question:

Regardless of your selection in the first question, please mark which of the following non-territorial options you prefer.

Statehood: Puerto Rico should be admitted as a state of the United States of America so that all United States citizens residing in Puerto Rico may have rights, benefits, and responsibilities equal to those enjoyed by all other citizens of the states of the Union, and be entitled to full representation in Congress and to participate in the Presidential elections, and the United States Congress would be required to pass any necessary legislation to begin the transition into Statehood.

If you agree, place a mark here _____.

Independence: Puerto Rico should become a sovereign nation, fully independent from the United States and Congress would be required to pass any necessary legislation to begin the transition into the independent nation of Puerto Rico.

If you agree, place a mark here _____.

Sovereign Free Associated State (Estado Libre Asociado Soberano): Puerto Rico should adopt a status outside of the Territorial Clause of the United States Constitution that recognizes the sovereignty of the People of Puerto Rico. The Sovereign Free Associated State would be based on a free and voluntary association, the specific terms of which shall be agreed upon between the United States and Puerto Rico as

> sovereign nations. Such agreement would provide the scope of the jurisdictional powers that the People of Puerto Rico agree to confer to the United States and retain all other jurisdictional power and authorities.
>
> If you agree, place a mark here _____.

The pro-Commonwealth Popular Democratic Party opposed this plebiscite based on three main facts: (1) the process' biased structure, (2) the unfair characterization of the Commonwealth option, and (3) the disenfranchisement of pro-Commonwealth voters. This was an electoral process rigged in favor of statehood.

A. The plebiscite's structure was rigged in favor of statehood

The plebiscite's structure closely followed the process proposed in H.R. 2499 (111th Congress) by Resident Commissioner Pedro Pierluisi in 2009. H.R. 2499 only differed in that it called for the two separate votes to occur on different dates, holding the second vote only if the status quo was defeated in the first round. (And if the status quo won, the bill would subject it to continuous periodic voting.)

This structure was severely criticized on the House Floor. The Congressional Record shows that criticisms of H.R. 2499 in its original form came from both sides of the aisle and focused mainly on the exclusion of the Commonwealth option in the second vote.

As a result of those objections, the bill was amended to include the Commonwealth as an option in the second ballot and passed.

Revealingly, on May 20, 2010 Resident Commissioner Pierluisi came before this very Committee and acknowledged the fairness of the amendment:

> I should note something. When I introduced this bill originally I did not have that fourth option, the current status. My thinking as a lawyer was like, I was being logical in the sense if the majority of the people reject the current status, why include it in the second -- the second time around? But I have to say now on behalf of my federal colleagues in the House, the sentiment in the House was let's make sure that nobody's left out, nobody who wants to support a valid option. And the current status called the Commonwealth, it is one option. We've been living through it for a long time.

Former Governor Luis Fortuño, did so as well:

> If a second stage vote does take place the current status will stand equally alongside the other possible status alternatives that are so important in Puerto Rico.

The 111th Congress ended without Senate action on H.R. 2499. The pro-statehood Puerto Rico legislature and Governor vowed to legislate it locally but delayed any action in anticipation of the White House Task Force Report on Puerto Rico's Status, released on March 16, 2011.

The report gave them a very strong admonition:

> To move forward, it is critical that the process is accepted by the people of Puerto Rico as fair and that it ensures that even those whose status option is not selected feel fairly treated. (White House Task Force Report on Puerto Rico's Status, p. 26)

Expressing such a concern is unusual, for fairness as a procedural specification should go without saying. Evidently, the Task Force felt that need. President Obama himself, during his visit to Puerto Rico in June of 2011, reiterated that warning: "The most important thing is that there is a sense of legitimacy to the process here in Puerto Rico." (Univision TV interview.)

H.R. 2499, in its original form, led to these admonitions. On this, the Task Force pointed out:

> In the original form of the bill, if a majority voted for a different political status, the people of Puerto Rico would then have another plebiscite to vote on three options: (1) Statehood; (2) Independence; or (3) Free Association. There was criticism that, under H.R. 2499 in its original form, if a change of status won the first vote but the vote was close, the second vote would not include an option that perhaps 49 percent of the population supported as a first option and an unspecified number believed was the second best option. In part, for this reason, those supporting certain options objected to the bill, and, as a result, it was amended to include a fourth option in the second plebiscite: the current political status. (Report, pp. 27-28.)

The then ruling pro-statehood legislature and Governor of Puerto Rico disregarded the concerns of both the House and the White House, and disregarded what they told this Committee. The inclusion of the Commonwealth option in the second round was not given serious consideration by the legislative assembly. All the rhetoric about "not leaving anybody out" or Commonwealth "standing equally alongside the other alternatives" was not sincere. This is the typical behavior of a statehood party that speaks about fairness in Congress but acts unfairly in Puerto Rico.

The Task Force Report had recommended a two round vote where the Puerto Ricans would first answer whether they preferred to remain part of the United States or separate, and then a run-off between the alternatives that fell under the winning category, Commonwealth and statehood would be the "in-union" options, independence, and free-association the "in-separation" ones. In contrast to the manner the statehood party handled this matter, I, then a senator in the minority party, introduced legislation adopting the Task Force's recommendations.

The two-question structure sought to conceal the fact that Commonwealth is still the preferred option among Puerto Ricans. In the 1993 plebiscite, Commonwealth got 48.6% of the vote, statehood 46.3% and independence 4.4%. Commonwealth won, although it did not pass the 50% mark. Those same results under the 2012 plebiscite structure, would have meant a Commonwealth defeat.

The results, nonetheless, show that statehood is on the decline and suggest that **Commonwealth** is still the preferred option.

A full-page ad published earlier this year in *Politico* by a pro-statehood group claimed that "over 75% of registered voters came to the polls, and 61% voted for statehood." That is a

great example of how you can lie with numbers. You can only read that phrase one way; it is claiming that of those that "came to the polls," 61% voted for statehood. That is objectively false.

The Puerto Rico Elections Commission certified that 1,878,969 participated and that 834,191 voted for statehood. The truth is that of the total of votes cast, only 44.4% favor statehood.

The statehood group claims the number is 61%, but that is because they changed the manner in which the Elections Commission calculates percentages. Until this past plebiscite, percentages were calculated based on total ballots cast. The 2005 Report by the President's Task Force on Puerto Rico's Status calculated the 1993 result percentages based on total participation including blank and void ballots. Using that method, the Report states that statehood got 46.3% and 46.49% in those plebiscites. Statehooders recognize these percentages as valid.

However, the November 2012 plebiscite was the first election in which the Commission could no longer include blank and void ballots when calculating percentages. When blank and void ballots are excluded, the statehood percentage jumps from 44.4% to 61%. There has not been a surge in statehood support, just a change in how votes are counted or, should I say, excluded.

B. The plebiscite ballot had a serious language problem

i- The plebiscite did not refer to Commonwealth by its name

The Committee should wonder why the Puerto Rico legislature chose not to refer to the Commonwealth option in the ballot by its rightful and legal name, as used more than one thousand times in the US code, but instead used a derogatory "present form of territorial status."

The reference to Commonwealth as "present form of territorial status" was meant to offend its supporters and deter them from voting "Yes". This is sometimes overlooked in Washington where the term "territory" is used in a more general sense as an umbrella term that includes all US non-state entities. A memo from the Clinton years regarding "Mutual Consent Provisions in the Guam Commonwealth Legislation" acknowledges, in the first footnote, the pejorative sense that the term "territory" carries:

> Territories that have developed from the stage of a classical territory to that of a Commonwealth with a constitution of their own adoption and an elective governor, resent being called Territories and claim that that legal term and its implications are not applicable to them. We therefore shall refer to all Territories and Commonwealths as non-state areas under the sovereignty of the United States or briefly as non-state areas.
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> In the particular case of Puerto Rico, the United States Code recognizes that:
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> Fully recognizing the principle of government by consent, sections 731b to 731e of this title are 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. 48 U.S.C. §731b.

Those who seek to justify using the "present form of territorial status" terminology resort to the case of *Nat. Bank v. County of Yankton*, 101 U.S. 129, 133 (1879), for the proposition that "[a]ll territory within the jurisdiction of the United States not included in any state must necessarily be governed by or under the authority of the Congress." But that only reveals their ill-intent. *County of Yankton* reflects nineteenth century a state of mind, when the United States was expanding westward and incorporating territories for eventual statehood. It was understood that the Constitution provided for Congress to hold plenary powers over those territories until admission as a state. Two decades after *Yankton County*, however, the United States began to acquire territories not intended for eventual statehood. Through the years and decades, these new territories would evolve, to use the Clinton administration's terminology, from "classic territories" into other forms of relationship. Felix Frankfurter recognized this as far back as 1914 when he was a law officer in the U.S. Department of War:

> The form of the relationship between the United States and [an] unincorporated territory is solely a problem of statesmanship. History suggests a great diversity of relationships between a central government and [a] dependent territory. The present day shows a great variety in actual operation. One of the great demands upon creative statesmanship is to help evolve new kinds of relationship[s] so as to combine the advantages of local self-government with those of a confederated union. *Luckily, our Constitution has left this field of invention open*. The decisions in the Insular cases mean this, if they mean anything; that there is nothing in the Constitution to hamper the responsibility of Congress in working out, step by step, forms of government for our Insular possessions responsive to the largest needs and capacities of their inhabitants, and ascertained by the best wisdom of Congress.

Constitutional law has evolved to create this type of creative statesmanship. In the case of Puerto Rico, the United States Supreme Court recognized the change in the nature of the relationship between the United States and Puerto Rico that occurred in 1952:

> By 1950… pressures for greater autonomy led to congressional enactment of Pub. L. 600, 64 Stat. 319, which **offered the people of Puerto Rico a compact** whereby they might establish a government under their own constitution. **Puerto Rico accepted the compact**, and on July 3, 1952 Congress approved, with minor amendments, a constitution adopted by the Puerto Rican populace [...] Pursuant to that constitution the Commonwealth now "elects its Governor and legislature; appoints its judges, all cabinet officials, and lesser officials in the executive branch; sets its own educational policies; determines its own budget; and amends its own civil and criminal code." (citing Leibowitz, The Applicability of Federal Law to the Commonwealth of Puerto Rico, 56 GEO. L. J. 219, 221 (1967)).[1]

The Court then provided a general sense of what Puerto Rico had become with the transformation of its status from that of a mere territory into a Commonwealth by quoting at length, and with approval, from Chief Judge Magruder's observations in *Mora v. Mejías*:

> Puerto Rico has thus not become a State in the federal Union like the 48 States, but it

[1] *Calero Toledo v. Pearson Yacht Leasing Co*., 416 U.S. 663 (1974).

> would seem to have become a State within a common and accepted meaning of the word … **It is a political entity created by the act and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact**.[2]

The process followed for Puerto Rico in 1952 resembled that of the admission of States, with the adoption of a constitution and assumption by Puerto Rico of all responsibilities of local government. Unlike regular laws or organic acts, here an act of Congress came into effect only after the people of Puerto Rico gave their consent, therein its nature as a compact.

Two years later, the Court explained that "**the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union […]."**[3] The Court reasoned, moreover, that through the establishment of the Commonwealth, "**Congress relinquished its control over the organization of the local affairs of the island** and granted Puerto Rico a measure of autonomy comparable to that possessed by the States." The Supreme Court describes the 1950-52 process as an act of relinquishment and not as a mere delegation of powers. To "delegate" means "to entrust" which is inherently reversible. To "relinquish" is "to cease," which denotes irreversibility.

The concept of "relinquishment" in the territorial policy context appears earlier in the memorandum by then Assistant Attorney General William H. Rehnquist:

> [T]he Constitution does not inflexibly determine the incidents of territorial status, i.e., that Congress must necessarily have the unlimited and plenary power to legislate over it. Rather, Congress can gradually relinquish those powers and give what was once a Territory an ever-increasing measure of self-government. Such legislation could create vested rights of a political nature, hence it would bind future Congresses and cannot be "taken backward" unless by mutual agreement.[4]

In 1980 the U.S. Supreme Court issued a brief *per curiam* opinion in *Harris v Rosario*, stating that Congress could, under the Territory Clause, treat Puerto Rico differently in the application of the Aid to Families with Dependent Children program.[5] The case has often been misread as negating the Court's previous –and posterior– assertions that Puerto Rico has attained sovereignty similar to that of the States over its local affairs and as a snub to the claim that the relationship is based on a compact. But the case has nothing to do with any of that. It holds that generally Congress may treat Puerto Rico differently from the States if it has a rational basis to do so. But that pertains strictly to matters that fall under the federal sphere of powers, in that particular case to a federal assistance program.

Some claim that *Harris v. Rosario* shows that Puerto Rico is still a territory of the United States and, thus, that using the tag is appropriate. That debate is more semantic than substantial.

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[2] *Mora v. Mejias*, 206 F.2d 377 (1st Cir. 1953).

[3] *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976).

[4] *Re: Micronesian Negotiations* (Office of Legal Counsel, Aug. 18, 1971).

[5] *Harris v. Rosario*, 446 U.S. 651 (1980).

There is no contradiction between Congress having power under the Territory Clause and those powers being limited by compact. This was squarely addressed by the Ninth Circuit in the context of the Commonwealth of the Northern Mariana Islands, by saying: "Even if the Territorial Clause provides the constitutional basis for Congress' legislative authority in the Commonwealth, it is solely by the Covenant that we measure the limits of Congress' legislative power."[6]

The U.S. Supreme Court has long recognized that Congress can limit or restrict its powers under the Territory Clause. In *Cincinnati Soap Co. v. U.S.*, the Court addressed the nature of the changes in status of the Philippine Islands upon the approval and adoption of a constitution for the Commonwealth of the Philippine Islands. The Court recognized that "these acts have brought about a profound change in the status of the islands and in their relations to the United States" and acknowledged that the power of the United States over the new Commonwealth had been so modified.[7]

Whatever confusion *Harris* may have provoked regarding the nature of the Commonwealth relationship was addressed by the Court in *Rodriguez v. Popular Democratic Party*, where it unambiguously stated that: "Puerto Rico, like a state, is an autonomous political entity, '**sovereign over matters not ruled by the Constitution**.'" [8] The Court in *Rodriguez* cited with approval from *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, a decision authored by then Circuit Judge, and now Supreme Court Justice, Stephen Breyer. *Cordova* seminally sums up the nature of the Commonwealth relationship:

> [In 1952] Puerto Rico's status **changed from that of a mere territory to the unique status of Commonwealth**. And the federal government's relations with Puerto Rico changed from being bounded merely by the territorial clause, and the rights of the people of Puerto Rico as United States citizens, to being bounded by the United States and Puerto Rico Constitutions, Public Law 600, the Puerto Rican Federal Relations Act and the rights of the people of Puerto Rico as United States citizens.[9]

When adopted, the Commonwealth of Puerto Rico was hailed as major example of that creativity. Chief Justice Earl Warren, in a speech given in 1956 on the occasion of the inauguration of the new Puerto Rico Supreme Court Building, put it eloquently:

> In the sense that our American system is not static, in the sense that it is not an end but the means to an end; in the sense that it is an organism intended to grow and expand to meet varying conditions and items in a large country; in the sense that every governmental effort of ours is an experiment-so the new institutions of the Commonwealth of Puerto Rico represent an experiment—the newest experiment and perhaps the most notable of American governmental experiments in our lifetimes. [10]

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[6] *U.S. ex rel. Richards v. De León Guerrero*, 4 F.3d 749 (9th Cir. 1993).

[7] *Cincinnati Soap Co. v. U.S.*, 301 U.S. 308 (1937).

[8] *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982).

[9] *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F. 2d 36, 39-42 (1st Cir. 1981).

[10] Speech on the occasion of the inauguration of the new Puerto Rico Supreme Court Building, 1956.

The reference to the Commonwealth of Puerto Rico as "present form of territorial status" in the ballot was ill intended. It sought to deny the achievements of the compact created by the United States and Puerto Rico in 1952

ii. The plebiscite disenfranchised pro-Commonwealth voters because it failed to recognize the possibility of an enhanced Commonwealth

Referring to the Commonwealth as territorial in nature is only part of the problem. From its inception, the Commonwealth concept has always been conceived as a dynamic relationship subject to development and growth. However, the 2012 ballot limited the Commonwealth option to its "current" form only, thus excluding from the ballot those who believe that the best option for Puerto Rico is a further developed form of Commonwealth. This option appeared in the 1967 and 1993 plebiscites and won. What happened in 2012 was the disenfranchisement of pro-Commonwealth voters.

The establishment of the Commonwealth status was undoubtedly a significant achievement. Until then, no territory or possession had been allowed to adopt is own constitution and elect its own governor and legislature. Until then, Congress had delegated to some extent the administration or governance of local affairs to territories through organic acts, but it had not relinquished those powers and granted state-like sovereignty.

The creation of the Commonwealth of Puerto Rico was not the culmination of an innovative process of self-determination and US federalism. From the very beginning, Commonwealth adherents recognized the need to address certain issues. One of these issues was the applicability of certain Federal Laws in Puerto Rico. For instance, under this innovative relationship nothing prevents Congress and Puerto Rico from agreeing on mechanisms for the exemption of Puerto Rico from specific Federal laws and wherein the Commonwealth is authorized to submit to the United States proposals for the entry of Puerto Rico into international agreements, in order that Puerto Rico may govern matters necessary to its economic, social, and cultural development.

Puerto Rico's first elected governor and main architect of the Commonwealth, Luis Muñoz Marín, in a letter to President Kennedy wrote the following:

> In planning the growth of the Commonwealth, we should, I believe, proceed along the following lines:
>
> (1) The indispensable principle of the Commonwealth is self-government for Puerto Rico in permanent association with the United States on the basis of common loyalty, common citizenship, mutual dedication to democracy and mutual commitment to freedom.
>
> (2) The moral and juridical basis of the Commonwealth should be further clarified so as to eliminate any possible basis for the accusation, which is made by enemies and misguided friends of the United States and Puerto Rico, that the Commonwealth was not the free choice of the people of Puerto Rico acting in their sovereign capacity, but was merely a different kind of colonial arrangement to which they consented.

(3) The governmental power and authority of the Commonwealth should be complete and any reservations or exceptions which are not an indispensable part of the arrangements for permanent association with the United States should be eliminated. Methods should be devised for forms of participation, appropriate to the Commonwealth concept, by the people of Puerto Rico on federal functions that affect them.

Certainly, the interests of the United States and of Puerto Rico would be greatly served by reaffirmation of our compact –including the guarantees of permanent association and common citizenship which practically all Puerto Ricans prize deeply– in a form which will leave no room for doubt as to the sovereign capacity of the people of Puerto Rico to give and receive these commitments.

In response to Muñoz's letter, President Kennedy said: "I am aware, as you point out, that the Commonwealth relationship is not perfected and that it has not yet realized its full potential…I am in full sympathy with this aspiration."

Since 1952 there have been several efforts, taking various forms, to further develop Commonwealth. Three merit discussion for they show that a further development of Commonwealth status is a matter of political will and statesmanship.

(i) 94th Congress: The New Compact – In October, 1975, an Ad Hoc Advisory Group on Puerto Rico appointed by President Nixon and Governor Hernández Colón presented a "Compact of Permanent Union Between Puerto Rico and the United States." The Advisory Group included U.S. Senators and Members of Congress, the founder of the Commonwealth of Puerto Rico and former Governor, Luis Muñoz Marín, and a number of other distinguished individuals from the U.S and Puerto Rico. The proposed compact was the result of a process of studies, inquiries, public hearings, reports and discussions over a two-year period.

The group concluded that:

It must be noted finally that the relationship between Puerto Rico and the United States since its inception in 1898, and especially since 1950-1952, has been unique within the American Federal system. However, because this association is unique and exists within a dynamic social and economic system, much debate has surrounded it during the twenty-three years since the Puerto Rican Constitution was adopted.

Public Law 600 primarily recognized the right of self-government by the people of Puerto Rico and established the process by which their representatives, freely and specifically elected for that purpose, drafted a constitution which the people of Puerto Rico adopted. Public Law 600 and the Constitution of Puerto Rico were noteworthy advances in the progress toward the maximum of self-government and self-determination by the people of Puerto Rico. However, Public Law 600 retained an accumulation of previous statutory provisions. These included several provisions from the Foraker Act of 1900, which established the first political and economic association between the United States and Puerto Rico after its cession from Spain to the United States in 1898. Also many were retained from the Jones Act of 1917 and some from

the Elective Governor's Act of 1947. The Jones Act of 1917 improved the political relationship, bestowed United States citizenship on the people of Puerto Rico, and retained ultimate Congressional control over Puerto Rico. This accumulation of provisions is in many ways anachronic. It is the belief of the Advisory Group on Puerto Rico that the time is appropriate to draft a new compact as a substitute for the Federal Relations Act.

The proposed new compact would define Commonwealth as follows:

> The people of Puerto Rico constitute an autonomous body politic organized by their own, free and sovereign will and in common agreement with the United States under the juridical structure and official name of the Free Associated State of Puerto Rico… The right of the Free Associated State of Puerto Rico to govern itself is hereby recognized as well as the right to exercise all the necessary powers and authority to govern the people of Puerto Rico according to its own Constitution and laws and to make a compact with the United States as to the nature of its present and future political relations… In order to respect the right of self government guaranteed by this compact, the United States agrees that the provisions of this Compact may be modified only by mutual agreement between the government of the United States and the government of the Free Associated State of Puerto Rico." [Arts 1, 2, 21 New Compact]

The proposed "New Compact" dealt with matters such as legal title to lands and navigable waters, citizenship, internal revenue, immigration, representation (proposing one non-voting representative in the Senate in addition to the one it has since 1900 in the House of Representatives), assignment of federal functions to Puerto Rico (if Puerto Rico agrees to assume the "expenses and responsibilities"), labor, and the environment.

The proposal further provided a solution to one of Commonwealth's most vexing problems: the automatic application of federal laws to Puerto Rico. The compact proposed an objection mechanism wherein Puerto Rico could protest the application of a given legislation triggering a process whereby Congress, following certain criteria, could exclude Puerto Rico from the application of a given law. While this has always been contemplated as an exceptional mechanism that would be used very sparingly, it helps resolve the current democratic fault of having the governed automatically ruled by laws adopted without their participation. Regarding this proposal for an enhanced Commonwealth, then Acting Assistant Attorney General for Legislative Affairs, A. Mitchell McConnell, Jr., commented:

> The proposed Compact would, without altering the fundamental nature of Puerto Rico's Commonwealth status, provide substantially increased autonomy to the island government and its people . . . Such autonomy may be granted to Puerto Rico because Congress under the Constitution (Article IV, § 3) has plenary power over the territories of the United States and Puerto Rico remains a territory as that word is used in the Constitution. *Cf. Detres v. Lions Building Corp*., 234 F. 2d 596 (7th Cir. 1956). In this light, it is possible for Congress to bind future Congresses with respect to Puerto Rico by means of a "compact." This may be viewed either as the vesting of certain rights, *see, e.g., Downes v. Bidwell*, 182 US 244, 261-71 (1901), or as the

> granting of a certain measure of independence which once granted cannot be retrieved. Thus, specifically, Article 21 of the proposed Compact, requiring mutual agreement for amendment of the Compact, would, in our belief, be constitutional. Indeed, its explicit statement would appear to be an improvement over the situation under the present Compact where there is some question as to the ability of Congress to change its provisions.[11]

A bill incorporating the compact was introduced in the House, H.R. 11200 (approved in subcommittee), and Senate, S. Res. 215, but the Commonwealth party's defeat in the 1976 elections for reasons unrelated to the status issue, put an end to such effort.

(ii) H.R. 4765, 101th Congress – Another significant effort to enhance Commonwealth occurred during the 101th Congress, where the House of Representatives unanimously passed H.R. 4765, a bill calling for a plebiscite on status. The House Report on the bill included the following definition of a "New Commonwealth":

> A NEW COMMONWEALTH RELATIONSHIP.- (A) The new Commonwealth of Puerto Rico would be joined in a union with the United States that would be permanent and the relationship could only be altered by mutual consent. Under a compact, the Commonwealth would be an autonomous body politic with its own character and culture, not incorporated into the United States, and sovereign over matters governed by the Constitution of Puerto Rico, consistent with the Constitution of the United States.
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> (B) The United States citizenship of persons born in Puerto Rico would be guaranteed and secured as provided by the Fifth Amendment of the Constitution of the United States and equal to that of citizens born in the several States. The individual rights, privileges, and immunities provided for by the Constitution of the United States would apply to residents of Puerto Rico. Residents of Puerto Rico would be entitled to receive benefits under Federal social programs equally with residents of the several States contingent on equitable contributions from Puerto Rico as provided by law.
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> (C) To enable Puerto Rico to govern matters necessary to its economic, social, and cultural development under its constitution, the Commonwealth would be authorized to submit proposals for the entry of Puerto Rico into international agreements or the exemption of Puerto Rico from specific Federal laws or provisions thereof to the United States. The President and the Congress, as appropriate, would consider whether such proposals would be consistent with the vital national interests of the United States on an expedited basis through special procedures to be provided by law. The Commonwealth would assume any expenses related to increased responsibilities resulting from the approval of these proposals.

As with the 1975 compact proposal, this definition of New Commonwealth provided for the "exemption of Puerto Rico from federal laws and for the entry of Puerto Rico into

[11] A. Mitchell McConnell to Marlow W. Cook, Department of Justice, Washington, D.C. 12 May 1975.

international agreements, so long as the proposals are consistent with the vital national interests of the United States."

(iii) S. 224, 102nd Congress – The Senate did not consider H.R. 4765. Instead, Senator Johnston, the Chairman of the Energy Committee, and Senator Wallop, the Ranking Minority Member, introduced their own bill, S.224, in the 102nd Congress. This bill also promoted a referendum in the various status alternatives, with a Commonwealth definition that made explicit some of its characteristics and established its further enhancement as a policy of the United States:

> Sec 401.PRINCIPLES OF COMMONWEALTH
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> a. The Commonwealth of Puerto Rico is a unique juridical status, created as a compact between the People of Puerto Rico and the United States, under which Puerto Rico enjoys sovereignty, like a State to the extent provided by the Tenth Amendment to the United States' Constitution and in addition with autonomy consistent with its character, culture and location. The relationship is permanent unless revoked by mutual consent.
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> b. The policy of the United States shall be to enhance the Commonwealth relationship enjoyed by the Commonwealth of Puerto Rico and the United States to enable the people of Puerto Rico to accelerate their economic and social development, to attain maximum cultural autonomy, to seek fair treatment in Federal programs, and in matters of government to take into account local conditions in Puerto Rico.
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> c. The United States citizenship of persons born in Puerto Rico shall continue to be guaranteed and indefeasible to the same extent as that of citizens born in the several states.

S.224 was defeated in mark up by members of the Energy Committee because some had objections to the inclusion of statehood as an option in the self-executing bill.[12] None had objections to the enhanced Commonwealth definition.

The U.S. Supreme Court has pointed out that "modify[ing] the degree of autonomy enjoyed by a dependent sovereign that is not a State– is not an unusual legislative objective."[13] History shows that Congress has engaged in far more radical adjustments to the autonomy of non-States (e.g. the Philippines) than those required for the enhanced Commonwealth formulations discussed above.

By failing to present the option of Commonwealth with enhancement potential, supporters of Commonwealth status were denied the opportunity to vote for their choice of association. They were unable to reiterate their desire that Puerto Rico continue to pursue enhancements of the Commonwealth for the benefit of both Puerto Rico and the United States.

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[12] Senate Comm. On Energy and Natural Resources, 102d Cong, 1st Session, Business Meeting (February 20, 1991) and Business Meeting February 27, 1991.

[13] *U.S. v. Lara*, 541 U.S. 193, 203-04 (2004).

iii- The plebiscite wrongful and ill-intentionally applied the term Commonwealth to the Free Association option

In Spanish, Commonwealth is known as *Estado Libre Asociado*, which translates literally to "Free Associated State". The term "Commonwealth" was chosen over "Free Associated State" because of its familiarity among members of Congress in 1952.

In the November plebiscite, while pro-statehood legislators avoided using the term Commonwealth in reference to the Commonwealth option itself, they unabashedly used the term in the ballot to denominate the free association option, calling it "Estado Libre Asociado Soberano" or "Sovereign Free Associated State." There are marked differences between the concepts of free association and Commonwealth. The U.S. defined both in the 1980s when it offered them to its protectorates in the Pacific. The Mariana Islands chose to become a Commonwealth while the Republic of Palau, Micronesia and the Marshall Islands chose free association.

Free association, as applied in those three cases, is a form of independence. Those compacts of association are for a specific term subject to renewal and renegotiation. The residents of the associated country are not U.S. citizens. In contrast, residents in a Commonwealth are citizens by birth and the compacts do not have an expiration date subject to renegotiation. Their sovereignty is not that of an independent nation but similar to that of the States.

The ballot's definition for "Sovereign Free Associated State" was that of free association. It specifically describes the relationship between the U.S. and Puerto Rico as between sovereign nations and makes no mention of U.S. citizenship.

During legislation, the statehood party fended off criticism that they were deliberately trying to confuse voters claiming that "Sovereign Free Associated State" was taken from the PDPs 2008 platform. "Sovereign Free Associated State" in such platform did not refer to an independent Puerto Rico in association with the U.S., as would be the case under free association and as asserted in the ballot. The term "sovereign," as used in the platform, referred to the relationship resulting from specific consent by the people of Puerto Rico.

iv. The Popular Democratic Party voted in protest

The PDP charged the statehood party with deliberately stacking the deck against Commonwealth with the two question structure and seeking to exclude and divide Commonwealth supporters by manipulating the ballot's language.

In February 2012, the party's governing board passed a resolution recommending that voters disregard the reference to Commonwealth as the "present form of territorial status" and vote "yes" in the first question. Since Puerto Rico's Supreme Court recently stated that a blank ballot "expresses an inconformity with the presented proposals,"[14] the Party asked voters to leave the second question blank as a form of protest.

[14] *Suárez Cáceres v.Comisión Estatal de Elecciones,*176 D. P.R. 31 (2009)

Some party leaders, including a former governor, argued that leaving a ballot blank was susceptible to fraud and would allow statehood supporters to claim an artificial victory with an inflated percentage. They openly recommended voting for "Sovereign Free Associated State," although under the pledge that it would not be interpreted as a vote for free association.

The unusually high number of blank ballots and votes for free association demonstrate an inconformity with the ballot. In the previous plebiscite, only 0.1% cast blank ballots and 0.3% for free association. That is less than half of a percentage point combined. But in the November plebiscite, 26.5% cast blank ballots and 24.2% voted for free association. Combined, their numbers rose from 0.4% in the previous plebiscite to 50.7%. One could disingenuously interpret that as a massive shift in voter preference. But the most reasonable explanation is that those were the two options where Commonwealth supporters sought refuge.

II. We are optimistic about the Administration's Efforts

The Administration has recommended an appropriation of:

> $2,500,000 for objective, nonpartisan voter education about, and a plebiscite on, options that would resolve Puerto Rico's future political status, which shall be provided to the State Elections Commission of Puerto Rico.
>
> The appropriation includes several provisions:
>
> Provided, that funds provided for the plebiscite under the previous provision shall not be obligated until 45 days after the Attorney General notifies the Committees on Appropriations that he approves of an expenditure plan from the Commission for voter education and plebiscite administration, including approval of the plebiscite ballot;
>
> Provided further, that the notification shall include a finding that the voter education materials, plebiscite ballot, and related materials are not incompatible with the Constitution and laws and policies of the United States.

While under normal circumstances the Department of Justice's participation in this process is unnecessary –historically this type of referenda have been conducted locally– there are at least two justifications for the Department of Justice's involvement this time around. One is the mistrust caused by all matters surrounding the last plebiscite. Two, while the Department of Justice's involvement is not legally a commitment to the results, I understand the President would become morally obligated to support the result.

Some claim that the language in the budget proposal that says "not incompatible with the Constitution and laws and policies of the United States" is a reference to precluding the enhanced commonwealth concept. This is not the case. There is no blanket rejection there, but rather an assurance that the "enhanced commonwealth" proposal that ends up in the ballot is constitutionally viable.

That becomes clear when read in conjunction with Report by the President's Task Force on Puerto Rico's Status, published on March 2011.

On page 32, the report addresses some areas of enhancement that are not constitutionally problematic, and that Puerto Rico would need to negotiate with Congress:

> If they selected Commonwealth, would Congress enact legislation to define what, if any, possible changes could be made to the Commonwealth status? Advocates for increases in Puerto Rican autonomy within the Commonwealth framework have argued for congressional legislation that would establish a process by which Puerto Rico could obtain relief from specific Federal laws, or enhance authority for the government of Puerto Rico to join certain international organizations and to engage in international cultural and economic outreach efforts so long as such activities were authorized by the Federal Government as consistent with the foreign relations of the United States. When the people of Puerto Rico vote among the status options, they should not assume such modifications unless legislation specifically provides that such a modification would occur upon selection of that status.

Since the Administration has not expressed an objection to enhanced Commonwealth per se, only to some aspects of it, we welcome the opportunity of discussing the enhancement potential of the Commonwealth with the Department of Justice.

In sum, I am optimistic that the Administration and Congress will act in a fair and balanced manner. I hope that the proposal put forth by the President is an opportunity to hold a plebiscite that is transparent, democratic and respectful of all self-determination options, including the pursuit of a more perfect compact between the United States and the Commonwealth.