WRITTEN TESTIMONY AT UNITED STATES SENATE
BY HÉCTOR J. FERRER RIOS
PRESIDENT OF POPULAR DEMOCRATIC PARTY

May 19, 2010

Hon. Jeff Bingaman.
Chairman
Energy and Natural Resources Committee
Washington, D.C. 20530

Re: H.R. 2499

Dear Chairman Bingaman:

My name is Héctor Ferrer Ríos, President of the Popular Democratic Party and House Minority Leader. I come before the Committee to urge you to oppose H.R. 2499, recently approved by the House of Representatives. H.R. 2499 simply appears to call for a non-binding expression by the Puerto Rican people as to their political status preference. Beyond its seemingly innocuous facade, the bill was constructed as an unusual and unprecedented two round voting scheme to predetermine the outcome by producing an artificial statehood majority.

Fundamentally, plebiscites and referendums are democratic mechanisms for determining by direct vote a people's own destiny. These are methods with which to identify, and subsequently implement, the people's most favored avenues of politico-constitutional evolution --- as selected by those peoples themselves. And the common denominator of any such democratic exercise is fairness. The legislator's fair and equitable treatment of the options is paramount to assuring the legitimacy of any such self-determination process.

Nevertheless, the legislative intention of H.R. 2499 was to sub-categorize the options to be presented to the people, in order to configure the voting system in a way that would assure a particular outcome, a predetermined result by imposing its bias and annulling the legitimacy of the process.

That is what H.R. 2499 attempts. In it, the drafters arbitrarily separated what they regard a "territorial and impermanent" option from purportedly "non-territorial and permanent" ones. Following that rationale, the bill calls for an initial round limited to a yes or no vote on the "current political status", followed by a second round among all other options if the current political status fails to achieve 50% of the vote in the first round. Such action renders the process patently biased.

Historical background illustrates what is at play here. Back in 1993, after a landslide victory in the general elections, the pro-statehood governor quickly called for a plebiscite expecting his personal popularity to translate into a similar win for statehood. The governor allowed each of the parties to decide how their status option would appear defined on the ballot. To his surprise, Commonwealth won with 48.6% of the vote to statehood's 46.5% and independence's 4.4.%.

Pledging not to let that happen again, governor Rosselló called for a new plebiscite in 1998, but this time he drafted the Commonwealth's definition himself and in such unpalatable terms that the Commonwealth party could not endorse it. To his total dismay, the Commonwealth party asked its supporters to vote instead under a "none of the above" option sanctioned by local courts. Commonwealth

status d/b/a “none of the above” prevailed again with 50.3% of the vote against statehood’s 46.5%, independence’s 2.5%. A new option called Free Association got a meager 0.3%.

After the 1998 humiliation, the statehood party went back to the drawing board and came up with a scheme that now takes the form of H.R. 2499. The 1993 plebiscite taught them that statehood can never beat Commonwealth in a face to face contest and the 1998 plebiscite showed them that the Commonwealth supporters are not easily excluded from the process. And so the idea of a two round vote.

The pro-statehood Resident Commissioner from Puerto Rico reasonably thinks that splitting the vote should result in a huge win for statehood. That conclusion is supported by history. Take the 1993 plebiscite results mentioned above. Commonwealth was the people’s top choice. If that vote had been divided into two rounds, as H.R. 2499 proposes, Commonwealth’s otherwise 48.6% victory would have meant a rejection, and the people would have been forced to choose between what were, and probably still are, their second and third choices. Based on those 1993 numbers, it is reasonable to conclude that statehood, although not the people’s preferred choice, would achieve an overwhelming majority of the votes in the second round.

The statehood party has already made sure that the "none of the above” option can no longer foil a statehood majority as it did in 1998. “None of the above” was a judicially mandated option based on constitutional grounds regarding the individual’s right to vote. But the current pro-statehood governor had the opportunity to change the Puerto Rico Supreme Court’s ideological composition by filling three vacancies; and just a year ago, a 4-3 majority, without having a case or controversy on this issue before it, quickly reversed the earlier ruling requiring this option.

H.R. 2499 is now the final piece of the statehood party’s assault on Puerto Rico’s right to self-determination. It is crude, unabashed, undemocratic gimmickry.

The two round setup had its genesis in heavily flawed conclusions regarding the current Commonwealth status found in a Presidential Task Force Report.

Executive Order 13183 (dated December 23, 2000), as amended by Executive Order 13319 (dated December 3, 2003), created a President’s Task Force on Puerto Rico’s Status (the “Task Force”) to “report on its actions to the President as needed, but no less than once every 2 years, on progress made in the determination of Puerto Rico’s ultimate status.” Pursuant to such directive, the Task Force issued its initial report on December 22, 2005, and the first follow up addendum report on December 21, 2007 (hereinafter the “Task Force Reports”). A final report is due this coming December 2009.

Ever since the publication of the initial Task Force Report in December 2005, the Popular Democratic Party openly challenged the Task Force Reports’ main legal conclusions; namely, that despite the establishment of Commonwealth status in 1952, Puerto Rico remains to this day an unincorporated territory of the United States subject to Congress’s plenary powers under the Territory Clause of the U.S. Constitution and as such can be unilaterally ceded or conveyed to any other sovereign country and, moreover, that the U.S. citizenship of the people of Puerto Rico is likewise revocable by Congress. For the past three and a half years, the PDP has forcefully contended that the authors of the Task Force Reports blatantly failed to substantiate their obtuse legal conclusions and inexcusably overlooked the robust and consistent corpus of U.S. Supreme Court precedent to the contrary.

During the 2008 Presidential Campaign, President Obama explicitly rejected the legal conclusions contained in the Task Force Reports. In a letter addressed to then Governor Aníbal Acevedo Vilá (the “President’s Letter”) (dated February 12, 2008), President Obama challenged head-on the Task Force’s irrational proposition that Puerto Rico (along with the 4 million Puerto Ricans inhabiting the

island) can be ceded or transferred to a foreign country at Congress's whim.

> The American citizenship of Puerto Ricans is constitutionally guaranteed for as long as the people of Puerto Rico choose to retain it I reject the assertion in reports submitted by a Presidential Task Force on December 22, 2005 and December 21, 2007 that sovereignty over Puerto Rico could be unilaterally transferred by the United States to a foreign country.

The erroneous legal conclusions put forward by the Task Force, as referenced above, are derailing Puerto Rico's self-determination process into a profound, unnecessary and unfair state of confusion. Such conclusions have now been used to legitimize and recommend a highly irregular two-round self-determination process, whereby the current Commonwealth option (in light of its alleged territorial nature) is put on for ratification or rejection in the first round, and, assuming rejection, then statehood and independence face it off in a second and definitive last round. This is contrary to the norm in all two-round voting processes where electors vote all status options in the first round, and then vote again in a face-off between the two most voted formulas in the final round.

As the subsequent sections show, President Obama was right in rejecting the legal conclusions rendered by the Task Force Reports because they run afoul the most basic values of substantive justice and equality under the law; all of which have been at the heart of American constitutionalism since the early days of the Republic --- as were so eloquently echoed in the President's Letter.

A. Congress no longer holds plenary powers over Puerto Rico and consequently cannot unilaterally cede Puerto Rico.

The Task Force Reports embrace the untenable proposition that the Federal Government can unilaterally cede Puerto Rico, if it so wishes, to any other sovereign (*e.g.* Venezuela, Cuba or Iran) without the consent of the people of Puerto Rico as an exercise of its plenary powers over the island under the Territory Clause of the U.S. Constitution. Specifically, the authors of the Task Force Reports conclude that: "[t]he Federal Government may relinquish United States sovereignty by granting independence *or ceding the territory to another nation … "* Ignoring the canon of legal construction articulated through the years by the U.S. Supreme Court to the effect that Puerto Rico shed its status as an unincorporated territory with the attainment of Commonwealth status in 1952, the drafters of the Task Force Reports claim that such event did not change Puerto Rico's relationship with the United States. Such posturing, in turn, rests on the perverse notion that Congress intentionally deceived the people of Puerto Rico when it entered into the compact elevating Puerto Rico's status from an unincorporated territory to a Commonwealth, and instead retained plenary powers --- including the authority to unilaterally cede or even sell Puerto Rico to any foreign nation.

President Obama was right in rebuffing such untenable conclusion. Neither the 2005 Task Force nor its 2007 sequel identifies any legal authority substantiating a contention so incendiary that flies in the face of U.S. Supreme Court jurisprudence (blithely ignored by the drafters of the Task Force Reports) that has explicitly recognized that the creation of the Commonwealth of Puerto Rico was effected through a compact wherein Congress relinquished powers over Puerto Rico making it sovereign over matters not ruled by the U.S. Constitution.

Not surprisingly, the federal courts have forcefully rejected the argument that would render Public Law 600 an entirely illusory legislative gesture. The U.S. Court of Appeals for the First Circuit addressed the issue in one of its first judicial interventions shortly after the Commonwealth's creation. Rejecting the contention that Public Law 600 was merely another Organic Act, Chief Judge Magruder,

writing for the First Circuit, concluded that, "*We find no reason to impute to the Congress the perpetration of such a monumental hoax*."

If, as suggested in the Task Force Reports, the compact entered into pursuant to Public Law 600 did not transform Puerto Rico's political status, then the United States perpetrated a "monumental hoax" not only on the people of Puerto Rico, but also on the General Assembly of the United Nations. Specifically, in 1953 the United States advised the United Nations that it would no longer report on Puerto Rico as a "non self-governing territory" under Article 73(e) of the United Nations Charter."

In the Cessation Memorandum, the United States formally advised the United Nations that the incremental process of the "vesting of powers of government in the Puerto Rican people and their elected representatives" had "reached its culmination with the establishment of the Commonwealth of Puerto Rico and the promulgation of the Constitution of this Commonwealth on July 25, 1952." The Cessation Memorandum explicitly declares that, "[w]ith the establishment of the Commonwealth of Puerto Rico, the people of Puerto Rico have attained a full measure of self-government."

In describing the "principle features of the Constitution of the Commonwealth," the Cessation Memorandum noted that the new Constitution, "as it became effective with the approval of the Congress, provides that '[i]ts political power emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America."

Mason Sears, the United States Representative to the Committee on Information from Non-Self-Governing Territories, explained the legal significance under American law of the fact that Puerto Rico's Constitution resulted from a compact,

> A most interesting feature of the new constitution is that it was entered into in the nature of a compact between the American and Puerto Rican people. A compact, as you know, is far stronger than a treaty. A treaty usually can be denounced by either side, *whereas a compact cannot be denounced by either party unless it has the permission of the other*.

Moreover, Frances Bolton, U.S. Delegate to the United Nations' Fourth Committee, made it plain clear that while "the previous status of Puerto Rico was that of a territory subject to the absolute authority of the Congress of the United States in all governmental matters […] the present status of Puerto Rico is that of a people with a constitution of their own adoption, *stemming from their own authority, which only they can alter or amend* […]"

The United Nations accepted at face value the representations made by the United States. The General Assembly recognized, "the people of the Commonwealth of Puerto Rico, by expressing their will in a free and democratic way, have achieved a new constitutional status." Resolution 748, VIII (Nov. 3, 1953). On approving the Cessation Memorandum on Puerto Rico, the General Assembly further stated that,

> [I]n the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity.

The U.S. Supreme Court has confirmed that view. In *Calero Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), the Supreme Court *motu proprio* addressed the issue of whether Puerto Rico statutes were State statutes for purposes of the Three-Judge Court Act (28 U.S.C. §2281). The issue was

of great import, for the predominant reason behind the law was requiring that issues about the constitutionality of State statutes be resolved before a three judge district court panel in order to avoid unnecessary interference with the laws of a sovereign State of the Union. That "predominant reason" did not exist in respect of territories because they do not enjoy the attributes of sovereignty of States within the U.S. federal structure. For that reason, the Supreme Court had already ruled in *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949) that the legislative enactments of the Territory of Hawaii were not State statutes for purposes of Judicial Code §266 (predecessor to 28 U.S.C. §2281). Similarly, the First Circuit had arrived at the same conclusion with respect to Puerto Rico in *Benedicto v. West India & Panama Tel. Co.*, 256 F.417 (1st Cir. 1919).

Stainback and *Benedicto*, of course, were decided before Puerto Rico became a Commonwealth, so the issue had to be examined afresh and the opportunity finally arouse in *Calero Toledo*. As the *Calero Toledo* Court narrates, Puerto Rico's Commonwealth status was preceded by a series of Organic Acts,

> Following the Spanish-American War, Puerto Rico was ceded to this country in the Treaty of Paris, 30 Stat. 1754 (1898). A brief interlude of military control was followed by congressional enactment of a series of Organic Acts for the government of the island. Initially these enactments established a local governmental structure with high officials appointed by the President. These Acts also retained veto power in the President and Congress over local legislation.

The creation of the Commonwealth, as the Court suggests by voice of Justice Brennan, followed a materially different procedure,

> By 1950, however, 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)).

The *Calero Toledo* Court recognized that the Commonwealth's creation effected "significant changes in Puerto Rico's governmental structure." It then quoted at length, and with apparent approval, from Chief Judge Magruder's observations in *Mora v. Mejías*, 206 F.2d 377 (1st Cir. 1953) that "Puerto Rico has thus not become a State in the federal Union like the 48 States, but it 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."

Two years later, in *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976), the Supreme Court again examined the juridical nature of Puerto Rico's Commonwealth status and held that for purposes of Section 1983 jurisdiction the island enjoyed the same attributes of sovereignty as a State of the Union. The Court found 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 […]."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."

Six years later, in *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), the issue before the Supreme Court was whether a local political party could be granted statutorily the power to fill an interim vacancy in the Puerto Rican Legislature. Arguing for the PDP, former Justice Abe Fortas wrote,

> The Commonwealth of Puerto Rico, as this Court has stated, "occupies a relationship to the United States that has no parallel in our history". *Califano v. Torres* 435 U.S. at 3, 98 S.Ct. at 907, fn. 4. That it is an "autonomous political entity," "in the framework of the compact agreed upon with the United States" has been recognized by formal action and resolution of the United Nations on the basis of representations of the United States.

Fortas added,

> There can be no doubt that the Commonwealth of Puerto Rico has "freedom from control or interference by the Congress in respect of internal government and administration . . ." *Mora v. Mejias*, 115 F.Supp. 610 at 612 (D.P.R. 1953) (Three-Judge Court), quoted in *Calero-Toledo v. Pearson Yacht Leasing Co*., 416 U.S. at 674, 94 S.Ct. at 2087. The Compact between the United States and the people of Puerto Rico incorporated the repeal of most of the provisions of the Organic Act of 1917, including repeal of the Bill of Rights contained therein and the provisions for local government. The provisions of the Organic Act that were continued by the Compact were directed to the interrelationships of Puerto Rico and the United States: Affirmation that Puerto Ricans are citizens of the United States; that Puerto Rico is free of United States Internal Revenue laws; that trade between the two shall be free of export duties; and that the rights, privileges and immunities of citizens of the United States shall be respected in Puerto Rico.

The Court, agreeing with the PDP's position, accorded the same deference to the Puerto Rico Legislature that it accords the States, "Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'" Based on the principle that fundamental constitutional rights apply to the people of Puerto Rico, the Court concluded that "it is clear that the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States." In reaching this conclusion the Court cited approvingly the following excerpt from a decision authored by then Circuit Judge Stephen Breyer in *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F. 2d 36, 39-42 (1st Cir. 1981),

> [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.

Between *Flores de Otero* (1976) and *Rodriguez* (1982), the Supreme Court delivered a very short *per curiam* decision that has been misinterpreted by anti- Commonwealth sectors in Puerto Rico, by some federal courts and by the Task Force. In *Harris v. Rosario*, 446 U.S. 651 (1980), the Supreme Court held that Puerto Rico could receive less assistance than the States under the Aid to Families with Dependent Children Program. In a two paragraph decision, the Court found that Congress pursuant to the Territory Clause of the U.S. Constitution could treat Puerto Rico differently than the States so long as there is a rational basis for its actions.

The Task Force Report interprets *Harris* as holding "that Puerto Rico remains *fully* subject to

congressional authority under the Territory Clause." But that reading confuses what *Harris* is about and ignores that the U.S. Supreme Court has clearly recognized that Puerto Rico enjoys full sovereignty over its internal affairs. If the Supreme Court said in 1976 that "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" and then in 1982 that Puerto Rico is "sovereign over matters not ruled by the Constitution" it is then wrong to interpret *Harris* in 1980 saying that Puerto Rico remains fully subject to congressional authority under the Territory Clause. These two notions are antithetical. So either the Supreme Court was twice contradicting itself, or *Harris* is being misread. We strongly believe the latter is the case.

The Supreme Court did not contradict itself. *Harris* deals with a federal assistance program, a legislative area within Congress' exclusive purview. It does not deal with the internal affairs of the Commonwealth. In ruling that Congress could treat Puerto Rico differently than a State for purposes of federal fund allocations, the Supreme Court was not suggesting that Congress retained its plenary powers over Puerto Rico under the Territory Clause. But there is even more to *Harris*.

The Supreme Court does say in *Harris* that Congressional power over Puerto Rico arises from the Territory Clause. That is a reflection of the Constitution's vintage. Its textual configuration reflects the conditions of its time. While Congress enjoys plenary powers pursuant to the Territory Clause, the Supreme Court has long recognized that Congress can relinquish such authority. It may do so, for instance, by admitting a Territory as a State, in which case Congressional power over the former Territory is transformed from plenary to limited under U.S. Constitution Article 1. While Puerto Rico did not become a State on July 25, 1952, Congress did relinquish (as the Supreme Court has consistently found) the same powers over Puerto Rico that it relinquishes when admitting a Territory as a State of the Union. In the case of the Commonwealth of Puerto Rico, while the remaining Congressional powers are exercised pursuant to the Territory Clause, for lack of a more specific source of constitutional authority, those powers are no longer plenary.

The courts and the U.S. Justice Department before 1990 have long recognized that the territorial power, like other federal powers, demands flexibility on the part of Congress and hesitation on the part of those who like the authors of the Task Force Reports would confine the exercise of those powers to rigid or arbitrary categories. In 1963 the U.S. Justice Department saw this very clearly, and quoted a memorandum written by future Justice Felix Frankfurter in 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.

Eight years later, the Office of Legal Counsel, under then-Assistant Attorney General William H. Rehnquist, expounded on Frankfurter's functionality argument:

> [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.
>
> That is precisely what *Flores de Otero* holds with respect to Puerto Rico.

A thorough reading of *Harris*, moreover, reveals that Congress' relinquishment of powers over Puerto Rico went beyond matters of internal governance. Even with regards to the allocation of federal funds, the Supreme Court makes clear in *Harris* that Congress cannot exercise unrestricted powers over Puerto Rico. It can only treat Puerto Rico differently to the extent there is a rational basis for doing so. If Congress had plenary powers over Puerto Rico, it would not need to have a rational basis to discriminate.

The Task Force Reports' erroneous reading of *Harris* constitutes their most fatal flaw. It leads their authors to make the colossal mistake of asserting that, "[a]s long as Puerto Rico remains a territory of the United States, Congress may not impair the constitutional authority of later Congresses to alter the political powers of the government of Puerto Rico by entering into a covenant or compact with Puerto Rico or its residents." In the same way that a future Congress cannot de-admit Alaska, Hawaii or Texas, or revoke the independent status of the Philippines, it cannot reclaim powers relinquished to the people of Puerto Rico.

The federal circuit courts of appeals have also recognized that Puerto Rico is no longer merely an unincorporated territory. *See e.g. United States of America v. Marco Laboy-Torres*, 553 F. 3d 715, 721 (3rd Cir. 2009) ("Puerto Rico possesses 'a measure of autonomy comparable to that possessed by the States.'"); *Emma Rodriguez v. Puerto Rico Federal Affairs Administration* 435 F. 3d 378, 379-80 (DC Cir. 2006) ("Through popular referendum, the people of Puerto Rico approved Public Law 600's proposed allocation of power – supreme national power to the U.S. Congress and full local control to the Puerto Rican government … and then adopted a … constitution."); *Romero v. United States*, 38 F. 3d 1204 (Fed. Cir. 1994) ("Congress approved the proposed Constitution of the Commonwealth of Puerto Rico, which thenceforth changed Puerto Rico's status from that of an unincorporated territory to the unique one of Commonwealth."); *United States v. Quinones*, 758 F.2d 40 (1st Cir. 1985) ("The authority of the federal government emanated thereafter from the compact itself. Under the compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally, and the government of Puerto Rico is no longer a federal government agency exercising delegated power.").

There is scattered case law asserting that Puerto Rico still is subject to the plenary powers of Congress under the Territory Clause. In *U.S. v. Sánchez*, 992 F.2d 1143, 1151-53 (11th Cir. 1993) the Eleventh Circuit disagreed with consistent First Circuit case law and held that Puerto Rico is not a separate sovereign for purposes of the dual sovereignty exception to the Double Jeopardy Clause. That patently wrong view is supported by Judge Torruella out of the First Circuit, who espoused it in his dissident opinion in *United States v. Lopez Andino*, 831 F.2d 1164 (1st Cir.1987) and then slipped a line to that effect writing for the majority in *Dávila-Pérez v. Lockheed Martin Corp*., 202 F.2d 464, 468 (1st Cir. 2000) (holding that Puerto Rico is a territory under the Defense Base Act). All of these cases rely on the same erroneous interpretation of *Harris v. Rosario.* These cases have been wrongly decided and must be discarded.

Both the constitutional history of the relationship between the United States and Puerto Rico and the relevant Supreme Court cases confirm that Puerto Rico's Commonwealth status is predicated upon a binding compact, created through the mutual consent of the sovereign parties and revocable, likewise, only by the mutual consent of such parties.

The Task Force Reports' blatantly outrageous conclusion that the United States can unilaterally cede the Commonwealth of Puerto Rico, without the consent of its people, to any foreign country of its choosing is not only superficial and highly un-American but also without any legal merit.

B. The U.S. Citizenship of the People of Puerto Rico.

The drafters of the Task Force Reports also adhere to the unfounded notion that Congress can rescind the U.S. citizenship of the 4 million Puerto Ricans born in the island. The Task Force Reports adamantly suggest that "[i]ndividuals born in Puerto Rico are citizens of the United States by statute (rather than by being born or naturalized in the United States)," and that as such "if Puerto Rico were to become an independent sovereign nation, those who chose to become citizens of it or had U.S. citizenship only by statute *would cease to be citizens of the United States*, unless a different rule were prescribed by legislation or treaty […]."

It is a well-settled principle of federal law that the citizenship rights of people born in Puerto Rico are protected by the constitutional guarantees of due process and equal protection of the laws emanating from the U.S. Constitution.

The history of the U.S. citizenship of the Puerto Rican people begins with the 1899 Treaty of Paris, which provided that, "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress." The Foraker Act, enacted on April 12, 1900, put an end to military rule and established a civil government in the island. But it was not until the enactment of the 1917 Jones Act that Puerto Ricans were granted U.S. citizenship. The 1940 Nationality Act, moreover, defined "United States" as "the continental United States, Alaska, Hawaii, Puerto Rico and the Virgin Islands of the United States," and determined that the people who were born "in the United States" were citizens at birth. The 1952 Immigration and Nationality Act, from which most Puerto Ricans today trace their U.S. citizenship, tracked the language of the 1940 statute.

The Citizenship Clause of the Fourteenth Amendment states, "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 wherein they reside." By its terms, the text of the Fourteenth Amendment extends American citizenship to persons born or naturalized "in the United States." The Commonwealth of Puerto Rico is certainly "in the United States," as specifically acknowledged in the Immigration and Nationality Act and elsewhere. Thus, the people of Puerto Rico clearly qualify as "constitutional" or "Fourteenth Amendment" citizens.

The Supreme Court has interpreted the Fourteenth Amendment as granting irrevocable constitutional citizenship to those persons born within a jurisdiction such as Puerto Rico. In the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), the Supreme Court directly rejected the claim that only citizens of a State are United States citizens under the Fourteenth Amendment. The Court found *inter alia* that "[…] persons may be citizens of the United States without regard to their citizenship of a particular State, and … by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States."

In light of the *Slaughter-House Cases* and the Supreme Court's common-law interpretation of the Citizenship Clause, it is clear that persons born "within the United States" --- such as the people of Puerto Rico --- are constitutional U.S. citizens. In *Afroyim v. Rusk*, 387 U.S. 253, 262 (1967), the Supreme Court explained that Congress cannot revoke Fourteenth Amendment citizenship,

> [The Fourteenth Amendment] provides its own constitutional rule in language calculated completely to control the status of citizenship: 'All persons born or naturalized in the

> United States … are citizens of the United States …' There is no indication in these words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time. Rather the Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntary relinquishes it.

Thus, *Afroyim* makes clear that Congress may not rescind or revoke the U.S. citizenship of people born in Puerto Rico. The Task Force Reports' contrary conclusion is patently incorrect. The Supreme Court has only recognized one revocable variant of U.S. Citizenship. Both the 1940 Nationality Act and 1952 Immigration and Nationality Act, as well as subsequent federal statutes, contain provisions regarding persons born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States. They are regarded as U.S. Citizens, but if they fail to reside in the United States or its outlying possessions for a prescribed period or periods of time between given ages, they automatically, by statute, lose that citizenship.

Quite clearly, the people of Puerto Rico do not fall under this latter category. Puerto Ricans are born in the United States for purposes of the Fourteenth Amendment. Their citizenship, thus, is irrevocable.

Rather than designing a process whereby all three options --- namely commonwealth, statehood and independence --- are voted on side-by-side, H.R. 2499, in accordance with the Task Force Report, adopted a rigged two-step process designed to kill the commonwealth option in the first round of voting. However, H.R. 2499 was amended before its consideration by the House of Representatives in the second round and the commonwealth option was included. Hence, the initial round is superfluous, unnecessary and wasteful. This committee must recommend its elimination. But the second round, as an only round, would still have problems. In a study conducted in 1985 at the request of the late Senator Kennedy, the Library of Congress examined the statehood processes of all the territories and identified as one of the traditional requirements for statehood that a majority of the electorate wish it. The four option plebiscite in H.R. 2499 is likely to produce only a plurality for the prevailing option. If the statehood option were to obtain that plurality in a "federally sanctioned process", you will have to deal with the unprecedented situation of admitting a new state against the will of the majority of its population.

An obvious solution is to require a majority vote for any change of status. Since one generation of voters would be deciding on behalf of all subsequent generations and simple majorities may result from purely temporary sentiments, you should consider whether requiring a supermajority of votes is more prudent. The way to obtain a majority vote in this situation is to hold a runoff election between the two most voted options.

Another defect of this bill is that it presents statehood as an option without having conducted a feasibility study. The Library of Congress' 1985 analysis reveals that one of the traditional requirements for statehood is "that the proposed new State has sufficient population and resources to support State government and at the same time carry out its share of the cost of the Federal Government." The Congressional Budget Office must conduct such an analysis before the people vote. It is unfair to all parties to do it after the votes are cast.

The other major defect of this bill is that it contains nothing in terms of implementation of the results. As indicated earlier, if the Senate sanctions this process it will become morally bound to respect its results. Failing to provide for an implementation process will only lead to chaos. We already know how the statehood party intends to force statehood down the Senate's throat. But what if Commonwealth prevails and we wish to propose some enhancements to its current structure?

The bill should address this issue. It should provide for the people of Puerto Rico to convene in a

constitutional convention.

As contended above, the second ballot prescribed by H.R.2499 should allow the voters the option of continuing and enhancing Puerto Rico's Commonwealth status. Thus, H.R. 2499's voting process has to recognize the voting rights of Puerto Rico's voters to choose within that second vote the enhancing of the Commonwealth.

During his campaign, President Obama made a commitment that his Administration would openly engage the people of Puerto Rico in engineering a "genuine and transparent process of self-determination that will be true to the best traditions of democracy." He said:

> As President, I will actively engage Congress and the Puerto Rican people in promoting this deliberative, open and unbiased process, that may include a constitutional convention or a plebiscite, and my Administration will adhere to a policy of strict neutrality on Puerto Rico status matters. My Administration will recognize all valid options to resolve the question of Puerto Rico's status, including commonwealth, statehood, and independence.

As President of the Popular Democratic Party, I encourage Congress to insist upon a real self-determination mechanism that will not force statehood upon the people of Puerto Rico, and instead to support a process that will provide productive and democratic options. H.R. 2499 still does not do that.

Moreover, the results of the proposed plebiscite in this bill will make sense only if Congress legitimizes it, by amending the bill and clearly ratifying the results as "federally sanctioned". If not, the process will be a beauty contest.

My party and I believe that the true way of dealing with the status issue of Puerto Rico is, as stated before, providing for the people of Puerto Rico to convene in a Constitutional Convention. It will allow a true democratic and self determination process with the participation and representation of all the political sectors. HR 2499 is not a true democratic and self determination process.

Thank you.