

White House Interagency Task Force on Puerto Rico
Discussion on Status – May 25, 2010
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Testimony

Good afternoon. My name is Christina Duffy Burnett and I am an Associate Professor of Law at Columbia University. I teach American legal history, constitutional law, and immigration law, and I have published and spoken extensively on the constitutional issues raised by the U.S. territories in general and Puerto Rico in particular. This issue is not only of intellectual interest to me, it's close to my heart: I'm Puerto Rican, raised the island, where my parents still live. Spanish is my first language. For four generations members of my family have tried to do their part to resolve Puerto Rico's status problem. (I take some pride in the fact that we've represented essentially every point of view on this vexed matter—and we've managed to get along!). I very much appreciate the invitation to participate in this discussion and I look forward to our conversation.

Let me start by recalling President Obama's own words on this topic. Soon after his election, the President wrote a letter to Governor-elect Luis Fortuño of Puerto Rico, in which he made a promise: to work to ensure that Puerto Rico's status problem would be *resolved* by 2012. "This time," he wrote, "must be different." No previous President had ever made such a clear commitment to Puerto Ricans with respect to the status problem—a problem that has remained unresolved for more than a century. It was a courageous thing to say. And it was the right thing to say.

This Task Force plays a critical role in advising the President on how to fulfill this pledge. My aim today is to do what I can—in a limited amount of time—to assist you in your important work.

To this end, then, I'm going to use my time to raise and examine what I take to be *the* critical constitutional question at stake in these matters—a question that has been, for many decades, a major stumbling block on the path to resolving the status issue. Without a clear answer to the question I have in mind, the self-determination process simply cannot move forward.

Now you all have been studying the status problem for some time, so I suspect you're going to recognize this question:

Can Puerto Rico and the United States form a permanent union—a union that will guarantee U.S. citizenship to the people of Puerto Rico—without the admission of Puerto Rico into the Union as a state?

Over the next ten minutes, I'm going to do three things: I'm going to talk about why this question so important, what the answer is, and what the President can do about it.

I.

So, first: Why is the answer to this question so important?

Anyone who knows anything about Puerto Rico's status debate knows that Puerto Ricans disagree on the best way forward. Statehood. Independence. Free association. Commonwealth. New commonwealth. Enhanced commonwealth. There's a lot on the table.

But what is essential to recognize is that there is important common ground on the island. This is easy to overlook in the thick of heated debates. But that common ground is there, and it goes directly to the heart of the question before us.

Puerto Ricans overwhelmingly agree on this: we want permanent union with the United States. And we want guaranteed U.S. citizenship.

Recent plebiscites may have been confusing, but they do establish what I have just said. Overwhelmingly, Puerto Ricans want permanent union and guaranteed U.S. citizenship (by which I mean, Puerto Ricans want a guarantee that Congress will not take away the U.S. citizenship of persons who already have it by virtue of birth in Puerto Rico, *and* that Congress will continue granting U.S. citizenship to persons born in Puerto Rico in the future).

Supporters of statehood want this, and supporters of commonwealth want this. As you know, these two groups comprise the vast majority of the electorate. And I don't mean 57 and a half percent. I mean close to 90. I mean virtually everybody.

What we're divided on, then, isn't what we want; it's *how to get there*. How to secure permanent union with the United States, and cement the guarantee of U.S. citizenship.

About half of us think statehood is the answer. About half of us think some version of commonwealth can get us there.

And here's where the Constitution comes in.

That statehood would make Puerto Rico a permanent part of the United States is straight-forward, constitutionally-speaking. And under the Fourteenth Amendment, persons born in the United States have birthright U.S. citizenship. Done.

But what about commonwealth?

Supporters of what has come to be known as “new” or “enhanced” commonwealth will tell you that *yes*, commonwealth status can also mean permanent union with the United States and guaranteed U.S. citizenship. They will tell you that Puerto Rico can have a binding bilateral compact with the United States, unalterable except by mutual consent, and that as part of the compact, persons born in Puerto Rico can enjoy a guarantee of U.S. citizenship now and into the future. At the same time, they say that such a compact would affirm Puerto Rico's nationality, and that Puerto Rico would retain sovereignty.

(They will also tell you, by the way, that Puerto Rico can have a host of additional powers under such an arrangement—we can come back to this in Q&A, if you like. For now, let's focus on our central question)

I hope you can see clearly why that question is so important.

If Puerto Rico *can* have permanent union and guaranteed U.S. citizenship without becoming a state, then Puerto Ricans have two options for getting what they have repeatedly said they want: statehood or some version of commonwealth. But if this *can't* be done, then Puerto Ricans really only have one option: statehood.

And what that means is that it is impossible for Puerto Ricans even to *know what their options are*, much less to choose one of them, without an answer to this constitutional question: Can Puerto Rico and the United States enter into a permanent union with guaranteed U.S. citizenship without statehood?

II.

So. What *is* the answer?

Proponents of new or enhanced commonwealth will tell you that nothing in the Constitution prevents Congress from entering into the proposed compact: therefore, Congress can do it. QED. All it takes, they argue, is creative statesmanship.

(In fact, some of them will even tell you that Puerto Rico and the United States already have a compact, and that all we need now is to get Congress to admit as much, and to fix some nagging problems with it.)

The problem with all of this – with what is known as the “compact theory” in its various forms – is that it reflects a fundamentally misguided understanding of the Constitution and of Congress’s powers under it. Let me address its two central components in turn: permanent union and guaranteed citizenship.

As to permanent union: No one denies that Congress has the power to be creative in Puerto Rico. Congress has *already* been plenty creative in Puerto Rico. This is beside the point. The point is that, whatever experiments Congress can undertake with respect to its largest territory, what Congress *cannot* do is bind the United States to a bilateral compact with a non-state entity – a compact that affirms each side’s nationality, but from which neither party can withdraw without the other’s permission. To suggest otherwise is to ignore the entire legal framework that governs national sovereignty, territorial boundaries, and, yes, self-determination itself. If conditions were someday to persuade a subsequent Congress (or the Executive, for that matter) that U.S. national interests required an end to said “compact” with Puerto Rico, the United States would be well within its rights, as a sovereign nation, to withdraw from the arrangement. Such determinations belong entirely to the political branches. No court would touch the decision, much less overturn it.

(This reasoning, by the way, cuts both ways. If Puerto Rico were to decide that it had come to be in its own interests to withdraw from a “compact” of the sort proposed, it is my view that the United States would have an obligation, under the law of self-determination, to agree to the withdrawal.)

The people of Puerto Rico deserve to understand all of this before mortgaging their future to promises Congress cannot make.

As to citizenship: Puerto Ricans are citizens by statute, under §§301(a) and 302 of the Immigration and Nationality Act. And, rumors to the contrary notwithstanding, statutory citizenship *is* constitutionally protected: not by the Fourteenth Amendment, but by the Due Process Clause. Congress cannot just waltz in and declare everyone in Puerto Rico an alien. As the relevant case law makes clear, one cannot be stripped of U.S. citizenship one *already has* unless there is clear evidence of intent to relinquish it.

But this is *different* – and here’s the crucial point – from an assurance that Congress will continue granting U.S. citizenship to persons born in Puerto Rico in the future, as the proposed “compact” would hope to guarantee. No Congress

can make this promise, because subsequent Congresses will always have the power to amend the statutes that govern citizenship. No one should be told otherwise.

At this point, proponents of the compact will often point out that enhanced commonwealth is the option that a majority of the people of Puerto Rico themselves have chosen. To reject it, they say, is to reject self-determination itself.

A version of this option did indeed win a plebiscite in 1967; more recently, it has lost its majority, but, together, the various versions of commonwealth have managed a slim plurality. And here's the thing: I believe in self-determination as much as anyone. But the brutal truth is that just because the people vote for something doesn't mean it's constitutional.

It is deeply unfair to the voters to offer them an option that is not constitutionally viable—*precisely* because they might vote for it. Allowing people to vote based on promises Congress can't keep doesn't vindicate the values of self-determination; it makes a mockery of them.

III.

What can the President do about all this?

First, he needs to have the courage to say, clearly, that Puerto Ricans should be offered constitutionally viable options—not pie-in-the-sky wish-list options, but options that can actually be implemented.

Second, he needs to state, clearly, what those options are. Congress can admit Puerto Rico into statehood. Congress can accede to Puerto Rico's independence. Congress can enter into a treaty of free association with an independent Puerto Rico—and under this arrangement, by the way, Puerto Rico could have a lot of what the "compact" promises. Congress can also allow Puerto Ricans to remain in the current holding pattern—that is, to remain a territory (and yes, I do mean "territory"—I'd be happy to elaborate on this). But for as long as this condition persists, regular plebiscites are imperative—it's the only way to ensure a real resolution of an unacceptable arrangement. What Congress *cannot* do is bind the United States to Puerto Rico, as the states are bound to each other, without making it a state.

Third, and finally, the President needs to put the full weight of his influence behind the proposition that the time to choose among these options is *right now*. That is the only way to *resolve* this issue. Anything less than a *real resolution* is simply not enough.

Let me close on a still stronger note: you, the members of this Task Force, have been given an exceedingly important charge. I suspect that, for some of you at least, all this probably seems like a thankless business, being dragged into a difficult, demanding debate among people who apparently have disagreed about these issues since the nineteenth century. But I urge you to remember what's at stake: we're talking about four million citizens of the United States who have absolutely no voice—*no voting representation whatsoever*—in the federal government, and who have been in this position—and struggling mightily to get out of it—for a very long time. It is an untenable situation. It cries out for a solution. And you're in a position to do something about it. Please do.

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*Note: I altered the text above somewhat during the actual presentation, both for purposes of time and in order to respond to several points made by Professor Rick Pildes. Professor Pildes cited what he described as several precedents in U.S. history for a mutually binding bilateral compact, including the Northwest Ordinance, the Supreme Court case of *Rasmussen v. Alaska* (1905), and the example of interstate compacts, which bind states. Below I summarize our exchange on these points at the Task Force discussion. I would be happy to elaborate on any of the points below or above, providing citations, if it would help the Task Force.*

With respect to the Northwest Ordinance, Professor Pildes stated that it contained articles of compact, thus demonstrating that Congress has the power to bind itself in the manner now proposed for Puerto Rico. In response, I pointed out that Congress actually altered said articles of compact immediately, without asking for (or getting) anyone's permission. The Northwest Ordinance therefore stands for the opposite of what Professor Pildes argues: that is, it is a perfect example of how Congress can indeed present itself as having entered into a "mutually binding bilateral compact," and then subsequently disregard that commitment with impunity.

With respect to *Rasmussen*, Professor Pildes stated that the case upheld Congress's incorporation of Alaska territory by statute and made clear that such incorporation is irreversible. In response, I noted that this is not an accurate description of *Rasmussen*, insofar as Congress has never incorporated a territory by statute. Incorporation does exist, of course, and it is binding, but it is so precisely because it cannot be understood separately from statehood: specifically, as the case law makes clear, incorporation is a first step in a process culminating in statehood.

With respect to interstate compacts, Professor Pildes argued that if states can bind themselves to such compacts, it is inconceivable that the federal government does not have the same power. In response, I pointed out that this gets it exactly backwards: the federal government may participate in interstate compacts but cannot be bound to them. Contrary to Professor Pildes' characterization, this is not an instance of the federal government having "less" power than the states but actually of it having "more" power, insofar as it retains the power to withdraw from such commitments.