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**Congressman Luis G. Fortuño**

**Remarks Delivered for the Puerto Rico Chapter of the Federal Bar Association**

*August 4, 2008*

Thank you. I am pleased to be here in such esteemed company.

As you know, I was a lawyer before I entered elective politics. And I anticipate that I will be a lawyer long after my political life draws to a close.

While the world of politics has its unique pleasures and challenges, I confess that I often miss the practice of law. But the two fields are similar in an important respect. Both the practice of law and the practice of politics are about serving others while still exercising one's independent judgment and remaining true to one's values. But faithfully representing one's clients or political constituents does not mean merely bending to their will. Anthony Kronman, the former dean of Yale Law School, has described how the late trial attorney Arthur Liman was able to strike the proper balance in his advocacy. Kronman writes: "No lawyer has ever been a more steadfast supporter of his clients than Arthur Liman was. But no lawyer has spoken more bluntly or with greater moral candor to his clients than Arthur did."

Just as a lawyer must balance loyalty and independence in her relationship with a client, a public servant inevitably will stake out positions with which some of his constituents do not agree. If I have learned one thing, however, it is that constituents appreciate frankness and independent judgment in their public servants, just as most clients value these qualities in their attorneys.

It is in this spirit of informed candor that I turn to the subject of my remarks this afternoon, the recent Supreme Court ruling in Boumediene v. Bush. My initial commentary on this case was published in the July 7th *San Juan Star*. I wanted to use this forum to develop that analysis and, in so doing, to respond at least in part to those who have articulated a different view of the ruling, including former governor Rafael Hernández Colón. Despite our difference of opinion on this matter, I respect Governor Hernandez Colón and admire his dedication to our political status problem.

In Boumediene, the Court held that aliens designated as enemy combatants by the U.S. government and detained in Guantanamo have the constitutional right to challenge their detention in federal court. This ruling implicates Puerto Rico only because the Court's majority bolstered its opinion with an arguably ill-conceived discussion of federal territorial case law: namely, the Insular Cases from the early 1900s and the 1922 case of Balzac v. Porto Rico—both of which narrowly defined the rights of the Island's residents.

The most accurate way to state the Court's holding in the Insular Cases is that Puerto Rico was an annexed but unincorporated U.S. territory, and that the U.S. Constitution did not apply by its own force to U.S. "nationals" on the Island. However, the Court's logic clearly indicated that "unincorporated" status would continue only until Congress either (1) granted U.S. citizenship, leading to incorporation and ultimately statehood, *or* (2) denied citizenship and put Puerto Rico on the path to independence.

In 1917 Congress conferred statutory citizenship on all persons born in Puerto Rico. But, in Balzac, decided five years later, the Court deviated from the Insular Cases doctrine, holding that the conferral of citizenship did not end "unincorporated" status. This meant that Congress could govern the U.S. citizens of Puerto Rico in the same manner as it had governed its non-citizen nationals before citizenship was granted. Echoing language in the Insular Cases, Balzac limited

the territorial power of Congress with only the vague injunction that federal law must respect “certain fundamental rights declared in the Constitution.”

The Boumediene majority, seeking to reason by analogy, cited the “fundamental rights” language in the Insular Cases and Balzac as justification for extending the fundamental right of habeas corpus to the detainees. My view is that reliance on these cases, particularly Balzac, did not enhance the Court’s analysis. At issue in Boumediene were the rights owed to foreign nationals detained in a location outside this nation’s borders but within the federal government’s control. By contrast, the Insular Cases dealt with U.S. nationals living on U.S. soil under U.S. sovereignty. And Balzac involved U.S. citizens living in a U.S. territory under U.S. sovereignty. Consequently, the connection between these territorial precedents and Boumediene falls somewhere in the range between tenuous and non-existent.

Moreover, respected voices in American law, including former U.S. Attorney General Dick Thornburgh and Judge Torruella on the First Circuit, have questioned Balzac’s legal soundness—which ought to raise further doubts about whether it was an appropriate case for the Boumediene majority to invoke. These critics note that Balzac cannot be squared with a 1905 Supreme Court decision, Rasmussen v. United States, where the Court interpreted the grant of citizenship as the critical proof that Congress intended to incorporate Alaska. By contrast, Balzac held that the conferral of citizenship was insufficient evidence that Congress intended to incorporate Puerto Rico into the Union. No case since Balzac has reconciled the contradictions between these two holdings.

It is Balzac that has made possible the present state of affairs—one in which, more than 90 years after the grant of citizenship, Puerto Rico remains an unincorporated territory whose residents lack equal civil and political rights at the national level. Most fundamentally, the U.S. citizens of Puerto Rico have no representation in the federal government that enacts and enforces their national laws. Just as fundamentally, Congress has never authorized a process of self-determination on the Island so residents can either give their consent to the existing arrangement or choose to pursue a permanent and fully democratic non-territorial status recognized under U.S. and international law—namely, independence, free association or statehood.

Although it was almost certainly not the Boumediene Court's intention, by invoking this federal territorial case law, the majority creates the appearance that it still looks favorably upon the undemocratic doctrine of the Insular Cases as applied by Balzac to the U.S. citizens of Puerto Rico. That is particularly dismaying when one considers that Balzac could have been decided in a way that both modified the Insular Cases doctrine so as to recognize that citizenship ushers in a higher degree of constitutional protection *and* left the issue of Puerto Rico's future political status to be resolved at a later date.

In other words, if the Balzac Court did not want to declare Puerto Rico an incorporated territory based on the grant of citizenship, as it had done in Rasmussen, but also did not want to deny constitutional rights to U.S. citizens under the Insular Cases doctrine originally applicable only to non-citizens, the Court could have found a way to strike a balance that would have enabled it satisfy both criteria. As part of that balancing act, the Court could have required Congress, as a matter of due process and equal protection of law, to act in a timely fashion to resolve the political status of the territory.

The lack of vigilance by the Balzac Court regarding the meaning of U.S. citizenship rights outside the States has enabled Congress for the last nine decades to essentially abdicate its responsibility to address the issue of Puerto Rico's political status. Inaction by Congress, in turn, has created a political vacuum in which arguably well-intentioned but legally impossible and politically unrealistic status proposals have too often flourished. The resulting confusion on the Island—which Congress calls a “lack of consensus” and cites as justification for further inaction on its part—is among the more unfortunate aspects of Balzac's legacy.

For example, in the empty space that Balzac created, the local commonwealth party has embraced a hybrid proposal whereby Puerto Rico would seek to become a sovereign nation with its own foreign relations powers; residents would retain their U.S. citizenship; and Puerto Rico would enter into a sovereign-to-sovereign pact of free association with the United States that would be alterable only with the *mutual consent* of both parties. This proposal or something similar has been given many names over the years—“enhanced commonwealth,” “free

association with U.S. citizenship,” “sovereign nationhood with permanent union,” and, in its most recent incarnation, “sovereign autonomy in association with the United States.” Whatever the superficial label, however, each proposal features the same core elements.

Now, I can see why some may find the idea of such a relationship appealing—even though I view statehood as the “right and logical destination for Puerto Rico,” as the first President Bush so simply put it. Nevertheless, I think it is incumbent upon all political and intellectual leaders on the Island, particularly those trained in law, to acknowledge that there exist well-established standards for defining which status options qualify as fully democratic and non-territorial and for defining the meaning of equal rights. These standards cannot be ignored or wished away because they pose an inconvenience or serve as an obstacle to one’s preferred status arrangement. Under U.S. law, defining free association and relevant U.N. resolutions, each sovereign party to a free association status agreement must be able to terminate the association unilaterally in favor of full independence. This is because a requirement of mutual consent to alter or end the association would give each sovereign party the power to deny the other’s right to full independence.

Currently, three lightly-populated islands in the Pacific—Micronesia, the Marshall Islands and Palau—have free association agreements with the United States. Each agreement is terminable at will by either party and none extends citizenship to the residents of the associated republic. Those who understand how free association has operated in these instances recognize that it is a transitional status for under-developed mini-states on the road to full integration or independence. In stark contrast, the commonwealth party platform envisions sovereign free association with international status and rights, but also the retention of U.S. citizenship, a common market and a permanent union unalterable without mutual consent. Whatever the other merits of such a platform, it is not one grounded in legal or political reality.

Moreover, even if a realistic free association proposal were put forward, it is fair to question why either the U.S. or a highly developed society like Puerto Rico would regard it as an attractive option. One can only imagine the number and variety of complex issues that the parties would have to resolve in order to make the compact work—issues related to fiscal policy; trade policy;

immigration and nationality; diplomacy; law enforcement; national security; and so many others. It must always be kept in mind that any free association agreement will have to be acceptable to the federal government and compatible with the Constitution, laws, and policies of the United States. The Island's leaders, in championing status proposals, have an overriding obligation to be realistic and to avoid creating false hope. I think this is a responsibility that too often goes unfulfilled. In any event, I look forward to continuing this debate about free association.

I would like to close with this overarching point. Notwithstanding the invocation of the territorial law cases in Boumediene, there is reason to hope that the Court—if squarely presented with a case about the status and rights of U.S. citizens in Puerto Rico—would reconsider its precedent and require Congress to authorize a process of self-determination. But Boumediene does reflect the reality that, at this juncture, a political solution by the president and Congress to the question of Puerto Rico's status is both more likely and more appropriate than a solution prescribed by the federal judiciary. The Report by the President's Task Force on Puerto Rico is a powerful and historic document, one in which the federal government comes to terms with its flawed policies towards Puerto Rico and provides a road-map for resolving the status issue. Drawing on that Report, I co-sponsored legislation in Congress that would authorize a plebiscite on the Island to choose between continuing the current status and pursuing a fully democratic and permanent non-territorial status. We made unprecedented progress this session and I am optimistic that, in the coming year, we will be able to enact a simple and effective status bill. This must be the highest priority because, as the people of Puerto Rico clearly understand, ending the uncertainty of the present status is necessary before the Island we love can finally realize its full political, economic and social potential.

Thank you very much.