THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES
SUBCOMITTEE ON INSULAR AFFAIRS
HEARING ON H.R. 1230 AND H.R. 900
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WRITTEN TESTIMONY OF
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GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO

Good afternoon, Madam Chairwoman and members of the Committee. Once again, I come before you to talk about the political and constitutional relationship between Puerto Rico and the United States. Very briefly, I want to put into perspective the concrete proposals and recommendations I will make today regarding the two bills pending before this Congress: H.R. 900 and H.R. 1230. As Governor of Puerto Rico, it is my obligation to place the current debate in the right context, to help the Committee overcome the temptation of rushing to conclusions that may bring bigger problems to Puerto Rico and the United States in the long run.

For more than a century, Puerto Ricans have lived through a challenging and emotional debate about our political relationship with the United States. However, outside of the 1950-52 process which led to the adoption of Commonwealth status, the relationship between Puerto Rico and the United States has largely been absent from the U.S. national debate, and has produced no movement here in Congress.

For this, Puerto Ricans have paid a high price. Some political parties on the Island have taken full advantage of the situation, basing their existence almost exclusively on their stance regarding status. They have gone so far as to manipulate the process toward their preferred option or to halt progress when they feared the final outcome would not favor them. Now, as the statehood party moves aggressively to re-open this debate in Washington, Congress is placed in a difficult position. Should you repeat the same mistakes of the past, the result is clear: the full array of tricks will be played to reach that party's preferred outcome.

So, after many years of discussion about the right to self-determination of the people of Puerto Rico, there are some principles that we should respect. Every citizen should have an equal say. The system for determining Puerto Rico's political status should be fair and unbiased. Each political status option must be considered on the same footing. And the clear choice of the people should win. That, Madam Chairwoman, is the true definition of democracy.

Today this Congress has before it two fundamentally different approaches. One repeats the same mistakes of the past, allowing and even encouraging the same Puerto Rican political parties to play trick politics with Congress and the people of Puerto Rico. The other brings to the table a new and totally fair process, open equally to all options, putting power in the hands of the people themselves, as opposed to the local political parties.

Let me first discuss H.R. 900, the pro-statehood bill that is "more of the same."

In previous plebiscites to determine the Island's future, participation from our citizens has been high. And for more than five decades, the winner in each referendum has been Commonwealth. Now, the same people who could not convince the citizens of the Island to vote for statehood, are trying - again - to change the rules of the game, crafting a system to force statehood upon Puerto Rico. Rather than give every Puerto Rican an equal opportunity to have his or her voice heard, these statehood advocates have designed a series of referendums that would distort the will of the people.

Supporters of Commonwealth have held a narrow but notable edge over the second-place finisher, statehood, for decades, with the smaller independence movement finishing third. H.R. 900 proposes a two-stage vote. In the first round, our citizens would select either a continuation of an ill-defined Commonwealth or a category that combines statehood and independence.

That would create a merger between those two fundamentally opposite parties and options, with the goal of building a tiny majority over Commonwealth. Once Commonwealth has been knocked out, voters would then choose between only statehood and independence, with statehood assuredly winning. The math is very simple. If you add the second place – statehood – to the third place – independence – then you can fabricate an artificial majority. And that helps eliminate the true popular choice of the people, Commonwealth.

This is the first time I have seen a process in which the run-off election would be held between the second and third place! To support that plan would be destructive and anti-democratic.

It is time for a new, and better, approach. An approach that is fair to everyone and removes the total responsibility and control from the hands of the political parties. This is why I recommend that we entrust the people of Puerto Rico to organize a Constitutional Convention, as proposed by H.R. 1230. This gathering would represent the true will of our citizens, not the political parties determined to promote their own factional interests, even at the expense of fairness or respect. The delegates would be free to consider proposals, eventually proposing an ideal solution to our citizens and then to Congress.

Congress would retain the right to approve, negotiate, modify, or simply reject the proposal coming from the Constitutional Convention. But it would also have the obligation to do the right thing – to assure that it respectfully considers the option presented, and recognizes the Convention's right to propose such an alternative.

In contrast, if Congress decides to define the status options for Puerto Rico, then it has no choice but to follow principles of honest statesmanship and fair play. It would be senseless to do otherwise. If you yield to the tricky games proposed by some politicians, the process will lose credibility, or worse, die stagnated.

As you know, one of the first tricks to come out of the bag in the partisan-driven debates on Puerto Rico's political status is typically camouflaged in legal wrappings. The argument is that that Commonwealth, which historically has been preferred by Puerto Ricans, has no place in the American constitutional framework; that the Constitution is so rigid and formalistic that, just as we if we were living back in the late eighteenth century, it can deal with nothing but states and traditional colonies; that, accordingly, the United States cannot constitutionally produce new arrangements to meet the country's emerging needs. That is the basic premise of the White House Task Force report and of H.R. 900.

I feel a particular need to address this issue today, since it collides head-on with many years of opinions from the best legal minds in the United States. From Judge Magruder in *Mora v Mejía,* to Justice Breyer in *Córdova & Simonpietri,* to Justice Brennan in *Calero Toledo* to so many other landmark decisions. And now, as the new century unfolds, top modern thinkers and scholars are following that same line or analysis. For example, Dean Alexander Aleinikoff from Georgetown Law School, in his 2002 book, Semblances of Sovereignty, devoted an entire chapter to the Commonwealth of Puerto Rico. He wrote:

The (Commonwealth Opponents') reasoning seems to be this: the United States Constitution knows only the mutually exclusive categories of "State" and "Territory." States are full and equal members of the Union, but territories are subject to plenary federal power. Such plenary power may be surrendered only by moving outside the territory clause by granting statehood or independence. To recognize congressional power to create new categories – such as "enhanced commonwealth" – violates the structure of the Constitution and potentially weakens the position of the states..."

Rejecting that approach and making an implicit challenge to Congress, Aleinikoff states: *"The infamous Insular Cases recognized the need for congressional flexibility in handling the unanticipated situation of Empire. When flexibility is now, by mutual consent of capital and former colony, exercised to restore dignity and self-government, why should congressional power suddenly be read narrowly?"*

And more specifically he asks Congress: *"the question is whether we can think ourselves into notions of sovereignty that permit overlapping and flexible arrangements attuned to complex demands of enhanced autonomy with a broader regulative system of generally applicable constitutional and human rights norms,"* responding that *"if both Congress and the people of Puerto Rico seek to establish a new relationship that recognizes space within the American constitutional system for "autonomous" entities, it ill behooves either the executive branch or the judiciary to set such efforts aside in the name of nineteenth-century conceptions of sovereignty...The Constitution should not be read – out of fear and loathing of new understandings of sovereignty – to prevent promising power-sharing arrangements that provide a space for political and cultural autonomy."*

Similarly, in a recent memorandum, Professor W. Michael Reisman, Professor of International Law at Yale (2006), states:

"Yet in the late twentieth and early twenty-first century, all three branches of the U.S. federal government maintain legal positions on Puerto Rico rooted firmly in a nineteenth-century paradigm of international law.....This binary division (between states and territories),...is in fact, anachronistic: It neither accurately reflects nor properly accommodates the diverse political arrangements embodied in the freely associated state of Puerto Rico, the CMNI, and the FAS. Legally created at a later date, those arrangements better represent current law."

And Reisman further concludes: *"Should Puerto Rico decide that an "enhanced" commonwealth status best serves its long term interests, U.S. constitutional law, to our view would likely be able to accommodate that arrangement...; the barriers to enhance commonwealth status are more political than legal."*

Another scholar, Constitutional Law Professor Richard Pildes from NYU testified recently before this same committee that *"were the United States Congress and the people of Puerto Rico to prefer expanding the existing Commonwealth relationship, in a way that provides greater autonomy for Puerto Rico on the basis of mutual consent, it would be unfortunate, even tragic, for that option to disappear due to confusion or error about whether the Constitution permits Congress to adopt such an option."*

And he clearly concludes: *"Congress does have the power, should it choose to use it, to enter into a mutual-consent agreement that would create and respect more autonomous form of Commonwealth status for Puerto Rico, in which Congress would pledge not to alter the relationship unilaterally."*

Finally, Charles Cooper, a former head of the Office of Legal Counsel of the U.S. Department of Justice, in a recent memorandum stated that *"there is no support for a reading of the Constitution that unnecessarily restricts the political arrangements available to the President and Congress in fashioning binding consensual solutions to the Nation's relations with the people of its territories,"* and that *"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, only by mutual consent of the parties."*

As you can see, in the last five years, many distinguished constitutional law scholars have rejected the basic assumptions of H.R. 900. Each of them has re-validated the 1914 vision of later Justice Felix Frankfurter that *"the form of relationship between the United States and unincorporated territory is solely a problem of statesmanship..... Luckily, our Constitution has left this field of invention open."*

Members of Congress, with that in mind, if you want to impose upon the people of Puerto Rico a petition for statehood, without any commitment to grant it, H.R. 900 accomplishes that. And if you seek to deprive the people of Puerto Rico of a valid Commonwealth option, H.R. 900 does that as well. But please do not use the Constitution as an excuse. Be straightforward, and just say that you support imposing statehood on my people of Puerto Rico, even against the expressed will of our four million citizens, as H.R. 900 pre-

determined outcome intends. But if you want to be fair and creative, discard anachronisms, offer our residents a true process for self-determination and deal with this issue with statesmanship, I recommend H.R. 1230 is right alternative.

In any case, if the future of the Commonwealth is to be subjected to a legalistic, why-not scrutiny, what shall we expect regarding statehood? Many issues come to mind: Are we planning to entitle the fifty-first state to keep forever the Spanish language as its principal language in public schools, in the local courts and in everyday business? Would it be kept immune from the English-only movement? Is the United States ready and willing to accept into the union a distinct society with all the sociological characteristics of a nation like Puerto Rico? What about federal income taxation? How will the federal income taxation system apply in Puerto Rico? Is the local system to be dismantled? If so, how is the government of the fifty-first state to be financed? If you choose to support the statehood bill, H.R. 900, the people of Puerto Rico will deserve, and demand, clear answers to these and many other questions.

Madam Chairwoman, the tricks of H.R. 900 are more than tricks: they are the poison pills that, in the past, account for the death of processes like this one. Our people have rejected statehood over and over, but statehood supporters have returned again and again -- adjusting their approach, rephrasing their rhetoric or making minor changes to their proposal, with hopes of obscuring the flaws of their intentions.

It's time for something better, for Congress to decisively help Puerto Rico overcome the status dilemma through a fair and unbiased process. If you are serious about meeting that goal, I urge you to approve H.R. 1230.

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