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**On Puerto Rico's Options for a Non-Territory Status and
What Should Happen After November's Plebiscite**

I. Introduction

Chairman Grijalva, Ranking Member Bishop and distinguished members of the Committee on Natural Resources. Thank you for inviting me to testify today.

I am a professor of law at the David A. Clarke School of Law of the University of the District of Columbia in Washington, D.C, where I teach Constitutional Law and Public International Law, among other topics. I am also the author of *Revisiting the Transatlantic Triangle: The Constitutional Decolonization of the Eastern Caribbean* (2009).

II. Constitutional Source of Congress' Power to Chart a Decolonizing Path

The time is ripe for Congress to take stock of the seminal lessons stemming from the long string of failed attempts at disentangling Puerto Rico's political status conundrum.

The first lesson that must be clearly understood is that the Constitution vests in Congress plenary power to chart, along with the people of Puerto Rico, a path to the island's decolonization.

The language chosen by the founders in Philadelphia leaves little room for equivocation: "*The Congress shall have power to dispose of and make all needful rules and regulations* respecting the territory or other property belonging to the United States." (U.S. Const. Art. IV, Sec.3, Cl. 2).

Thus, it is not incumbent on the judiciary or the executive branches to articulate a decolonizing solution for Puerto Rico. Only Congress bears that constitutional responsibility.

Decolonizing Puerto Rico is both a moral and legal imperative, consistent with the corpus of anti-colonial values leading the founders to overthrow (in the words

of Jefferson) George III's "absolute tyranny"¹ in order to form a "more perfect union."²

Decolonizing Puerto Rico, moreover, is consistent with the treaty obligations of the United States pursuant to the International Convention on Civil and Political Rights³ and the U.N. Charter.⁴

III. Puerto Rico Presents a Unique Territorial Case-Study

The second lesson that must be clearly understood is that the case of Puerto Rico finds no parallel in the territorial architecture of the United States.

Puerto Rico is not the District of Columbia.

The District is a community culturally and linguistically intertwined to the mainland, devoid of a sovereignty movement, which came to life upon the

¹ Refer to the text of the 1776 Declaration of Independence.

² U.S. Const. Preamble.

³ 99 U.N.T.S. 171 (1966). Note that the U.S. Senate ratified the Convention on Civil and Political Rights on June 8, 1992 --- subject to a series of reservations. Refer to 138 Cong. Rec. S4781-01 (1992). Of significance is the fact that the U.S. Senate, in exercising its constitutional prerogative of advice and consent, explicitly established that Articles 1 through 27 of the Convention are not self-executing. This notwithstanding, the United States is legally bound to the self-determination principles enshrined in the Convention.

⁴ Refer to Articles 2, 55 and 56 of the U.N. Charter. Note that the U.S. Senate ratified the U.N. Charter on July 28, 1945.

founding of the Republic per the strictures of Article I, Section 8 of the federal Constitution.

Puerto Rico is unlike the Virgin Islands.

By the time the United States signed the treaty of cession with the Danish Kingdom in 1916,⁵ the Virgin Islands were subject to an excessively centralized colonial system devoid of any quantum of self-government under the Danish colonial statute of 1863.⁶

Puerto Rico, to the contrary, was a fully autonomous overseas province of the Spanish Kingdom⁷ upon the U.S.'s invasion in 1898; remaining to this day a more complex political jigsaw puzzle than its immediate neighbors --- hostage, as it is, to a wide universe of ideological movements on constant collision against each other.

⁵ For the ratification instruments refer to 39 Stat. 1706 (1917). Note that the U.S. Senate ratified the cession treaty with Denmark on September 7, 1916. The Danish Kingdom, for its part, followed suit on December 22, 1916.

⁶ For the metes and bounds of the 1863 Danish colonial legislation see, for instance, *Virgin Islands: Hearing, Committee on Insular Affairs*, H.R. 7183 and H.R. 8517 (1926), 1 *et seq.*

⁷ *Carta Autonómica de 1897* (Charter of Autonomy of 1897), issued by Spanish Queen Maria Cristina de Habsburgo y Lorena, on the advice of her Council of Ministers, on November 25, 1897.

On that same token, Puerto Rico is not Guam.

While the Spanish Crown transferred its sovereignty over both jurisdictions to the United States pursuant to the 1898 Treaty of Paris,⁸ in Guam there was no civil government until 1950 and it has, since then, been governed “not by a formal constitution but by an organic act”⁹ of Congress --- free from the ideological balkanization that has torn apart Puerto Rico’s political milieu since 1898.

Puerto Rico, furthermore, is not American Samoa.

Since their annexation to the United States, following the signing of the 1899 Tripartite Convention among Great Britain, Germany and the United States,¹⁰ the people of American Samoa have plodded along a different territorial path than Puerto Rico --- devoid of U.S. citizenship, governed by an organic act of Congress and still in the United Nations’ List of Non Self-Governing Territories.¹¹

⁸ 30 Stat. 1754 (1898).

⁹ 48 U.S.C. §§ 1421-24.

¹⁰ For the text of the Tripartite Convention, concluded on November 7, 1899, see Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers 1776-1909*, Vol. II, 1576 (1910).

¹¹ Puerto Rico was removed from the U.N.’s List of Non Self-Governing Territories in 1953. Refer to G.A. Res. 748 (VIII), U.N. GAOR, 8th Sess., Supp. No. 17, at 25, U.N. Doc A/2630 (Nov. 27, 1953).

Puerto Rico, moreover, is unlike the Commonwealth of the Northern Mariana Islands and, most noticeably, dissimilar to the Republic of the Marshall Islands, the Republic of Palau, and the Federated States of Micronesia.

These jurisdictions, originally placed under the fiduciary care of the U.N. Trust Territory of the Pacific Islands (which came to life in 1947 under the aegis of the U.N. Security Council), deserve separate analysis.

By the time the U.N. Security Council appointed the United States as their trustee,¹² Puerto Rico was at the verge of electing its own governor (pursuant to the 1947 Elective Governor Act)¹³ --- soon to convene a Constitutional Convention for drafting an internal constitution of its own making.¹⁴

¹² Refer to the statement made by the U.S. Representative to the U.N.'s Security Council on presentation of the Trust Agreement, available at 2 U.N. SCOR (113th mtg.) 410 (1947).

¹³ 61 Stat. 770 (1947).

¹⁴ 64 Stat. 319 (1950) (most commonly known as Public Law 600). Public Law 600 was enacted "in the nature of a compact" between Congress and the people of Puerto Rico. Following its ratification in a local referendum held on June 4, 1951, the constitution-making process began in earnest. Delegates to the Constitutional Convention were elected on August 27, 1951. The newly drafted Constitution, while ratified by the people of Puerto Rico on March 3, 1952, was unilaterally modified by Congress --- which finally ratified it on July 3, 1952. The Commonwealth's Constitution was finally inaugurated on July 25, 1952. PROMESA has significantly eviscerated the vitality of the 1952 Constitution.

Against this background, it is safe to conclude that history, geography, culture, language, politics, demographics, and economics have conspired to make Puerto Rico a unique case study within the U.S.'s wider territorial tapestry.

Thus, Puerto Rico's unique location within the U.S.'s territorial topography requires a unique decolonizing solution --- not inconsistent with the United States' constitutional design, but carefully designed to address the unique characteristics of the Puerto Rican landscape.

IV. Designing a Binding Procedural Mechanism is of the Essence

All federal initiatives for disentangling Puerto Rico's colonial knot have so far foundered, in no small measure, due to flawed procedural mechanisms.

Therein lie the failed experiences of the 1959 Fernós-Murray bill,¹⁵ the 1963 Aspinall bill¹⁶ (leading President Johnson to appoint the failed status commission of 1966),¹⁷ the 1973 Ad Hoc Advisory Group on Puerto Rico's Status

¹⁵ *A bill to provide amendments to the compact between the people of Puerto Rico and the United States*, H.R. 5926, 86th Cong., 1st sess. (1959).

¹⁶ *To establish a procedure for the prompt settlement, in a democratic manner, of the political status of Puerto Rico*, H.R. 5945, 88th Cong., 1st sess., (1963).

¹⁷ United States-Puerto Rico Commission on the Status of Puerto Rico, *Report of the United States-Puerto Rico Commission on the Status of Puerto Rico* (Washington, D.C.: Government Printing Office, 1966).

appointed by President Nixon,¹⁸ the 1989-1991 Johnson – De Lugo bills,¹⁹ the 1997 Young bill,²⁰ along with the more recent bills authored by the island’s resident commissioner and various members of the U.S. House.²¹

Furthermore, none of the 5 local plebiscites held in the island in 1967,²² 1993,²³ 1998,²⁴ 2012²⁵ and 2017²⁶ have led anywhere. And the 2020 “statehood yes or no” referendum will also die a quiet death much like its predecessors.

Those who forget the lessons of history, in the words of the Spanish essayist Jorge Santayana y Borrás, are condemned to repeat their mistakes.

¹⁸ See Report of the Ad Hoc Advisory Group on Puerto Rico, October 1, 1975. Also consult H.R. 11200, 121 Cong., 1st sess. (1975) (*To approve the Compact of Permanent Union between Puerto Rico and the United States*). Memorandum from Jim Cannon to President Gerald Ford (Office of the Domestic Policy Advisor, October 28, 1976) (Ford Presidential Library).

¹⁹ *To provide for a referendum on the political status of Puerto Rico*, S. 712, 101 Cong., 1st sess. (1989); *Puerto Rico Status Referendum Act*, S. 244, 102 Cong., 1st sess. (1991); *To enable the people of Puerto Rico to exercise self-determination*, H.R. 4765, 101 Cong., 2nd sess. (1990).

²⁰ *United States-Puerto Rico Political Status Act*, H.R. 856, 105th Congress (1997).

²¹ At the time of this writing, there are 4 status bills presently before the U.S. House, namely H.R. 8113 (*To recognize the right of the people of Puerto Rico to call a Status Convention*); H.R. 4901 (*Statehood Admission Act*); H.R. 1965 (*Puerto Rico Admission Act*) and H. Res. 113.

²² July 23, 1967: “Enhanced” Commonwealth 60.41%, Statehood 38.98%, Independence 0.60%. Note that the Puerto Rico Independence Party boycotted the 1967 plebiscite.

²³ November 14, 1993: “Enhanced” Commonwealth 48.89%, Statehood 46.64%, Independence 4.47%.

²⁴ December 13, 1998: None of the Above 50.46%, Statehood 46.63%, Independence 2.55%, Free Association 0.29%, Territorial Status 0.06%.

²⁵ 54% voted against the territorial *status quo*. A sizeable proportion of voters abstained from casting their ballots on the plebiscite’s second question, following the Popular Democratic Party’s boycott of that aspect of the local process. Against that background, Statehood 61.16%, so-called *Estado Libre Asociado Soberano* 33.34%, Independence 5.49%.

²⁶ June 11, 2017: following the boycott of the Popular Democratic Party and the Independence Party, voter turnout plummeted to 23%. Against that background, Statehood received 97%.

Thus, fresh thinking is of the essence.

The path leading to local (or *criollo*) referenda must be irrevocably discarded. These are but exercises in the dark, not binding on Congress.

Under this mechanism, the people of Puerto Rico would cast their ballots without knowing what each formula entails. How can the people of Puerto Rico seriously exercise their inalienable right to self-determination in a *referendo criollo* if they do not know for what they are voting for?

It is well settled that defining the substantive scope of the status formulas requires Congress' active participation in the process. Thus, from a procedural perspective, there are only 2 viable options for Puerto Rico.

On the one hand, a federal plebiscite (with detailed definitions already agreed upon with Congress) and, on the other, a status convention (also referred as the constitutional convention). It is essential to note that these procedural options are not, necessarily, mutually exclusive.

The federal plebiscite option would require, moreover, voting resolutions in Congress for the expedited consideration, and subsequent execution, of the results.

Due to the tight timetable of biannual congressional elections, putting in place the expedited consideration mechanism will infuse the necessary continuity to a process that might take several years.

The option of the federal plebiscite, however, would be patently incomplete without a congressional bilateral negotiation commission insulated from the vagaries of congressional elections and local politics.

Because the life of the status convention would be independent from Congress' and Puerto Rico's electoral cycles, it achieves the twin goals of stability and continuity more effectively than the federal plebiscite option.

The Committee on Natural Resources would be well advised to seriously consider the status convention approach delineated in the Velázquez-Ocasio Cortés Bill (H.R. 8113).

Far from silencing those voices opposing statehood, the Velázquez-Ocasio Cortés Bill opens the door to an inclusive and democratic mechanism for all ideological movements. Pursuant to H.R. 8113, Congress acknowledges the inherent authority of Puerto Rico’s Legislature to call a status convention and, moreover, commits to consider the self-determination option chosen by the people of Puerto Rico in a final status referendum. This new procedural

approach avoids the mistakes of the past, while opening the door to in-depth deliberations and negotiations between the people of Puerto Rico and the political branches in Washington. Far from un-American, the status convention is the most American of all plausible procedural mechanisms.

V. Congress Ought Not Act Upon the Results of the November Referendum

The upcoming November referendum is not a legitimate exercise of self-determination.

Puerto Rico Law No. 51 of May 16, 2020 is an empty statute. It does not define the path to statehood.

It fails to describe the transitional period for the application to Puerto Rico of the Tax Uniformity Clause, which requires that “all Duties, Imposts and Excises shall be uniform throughout the United States.” (U.S. Const. Art. I, Sec. 8, Cl. 1).

Puerto Rico Law No. 51 leaves the people of Puerto Rico (and legal persons established under the laws of the Commonwealth) in the dark, with respect to their tax liabilities under statehood. Nowhere does it address the phasing out of the various tax preference programs currently in full force and effect in Puerto Rico.

Equally importantly, Puerto Rico Law No. 51 remains silent as to which specific provisions of the Puerto Rico Constitution, and the Federal Relations Act, might be preempted by the full application to Puerto Rico of the federal Constitution; nor does it enumerate the federal statutes that currently do not apply to Puerto Rico but that would apply to the island under the federal Constitution’s equal footing requirement.

Similarly, the cultural, linguistic, and debt-restructuring aspects of the equation are also left untouched.

As Deputy Attorney General Jeffrey Rosen correctly recently concluded, Puerto Rico Law No. 51 is not compatible with the Constitution, laws, and policies of the United States.²⁷

It is a “decidedly pro-Statehood”²⁸ maneuver, designed to further the governing party’s political interests at the next general election. Unsurprisingly, the referendum will be held on election day --- namely November 3, 2020.

Moving forward, Congress should follow its own precedent by refusing to act upon a referendum tainted with partisanship and lack of consensus among Puerto Rico’s political forces --- as it did in 2012²⁹ and 2017 when previous pro-statehood governors concocted identical local schemes.

²⁷ Letter authored by Deputy Attorney General Jeffrey Rosen, dated July 29, 2020.

²⁸ *Id.*

²⁹ For further analysis on the anomalies surrounding the 2012 vote see, for instance, Congressional Research Service, *Puerto Rico’s Political Status and the 2012 Plebiscite: Background and Key Questions*, June 25, 2013 (admitting that the plebiscite’s results have been “the subject of controversy.”) *Id.* at 8. Also see Letter authored by Acting Deputy Attorney General Dana J. Boente, dated April 13, 2017, at 2.

VI. Options for a Non-Territory Status³⁰

Non-Territory Status options, by definition, are not susceptible to Congress' plenary powers under the Territory Clause (U.S. Const. Art. IV, Sec.3, Cl. 2).

Clearly, independence is a non-territory status option.

Needless to say, upon the proclamation of the Republic of Puerto Rico all obligations and responsibilities of the U.S. Government, arising under the 1898 Treaty of Paris, shall cease.

Sovereignty, in the international sense, will devolve to the people of Puerto Rico.

³⁰ Mindful that the Committee on Natural Resources has requested an opinion with respect to status options outside the reach of the Territory Clause, the author has refrained from discussing *in extenso* whether it is constitutionally viable for Congress and the people of Puerto Rico to enhance their current relationship through the devolution of further political authority to Puerto Rico within the federal framework. Pursuant to this formulation, sovereignty would not be transferred to Puerto Rico, but the island would no longer be subject to Congress' plenary powers under the Territory Clause. The constitutionality (let alone the desirability from a public policy perspective) of Congress' partial disposition of its powers under the Territory Clause has been the subject of intense debate. The DOJ's answer to this legal question has been far from consistent. (Compare the legal opinions rendered by the DOJ in 1960, 1963, 1975 with the ones issued in 1991 and 1994.) This notwithstanding, the recent concurrent opinion of Justice Sonia Sotomayor in *Financial Oversight and Management Board v. Aurelius*, 590 U.S. ___ (2020), bringing to the fore the glaring discontinuities and inconsistencies surrounding this debate, justifies revisiting this legal issue in light of Justice Sotomayor's observations.

Independence, however, will require a bilateral transition commission addressing a host of seminal matters pertaining to the public debt, monetary policy, foreign relations, defense and security, international commerce, accession to multilateral financial institutions, citizenship, the phasing-out of a number of federal programs, among others.

The precedents of Cuba (1902)³¹ and the Philippines (1946)³² are inapposite to the Puerto Rican context.

The uniqueness of the Puerto Rican landscape, bound to the United States through common citizenship in the midst of a highly interdependent global economy, will require a different transitional approach to the one applied in the cases of Cuba and the Philippines.

Statehood is yet another non-territory status option.

³¹ Note that Cuba never belonged to the United States. Pursuant to a Joint Resolution of Congress (commonly referred as the Teller Amendment), the United States had made it clear that the people of Cuba “are, of right ought to be, free and independent.” H.J. Res. 233 (1898). In the aftermath of the Spanish-American War, the United States formally occupied Cuba from January 1, 1899 until May 20, 1902. Yet, the process leading to the drafting of the 1901 Cuban Constitution, including the incorporation of the so-called Platt Amendment to Cuba’s constitutional text, was heavily influenced by the United States.

³² The 1916 Philippines Organic, different from the 1917 Jones Act, did not extend U.S. citizenship to the nationals of the Filipino archipelago.

It is well settled that states are sovereign entities within the Republic's federal design.

Each state accedes to the Union on an equal footing with its sister states, retaining for itself an inviolable quantum of sovereignty, as Madison acknowledged in his drafting of the 10th Amendment.

State sovereignty, moreover, is not commensurate to "international sovereignty."

As the Supreme Court has suggested on various occasions, states are "autonomous political entities, sovereign over matters not ruled by the Constitution."³³

The path to statehood, as suggested above, will also require a well-defined transitional period.

If Puerto Rico chooses to bear the economic burdens of statehood, it must do so on the basis of an informed decision.

³³ *Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982).

Besides independence and statehood, free association is the third non-territorial option.

Seldomly explored, the concept of free association deserves serious analysis.

Free association, as a legal construct, is not foreign to federal constitutional law or to public international law.

Yet, neither legal order offers detailed guidance on the substantive content of free association.

Bearing in mind that the decisions of the International Court of Justice (ICJ) constitute sources of public international law,³⁴ it is worth noting that in its advisory opinion in the case of *Western Sahara*³⁵ the ICJ found that “free association with an independent state” was a legitimate decolonizing formula.

³⁴ For the sources of public international law see, for instance, Article 38 of the Statute of the International Court of Justice. Also refer to Section 102 of the Restatement (Third) of the Foreign Relations Law of the United States.

³⁵ *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975.

U.N. Resolution 1541(XV) throws little light on the metes and bounds of free association.

It only establishes that free association must be “the result of a free and voluntary choice by the people of the territory concerned,” that the associated territory retains for itself both “the freedom to modify its status through the expression of its will,” and “the right to determine its internal constitution without outside interference.”³⁶

Public international law does not explicitly establish any further requirements.

Thus, it is up to the contracting parties to carve out a free association model not inconsistent with their respective domestic legal orders and public policy imperatives.

Under a free association arrangement, Congress would relinquish its sovereignty over Puerto Rico --- devolving it to the people of Puerto Rico.

³⁶ *Declaration Guiding the Determination of Self-Government*, G.A. Res. 1541 (XV) (Annex) of December 15, 1960, 15 U.N. GAOR, Supp. (No. 14), U.N. Doc. A/4684.

Consequently, the United States' international obligations, under the 1898 Treaty of Paris, would come to an end.

Simultaneously, Puerto Rico (in the exercise of its newly devolved sovereignty) and the United States (through the political branches' exercise of their constitutional powers under the Treaty Clause (U.S. Const. Art. II, Sec. 2)) shall enter into a new constitutional order --- where Puerto Rico would reserve for itself authority over some matters, while delegating to the United States authority over other areas.

Defining the various fields of legal responsibility (*i.e.* economic relations, foreign affairs, defense, and security) will require in-depth study and comprehensive negotiation between the parties.

The final associational agreement, moreover, would be embodied in an international treaty subscribed by both contracting parties.

Whether the treaty of association ought to be self-executing or non-self-executing, requiring Congress to enact enabling domestic legislation, should be determined by the parties in the course of their negotiations.

The Department of Justice's (DOJ) superficial reading of free association must be taken to task.

Seeking refuge in the compacts of free association of the Marshall Islands, Palau and the Federated States of Micronesia with the United States, the DOJ has tossed aside free association as a "type of independence."³⁷

This uncritical approach has led to a rather skewed notion of how to superimpose to the Puerto Rican landscape a free association arrangement.

A close perusal of the various free association models available around the globe renders the DOJ's analysis patently incomplete.

There is no fixed approach to free association nor is there a fixed model.

Each model is autochthonous, thus, adjusted to the specific realities of the partners.

³⁷ See, for instance, *Report by the President's Task Force on Puerto Rico's Status* (Washington, D.C.: White House, 2011), 25.

Construing a viable free association model for Puerto Rico requires a thorough exploration of the ways in which other jurisdictions have structured similar arrangements.

Contrary to conventional wisdom, the Micronesian model is inapposite to the Puerto Rican scenario.

The Micronesian archipelago, unlike Puerto Rico, was part of the territories entrusted to the U.N. Trust Territory of the Pacific Islands in the early stages of the postwar period.

Consequently, its politico-constitutional relationship with the United States is completely different to Puerto Rico's.

As a threshold matter, no common citizenship binds the Micronesian archipelago to the United States, while issues pertaining to geography, demographics, culture, language, and economics further sets it apart from Puerto Rico.

Against this background, it is essential to explore the associational models engineered in other jurisdictions.

More specifically, the associational models articulated by Denmark,³⁸ Finland,³⁹ the Netherlands,⁴⁰ and Britain⁴¹ in decolonizing their territorial peripheries deserve special attention.

The process of carving out an associational model for Puerto Rico will necessarily entail resolving complex legal and policy issues.

In so doing, Congress should not limit itself to the “one size fits all” approach the DOJ proposes with respect to free association.

³⁸ Act on Greenland Self-Government, Act. No. 473 of June 12, 2009 (Green.).

³⁹ Act on the Autonomy of Åland, 1991/1144 (1991) (Fin.).

⁴⁰ *Statuut voor het Koninkrijk der Nederlanden* [Charter for the Kingdom of the Netherlands], Stb. 1954 (Neth.)

⁴¹ *Statute of Westminster*, 1931, 22&23 Geo. 5, c. 4 (Eng.). Also consult the West Indies Act of 1967, 11&12 Eliz. 2, c. 4 (Eng.).

VII. Conclusion

The resolution of Puerto Rico's status is not so much a legal issue, as it is a political one. This is not a legal question for the U.S. Supreme Court to decide, as the high court itself recently intimated in *Financial Oversight and Management Board v. Aurelius*,⁴² but rather a political question that will require a political compromise between Congress and the people of Puerto Rico.

Achieving this goal necessarily requires a new procedural approach. The time for non-binding local plebiscites is over.

Only a status convention, with equitable participation from all Puerto Rican stakeholders, will command sufficient legitimacy in Washington, San Juan, and around the world, to jumpstart Puerto Rico's decolonization.

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⁴² *Financial Oversight and Management Board v. Aurelius*, 590 U.S. ____ (2020).

