

**THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON INSULAR AFFAIRS
HEARING ON H.R. 900 AND H.R. 1230
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Thank you for inviting me to testify. I specialize in constitutional issues concerning the structure of American government. The United States Supreme Court has cited my scholarship on these issues many times. I am also the co-author of a casebook entitled *The Law of Democracy* (2nd ed. 2001 and 2006 Supplement). I successfully represented the Puerto Rico Election Commission before the United States Court of Appeals for the First Circuit in the resolution of Puerto Rico's 2004 disputed gubernatorial election. I also successfully represented the government of Puerto Rico before the United States Court of Appeals for the District of Columbia Circuit in litigation concerning the legal status of Puerto Rico under particular federal laws. I am here testifying in my own capacity, based on my academic study of the relevant issues and my knowledge developed during my legal representation.

In my view, it would be unfortunate, even tragic, were the United States Congress and the people of Puerto Rico to prefer expanding the existing Commonwealth relationship on the basis of mutual consent, in a way that provides greater autonomy for Puerto Rico, but for that option to disappear due to confusion or error about whether the Constitution permits Congress to adopt such an option. Yet one of the proposed bills, H.R. 900, rests on precisely such confusion about how the Constitution applies to the potential political status of Puerto Rico. H.R. 900 would artificially and wrongly limit a plebiscite to two, and only two, options. H.R. 900 would deny the people of Puerto Rico the right to express their preference for a mutually-binding covenant that would determine Puerto Rico's status to be that of an autonomous, self-governing Commonwealth. H.R. 900 eliminates this option due to a faulty constitutional analysis that assumes, incorrectly, that the Constitution denies Congress the power to enter into such a mutually-binding covenant.

The plebiscite structure H.R. 900 would establish reflects the constitutional conclusions expressed in the December 22, 2005 report of President Bush's Presidential Task Force on Puerto Rico's Status (the Task Force). I would note that none of the members of the Task Force are academic authorities in constitutional law, particularly the exceptionally complex and arcane law that controls the relationship of the United States to various non-state entities, such as incorporated territories, unincorporated territories, the current Commonwealth of Puerto Rico, or entities of other political status with which the United States, for reasons of history and policy, might desire to form various types of political relationships. Perhaps for that reason, the Task Force's constitutional analysis is unpersuasive and inadequate. The analysis largely consists of the repetition of certain general platitudes that I believe to be wrong in the context of the United States' relationship to

Puerto Rico. Time and time again, the United States Supreme Court has insisted that this relationship has “a unique status in our system.” *Examining Bd. of Engineers v. Flores de Otero*, 426 U.S. 572, 596 (1976); *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966) (discussing “unique historic relationship between the Congress and the Commonwealth of Puerto Rico”). Proper understanding and analysis of this unique relationship is only confused and obscured, rather than advanced, by the repetition of highly general legal platitudes not designed to address the specific, exceptional context of the United States-Puerto Rico relationship.

The major platitude in the Task Force report, and which appears to be the basis for H.R. 900, is the notion that it “is a general rule that one legislature cannot bind a subsequent one.” Task Force Report, at 6. From this “general rule” it purportedly follows that Congress and Puerto Rico cannot enter into a mutually-binding covenant on Puerto Rico’s status – even should both Congress and the people of Puerto Rico prefer that option. According to the Task Force report, the United States Constitution, as currently written, “does not allow for such an arrangement.” *Id.* The reason, allegedly, is that such a covenant would involve one Congress binding a later one. Thus, Congress and Puerto Rico could not enter into a mutually-binding covenant to guarantee Puerto Rico’s status as an autonomous, non-State entity in permanent association with the United States. As a practical matter, there might be no realistic likelihood that the United States would violate such a solemn commitment. Nonetheless, the Task Force suggests that, as a matter of abstract constitutional theory, such an agreement would not, in principle, be valid.

This superficial analysis is seriously defective. First, constitutional issues involving political status of entities associated with the United States are too significant, unique, and complex to be addressed through general platitudes such as “one Congress cannot bind another.” Like most platitudes, this one is true in many routine contexts of lawmaking. Congress cannot, for example, pass a tax bill and deny a later Congress the power to amend, modify, or repeal that bill. But when it comes to far more fundamental issues involving the basic political status of individuals and entities, platitudes of this sort break down and lose their relevance. Congress’ creation of a new political status, for individuals and entities, can be a legal act that transforms the status quo irrevocably, in a way that does bind later Congresses. Not only does the Constitution permit Congress to do so. The Constitution actually *requires* later Congresses to adhere to the change in political status that an earlier Congress has established.

Thus, with respect to individuals, when one Congress grants statutory citizenship to a class of individuals, that statutory grant *does* bind later Congresses. When Congress changes the political status of individuals by making them citizens, the United States is bound, constitutionally, to honor this new political status. This commitment of one Congress binds the United States going forward. As the Supreme Court has said, Congress lacks a “general power . . . to take away an American citizen’s citizenship without his assent.” *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967). That is, once Congress enacts legislation signed by the President (or adopted over his veto), that legislation creates a new political status for individuals; the Constitution itself then denies later Congresses the power to change that status. *Afroyim* addressed naturalized citizens, who have become citizens only by virtue of legislation. Most commentators agree *Afroyim* applies in the same way to all statutory grants of citizenship. The United States Department of Justice agrees that it does. See Letter of

Assistant Attorney General Robert Raben to the Honorable Frank H. Murkowski, January 18, 2001.

With respect to territories associated with the United States, the constitutional principle is the same. The issue has directly arisen, however, in only one context of which I am aware. In that context, the Supreme Court similarly made clear that when one Congress changes the political status of a territory, later Congresses are bound by that change. Thus, it has long been bedrock constitutional law that, when Congress through legislation pledges to incorporate territory into the United States, that legislative commitment binds subsequent Congresses. *See Rasmussen v. United States*, 197 U.S. 516 (1905). The congressional pledge to incorporate transforms the legal status of a territory. Congress no longer has the “plenary power” under the Territory Clause, Art.IV, Sec. 3, cl.2, that it had before it enacted legislation to incorporate the territory. *Rasmussen* involved the Alaska Territory, which the United States had pledged originally, by treaty and statute, to incorporate into the United States. As a result of this statutory pledge, the Court held unconstitutional laws enacted by a later Congress that were inconsistent with the earlier Congress’ legal commitment to treat the Alaska Territory as an incorporated territory. *Rasmussen* is just one of many cases in which the Supreme Court, early in the 20th century, established that a congressional statute committing the United States to eventual incorporation of territory into the United States creates an irrevocable commitment that later Congress are constitutionally *required* to honor. The President’s Task Force does not indicate any awareness of *Rasmussen* or the many cases similar to it, let alone explain why those cases do not show the irrelevance of the “one Congress cannot bind another” platitude in the context of legal changes to the political status of territories.

Of course, one Congress can also irrevocably bind another Congress to a change in political status of a former territory in other, obvious ways. As it did with the Philippines, Congress can enact a statute granting a former territory full political independence. No one would suggest that, as a matter of domestic law, a later Congress could simply pass a new law declaring the Philippines to once again be a mere territory of the United States. Similarly, Congress can transform a former territory into a State, as it did with Hawaii. Again, once one Congress does so, it irrevocably commits the United States to maintaining Hawaii as a state on an equal footing with all other States. *See Pollard v. Hagan*, 44 U.S. 212 (1845) (discussing equal-footing doctrine). Thus, the United States can act in numerous ways to change the political status of territories or non-state areas of the United States: it can pledge to incorporate them into the United States, it can admit them as a State, it can grant them independence. Any of these changes are irrevocable once made and bind later Congresses. The one thing the United States purportedly cannot do, however, according to the President’s Task Force report, is to enter into a mutually-binding agreement to transform a territory into a Commonwealth, with guarantees of the self-governing autonomy of that entity. It would be exceedingly odd for the Constitution to single out, for no apparent reason, this one option as one that Congress does not have the discretion to choose. Surely some substantial explanation should be required before reading the Constitution to require such an odd result. Yet the Task Force report does not even attempt to provide such an explanation.

Moreover, to read the Constitution as denying Congress power to decide what forms of political relationship best serve the interests of the United States would be odd for three further reasons, at least. First, the United States has a long history of entering into mutual consent clauses.

Section 14 of the famous Northwest Ordinance of 1787, for example, contained six “articles of compact, between the original States and the people and States in the said territory, and [shall] forever remain unalterable, unless by common consent.” *Clinton v. Englebrecht*, 80 U.S. (13 Wall.) 434, 442 (1872). Many early territorial organic acts that Congress enacted incorporated these mutual-consent clauses from the Northwest Ordinance, either expressly or by reference. *Id.* If the constitutional analysis of the President’s Task Force is correct, Congress has been acting unconstitutionally for over 200 years, and the fundamental legal structures through which Congress historically has incorporated territory into the United States has been unconstitutional.

Second, individual States can enter into mutually-binding Compacts with other States. States can draft these Compacts so that they are binding absent mutual consent to a change by the other States in the Compact. As former Chief Justice Rehnquist wrote for the Court, the “classic indicia of a compact” between States is that once a State has entered a Compact, a State has no ability “to modify or repeal . . . unilaterally. . . .” *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 175 (1985). Nothing in the Constitution denies States the power to further their interests through such arrangements. The platitude that “one legislature cannot bind another” does not apply to these Compacts. *See, e.g.,* Jill Elaine Hasday, *Interstate Compacts in a Democratic Society*, 49 Fla. L. Rev. 1, 2 (1997) (“An interstate compact is an exception to the rule that one legislature may not restrict its successors.”).

Far from being unconstitutional, these arrangements are constitutionally sanctioned, enforced, and protected. Once a State consents to such a Compact, that consent binds the State going forward. *See, e.g., West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 725 (1838); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 92 (1823). Just as it is obviously advantageous for individuals to have the capacity to enter into binding contracts, it can be advantageous for a State to have the ability to enter into mutually-binding Compacts with other States. But unless the text of the Constitution expressly required it, why should the Constitution deny Congress the exact same power individual States have? If Congress and the President believe the interests of the United States, domestic and international, are best served by entering into a mutually-binding covenant with a non-state area or territory tied to the United States, under which the United States transforms that territory into a self-governing Commonwealth and pledges not to change the terms of that agreement absent mutual consent, is there anything in the Constitution that would preclude the United States from pursuing its interests in this way? If the text of the Constitution expressly forbid such an arrangement, that would be one thing. But the Task Force report does not claim that. There is nothing in constitutional history, precedent, or logical inference from the powers the Constitution grants Congress that requires such an odd and unlikely result.

Third, even a brief history of American political practices under the Territory Clause refutes the simplicity of the Task Force’s analysis. The Constitution itself only mentions two forms of political entity that the United States might govern: States and territories. If Congress’ powers were constitutionally limited to forming political relationships between only “States” and “territories,” as the Constitution originally understood those categories, Congress would never have had the power to forge the relationships it did for many decades between the United States and Puerto Rico, the

Philippines, Guam, and other places. But Congress did form these relationships, in the late 19th century, by creating the novel distinction between “incorporated” territories and “unincorporated” ones. The former are lands the United States has pledged eventually to incorporate as States; the latter entail no such pledge.

Before Congress decided to create this novel distinction, it had long been thought, and widely understood, that a “territory” within the meaning of the Constitution was limited to land the United States possessed with a commitment to turn that land eventually into a State. Nonetheless, the Supreme Court concluded that the Constitution, through the Territory Clause, grants Congress the power and flexibility to create additional forms of political entities beyond the two originally conceived and expressly mentioned in the text. Congress has the power to establish distinct political relationships with these entities. The conclusion that the Constitution grants Congress flexibility to create novel forms of political relationship is, of course, the basis for the *Insular Cases*, such as *Downes v. Bidwell*, 182 U.S. 244 (1901). This constitutional principle is also the foundation for the relationship the United States has had with Puerto Rico. Whatever one thinks as a matter of policy or political morality about the desirability of the United States holding lands indefinitely in a status other than statehood, it is clear as a matter of constitutional law that Congress has the power and flexibility, as United States policy interests dictate, to forge new kinds of political relationships and associations with lands formerly held as territories. The Territory Clause has long been a source for expansive and creative congressional policymaking, not a rigid straitjacket. The Court has *never* invoked the Territory Clause to deny Congress the power to form new types of political relationships and associations. If Congress were to enter into a mutually-binding covenant with Puerto Rico to ensure Puerto Rico’s expanded autonomy as a Commonwealth, this history strongly suggests the Court would acknowledge Congress’ power to do so.

Indeed, it would be perverse were the Constitution to permit Congress in the early 20th century the power to “invent” a new political status, that of unincorporated territory, that permitted the United States to possess territories in a colonial-like relationship, but then to deny Congress today the power to invent a new relationship, such as an amended and more autonomous Commonwealth, that promotes the self-governance and autonomy of places like Puerto Rico. I do not believe the Constitution, properly interpreted, requires such a perverse result.

In my last remarks, I would like to address the shifting positions of the Department of Justice (DOJ) on these issues over the years. For most of the past 50 years, DOJ concluded that Congress did have the power, constitutionally, to enter into mutually-binding agreements with non-state areas, such as an agreement to respect Puerto Rico’s status as a Commonwealth. In 1963, DOJ expressly took the position that such agreements were legally effective; DOJ concluded that Congress had the power to define the political status of a non-state area through a covenant that could not unilaterally be revoked. Once again, in 1973 DOJ confirmed this position – in a memorandum approved by then Assistant Attorney General William Rehnquist – when Congress sought DOJ’s advice in conjunction with pending negotiations over the status of Micronesia. Based on DOJ’s constitutional analysis, Congress did insert a mutual-consent clause into Section 105 of the Covenant with the Northern Mariana Islands. Yet again, DOJ endorsed the constitutionality of mutual-consent clauses in connection with the First 1989 Task Force Report on the Guam Commonwealth Bill. This history of

the DOJ's consistent position is set forth in the DOJ Memorandum, *Mutual Consent Provisions in the Guam Commonwealth Legislation* n.2 (July 28, 1994) (written by Teresa Wynn Roseborough, Deputy Assistant Attorney General, Office of Legal Counsel).

For reasons that remain difficult to understand, DOJ suddenly shifted its position in the early 1990s. That shift first occurred when then Attorney General Thornburg testified to Congress in 1991. U.S. Congress, Senate Committee on Energy and Natural Resources, *Political Status of Puerto Rico*, hearings on S. 244, 102nd Cong., 1st sess., Feb. 7, 1991 (Washington: GPO), pp. 206-207. The fullest explanation for that shift is in the Roseborough memorandum, above. According to that document, the Supreme Court's 1986 decision in *Bowen v. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41 (1986), required this 180-degree change in DOJ's position. I find that position mysterious. *Bowen* dealt with the routine context of a State's participation in the Social Security system for its employees; in creating this system, Congress had initially permitted States to participate voluntarily and to terminate their participation at a later date. The Act also expressly reserved the right of Congress to amend these terms at any time. In the 1980s, Congress exercised this right to end the option of States to terminate their coverage. *Bowen* rejected a State's argument that in doing so, Congress had unconstitutionally "taken" the State's property.

Bowen has nothing to do with mutual-consent clauses concerning the fundamental political status of non-state areas. Most obviously, in *Bowen* the statute expressly reserved Congress' right to amend it at any time. By contrast, the whole point of mutual-consent clauses is that Congress expressly *relinquishes* the power unilaterally to amend the terms of the agreement. Not surprisingly, *Bowen* concluded that there could be no "vested right" in an arrangement in which Congress had expressly reserved the right to change that arrangement at any time. *See* 477 U.S. at 55. That alone is enough to make *Bowen* irrelevant when Congress instead chooses to enter into a mutual-consent clause over political status. In addition, Congress' power to change, modify, or repeal routine regulatory programs is well-established. But congressional acts that distribute routine regulatory and welfare benefits and burdens are not of the same constitutional stature as those that address fundamental issues of political status. The latter are much more the analogue at the level of territories and non-state areas to what citizenship is at the level of the individual. And as *Afroyim* recognizes, once Congress changes the political status of individuals and confers citizenship on them, a later Congress no longer has the power unilaterally to revoke that status. One need not go as far as *Afroyim* to recognize the constitutionality of Congress' adoption of mutual-consent clauses over political status. *Afroyim* suggests it would be unconstitutional for Congress to attempt to change such an agreement over political status. Without going that far, the doctrine strongly suggests that, at the very least, the Constitution does not *prohibit* Congress from entering into such agreements.

In sum, H.R. 900 is fundamentally flawed and misleading. It rests on a mistaken constitutional premise. That premise is central to the Task Force report, on which H.R. 900 is based. Congress does have the power, should it choose to use it, to enter into a mutual-consent agreement that would create and respect a more autonomous form of Commonwealth status for Puerto Rico, in which Congress would pledge not to alter the relationship unilaterally. Congress' power to do so is supported by longstanding historical practice, going back to the Northwest Ordinance and the period

in which the Constitution was framed; it is supported by Supreme Court doctrine establishing the flexibility Congress has under the Territory Clause; it is supported by the longstanding position of the Department of Justice, before DOJ inexplicably changed positions; and it is supported, in my view, by sound constitutional analysis. H.R. 900 therefore does not give the people of Puerto Rico a full and informed choice of options concerning the potential future status of Puerto Rico. For that reason, Congress ought to reject H.R. 900.

None of this is to state my own personal view on what future status for Puerto Rico would best serve the interests of the Puerto Rican people. That is an issue on which, I believe, the Puerto Rican people should first be permitted to express a free and informed opinion. Nor do any of my comments address questions concerning the current legal and constitutional status of Puerto Rico. But as I noted at the outset, it would be highly unfortunate, even tragic, for Congress to limit artificially the choices in any plebiscite of the Puerto Rican people based on confusion or mistakes about what options the Constitution would permit Congress to adopt. Because H.R. 900 does exactly that, I urge its rejection.