Testimony of PROF. CARLOS IVÁN GORRÍN-PERALTA before the
Subcommittee on Insular Affairs of the Committee on Natural Resources
of the United States House of Representatives
regarding H.R. 900 (Puerto Rico Democracy Act of 2007) and
H.R. 1230 (The Puerto Rico Self-Determination Act of 2007)
March 22, 2007

Good morning, Madam Chairwoman and members of this Subcommittee.

Thank you for the invitation to share with you my perspective regarding the two bills under consideration. I will first outline some historical and legal concepts regarding the relations between Puerto Rico and the United States, as necessary background for my analysis of the two measures.

Puerto Rico is a colony of the United States. It has been an unincorporated territory of the United States since the relation began as an act of war in 1898, one hundred and nine years ago. Coincidentally, in 1898 the Constitution of the United States was one hundred and nine years old. That means that for fifty percent of its constitutional history, the United States has submitted the people of Puerto Rico to the ignominy of colonial rule, which is a subversion of the basic values on which the American Republic was founded.

The Declaration of Independence of 1776, which has been heard more clearly around the world than the shots fired at Lexington and Concord, states that "governments are instituted among men deriving their just powers from the consent of the governed. … [I]t is the right of the people … to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness." That seminal act of self determination was reaffirmed when "the people", through a constitutional convention, as depositary of popular sovereignty, and through ratification of the proposed document, adopted the Constitution of the United States. Blood had been spilled to

secure that right of self-determination, and has continued to spill since then throughout the world. Four score and seven years after independence, over the blood spilled on Gettysburg, Lincoln would renew the proposition that government OF the people, BY the people and FOR the people should not perish from the earth.

Yet, over the course of the 19th Century, the nature of the Republic was transformed. What Jefferson had referred to as the republican ideal of an empire of liberty somehow mutated into a very unrepublican regime that claimed the liberty to rule an empire. Constitutionally, the territory clause of the Constitution, which had been conceived as a mere property clause granting the federal government the power to dispose of and make all needful rules and regulations respecting the Northwest territory and other property belonging to the United States, was reinterpreted as granting Congress the power to acquire new territories by purchase or by conquest, and to exercise sovereingty over them, even though their inhabitants were not allowed to participate in their own government.

By the 1890's, dominant racist and imperialistic ideologies resulted in the infamous doctrine of "separate but equal" of *Plessy v. Ferguson*, 163 U.S. 537 (1896), and in the colonial doctrine of territorial non incorporation, enacted into law in 1900, and judicially constitutionalized in the *Insular Cases* from 1901 onward. Since then, Congress has purported to exercise constitutional power indefinitely over the nonincorporated territories – Puerto Rico included – as possessions which are not part of, but merely appurtenant to the United States. Never mind that those possessions are not mere tracts of real estate, but are inhabited, as is Puerto Rico, by a distinct and separate people who, despite their inalienable right to self-determination and their inherent constituent power, have never been allowed to exercise their collective rights as a people.

The federal government is not a government OF the people of Puerto Rico, nor is it in any way validated BY the people, nor does it rule FOR the people of Puerto Rico, but as it should be, for the interests of the people and institutions whom it represents. And yet, everyone in Puerto Rico is daily subjected to the application of federal laws, from from dawn to sundown, and even in our sleep. Federal laws apply in Puerto Rico without our consent or real participation in the Congress which enacts them. The federal executive administers such laws in Puerto Rico despite the fact that we do not participate in its election. The federal judiciary interprets and applies the laws in Puerto Rico, despite the fact that the judges are designated by a President we do not elect, and are confirmed by a Senate in which we do not have even nominal participation.

You will surely hear testimony of happy colonials or their retained representatives, to the effect that in 1950 to 1952 the people of Puerto Rico consented wholesale to the present relationship. But that is tantamount to saying that a slave owner may validly maintain a regime of involuntary servitude so long as he asks his slave whether she wants to adopt the rules for her household or whether she prefers that the master continue to dictate those domestic rules. Colonialism, like slavery, violates inalienable rights which may not be validly abrogated or renounced. No individual may consent to slavery; no people may consent to colonialism.

The legislative record of Law 600 of 1950 is clear. The purpose of the enactment was to allow Puerto Rico a greater degree of local self government and to obtain acquiescence of the colonized to the existing territorial relationship. The nature of the relation was to remain intact, as were the legislative authority of this Congress, the executive power of the President, and the judicial jurisdiction of federal courts.

The scheme was made possible by the territory clause and the doctrine of the Insular Cases, which have allowed the denial of the right to self determination, and present a grave

inconsistency with the founding values of the Republic. The doctrine defers to the political branches of the federal government the governance of the territories on the basis of political expediency. At the end of the 19th Century colonialism was enthroned as the law of the land, and basic tenets of democracy, liberty and self-determination were set aside to serve the national self-interest through the acquisition of new unincorporated territories.

The world has changed. The national interests that prompted the acquisition of Puerto Rico were strategic and economic. Puerto Rico no longer has the strategic value it once had. Economically, the colony has failed and our society is crumbling. The national self-interest is now best served by a new policy aimed at the disposition of the territory of Puerto Rico and the implementation of measures to promote the right to self-determination. Far from condemning the United States to continue an imperial policy of colonial rule, the doctrine of territorial incorporation leaves ample space for congressional action with respect to the territories. The day has come for the United States to finally solve the contradiction existing for too long between colonial rule and fully democratic government. Even Justice White, the judicial artificer of the doctrine of territorial incorporation, spoke in his opinion in *Downes v. Bidwell*, 182 U.S. 244 (1901), of "obligations of honor and good faith which … sacredly bind the United States to terminate the dominion and control, when, in its political discretion, the situation is ripe to enable it to do so." Faced with the prospect that his theory could be used to hold an unincorporated territory indefinitely, he stated:

> [T]he presumption necessarily must be that [the legislative] department, which within its lawful sphere is but the expression of the political conscience of the people of the United States, will be faithful to its duty under the Constitution, and, therefore, when the unfitness of a particular territory for incorporation is demonstrated the occupation will terminate…. [No pledge is] more sacred than … that great pledge given by every member of every department of the government of the United States to support and defend the Constitution.

This is the historical and legal background against which decisions are to be made to facilitate a truly meaningful process of decolonization, of disposition of the territory and the exercise of the right to self determination.

The political process necessary to resolve the territorial conundrum is twofold. Substantively, what kind of relationship should exist between Puerto Rico and the United States? The four options mentioned in the Puerto Rican political discourse are: (1) the present territorial relationship under the sovereignty of the United States; (2) full sovereignty under independence as a basis for a new relationship established by treaty; (3) admission as a state of the Union; or (4) sovereignty limited by a compact of free association, as that concept is defined under international law. Of course, the first is not really an option; territoriality is the problem, so it cannot be the solution. The other three will depend on the final decision of the people, and in the case of statehood and free association, the approval by Congress.

The other aspect of the process is procedural: how to reach the final substantive decision. H.R. 900 and H.R. 1230 suggest different approaches. Both have strengths and both have weaknesses. Neither, by itself, is an appropriate measure. But both have elements which could be combined in a new measure. Both pose many questions and raise issues which cannot be addressed in the limited time now available. I will focus on its fundamental design.

In order to comply with international law regarding decolonization, the measure ought to, first and foremost, declare the unequivocal intention of Congress to dispose of the territory, and to divest itself of the powers it has exercised over Puerto Rico under the territory clause of the Constitution. Once Congress complies with its international and constitutional obligation, the process of self-determination should begin with a free expression of the people of the will to change the present territorial relation and to enter into a future relation whereby Puerto Rico

shall not be subject to congressional power under the territory clause. In order to promote subsequent actions towards self-determination in Puerto Rico, Congress ought to recognize the inherent constituent power of the people of Puerto Rico to call, through its elected government, for the election of a constitutional assembly, as depositary of the sovereignty of the people, or any other decolonizing mechanism, to propose, negotiate and agree to future relations with the United States that will not be colonial or territorial in nature. Finally, the process of self-determination would culminate with the ratification by the people of the terms of the new relation.

How do H.R. 900 and H.R. 1230 attempt to comply with these proposed standards?

H.R. 900 proposes a series of plebiscites to solve the status issue. In a first plebiscite, the people would select between the existing territorial status and an alternative "viable permanent nonterritorial status." The bill would allow for a valid exercise of self determination if the people were to claim a change in status on the first round of voting. Should a majority reject the existing territorial status, there would be a clear exercise of self determination which would require a solution with all deliberate speed.

There are some problems with the first vote. The language of the ballot defines the alternative as "a constitutionally viable permanent nonterritorial status." The concept of "consitutional viability is ambiguous. It would invite subsequent controversies regarding what is viable or not, when the different political groups would begin specifying their status options for the second round of voting. In addition, the second plebiscite would require that the voter select between statehood and "sovereign nation," grouping here both independence and free association, two distinct options. Free association is by definition not permanent, since any party to the relation may opt out at any time.

The second round of voting presents another pitfall. A rejection of the the current status and a demand for change in the first vote would automatically prompt a second plebiscite in which the voter would choose between statehood and another nonterritorial option. Experience shows that a significant number of members of Congress would not support H.R. 900 because it would contain a self-executing provision that could result in a majority demand for statehood. No one here will come out and say it explicitly, but you know it is true; and that provision might hinder approval of the bill as it stands and stagnate the process. Nothing should stand in the way of congressional action at this time.

On the other hand, if the majority were to select the existing territorial status in the first vote, then another plebiscite would be held eight years later. It could be interpreted that Congress would have implicitly decided to renounce to its territorial powers at some future indefinite date when the people so decide. But there is no explicit declaration to that effect, and furthermore, the bill contemplates the possibility of consent to territoriality for periods of eight years, an excessively long period of territorial government, which contradicts the true intention of the measure which is to end the territorial regime.

The greatest problem with H.R. 900 lies in its absolute silence regarding the inherent constituent power of the people to determine their future. On the contrary, the bill would require that the permanent nonterritorial status be designed and submitted to Congress by the President's Task Force on Puerto Rico's Status, in mere consultation with the Governor, the Resident Commissioner, the President of the Senate and the Speaker of the House of Representatives of Puerto Rico. That is a flagrant denial of self-determination and a usurpation of the constituent power that belongs to the people. Those four officials will not have been endowed, nor can they

be endowed by this Congress, with constituent power, nor can they validly represent the people in this matter.

H.R. 1230, on the other hand, also has some positive and negative aspects. First, on the positive side, the bill is premised on an implicit policy of disposition of the territory, that is, a congressional objective to renounce to its territorial powers. The definition of a "self-determination option" would recognize the principle of sovereignty of the people of Puerto Rico and limit options for the future to alternatives not subject to the plenary powers of the territory clause of the Constitution. Some may argue, as they have in the past, that since 1952 this Congress does not exercise **plenary** powers. Therefore, they would probably argue, if the current language is enacted, that the existing relationship could be a self-determination option. That, of course, is contrary first to the understanding of probably all 535 members of Congress regarding the plenary nature of **all** federal powers, as decided almost two hundred years ago in *McCulloch v. Maryland*, 17 U.S. 316 (1819). In any case, the ambiguity can be avoided by changing the phrase "plenary powers" in Section 2 (2) of the bill, page 2, line 12, to the words "any powers."

Section 3 of the bill would recognize "the inherent authority of the people of Puerto Rico to call a constitutional convention … in accordance to legislation approved by the Commonwealth of Puerto Rico," which under Section 5 would remain in session until a definite self-determination proposal is finally adopted by the people in referendum and "enacted by federal law." There is a major flaw in Section 5. Only a territorial status option or an admission to statehood would culminate in a federal law. Relations under both independence and free association would culminate with the signature and ratification of a treaty. I would suggest that the language be modified as follows: "A constitutional convention … may remain in session

until all legal instruments needed for transition to a new nonterritorial relation shall have come into effect."

Despite its positive recognition of the inherent authority of the people, H.R. 1230 does little more. Section 4 contains a non-binding desideratum that whenever the constitutional assembly submits a self-determination proposal to Congress, that future Congress will enact a joint resolution to approve the terms of the proposal. That, of course, is wishful thinking at best, since one Congress may not bind a future Congress. In any event, requiring congressional approval to implement independence would be illegal under international law because once a people select independence, the colonial power may only accede to the demand and facilitate by law, not the decision itself, but the transition to the new status.

In conclusion, both H.R. 900 and H.R. 1230, as I have said before, have positive aspects and pitfalls. By facilitating that the people demand a profound change through a plebiscite, now or eventually, H.R. 900 clearly pursues a policy of disposing of the territory by congressional renunciation of the powers under the territory clause of the Constitution. On the other hand, H.R. 1230 would recognize the authority of the people of Puerto Rico to call for a constitutional convention as the procedural mechanism for the exercise of its right to self-determination.

What is of paramount importance at this point is that Congress act now, to set the process of self-determination and decolonization in motion. H.R. 900 is a step in that direction. In the first plebiscite the people could decide that the time has come to demand a change in the fundamental nature of the relationship. The ballot submitted to the voter should elicit a Yes or No answer to the following proposition:

> Puerto Rico should no longer be subject to the powers of Congress under the territory clause of the Constitution of the United States of America.

Congress has the legal and moral obligation to act. Unfortunately, disagreement among the different political sectors of Puerto Rican society has been used as an excuse for inaction in the past. The result has been congressional complicity during the one hundred and nine years of a colonial regime which demeans both the colonized and the colonizer. A radical transformation of the relationship is in order, now.

The time has come for Congress to finally find it in the best interest of the Unitd States to send a clear signal to the Supreme Court, to the Puerto Rican people and to the world to the effect that Justice John Marshall Harlan was right after all when he stated in his dissent in *Downes v. Bidwell*, one hundred and six years ago, that "the idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces … is wholly inconsistent with the spirit and genius as well as with the words of the Constitution."

Thank you.