

H.R. 1522, the Puerto Rico Statehood Admission Act

Executive Summary

The Department of Justice supports providing the people of Puerto Rico the opportunity to vote on whether to become a state of the Union, as H.R. 1522 would do. The Department's concerns with the bill relate only to the manner of execution. The Department's primary concerns are (1) providing for an orderly transition of the Financial Managements and Oversight Board for Puerto Rico that was established by the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), Pub. L. No. 114-187, 130 Stat. 549 (2016); and (2) addressing legal complications that would ensue from application of certain constitutional uniformity doctrines upon Puerto Rico's transition to a state. The Department stands ready to assist further in refining the legislation to address these and other concerns described in more detail below.

Section-by-Section Analysis

Section 1 (Short Title)

The stated purpose of H.R. 1522 is allow the Puerto Rican people to choose whether to become a state or remain a territory. The bill itself would not admit Puerto Rico as a state; rather, it would direct the President to issue a proclamation setting a date on which Puerto Rico will become a state if a majority of Puerto Rican voters chooses statehood in a territory-wide referendum. The Department would thus recommend that the title of the bill be the "Puerto Rico Statehood Determination Act," or simply the "Puerto Rico Statehood Act," so as not imply that admission of Puerto Rico as a state is a *fait accompli*.

Section 2 (Findings)

Subsection (4): It is unclear what section 2(4) means in saying that Puerto Rico, unlike Alaska and Hawaii, has not achieved statehood "due to anomalies emanating from the 1901 *Downes* ruling and its progeny." Although *Downes v. Bidwell*, 182 U.S. 244 (1901), held that Puerto Rico was an unincorporated territory—and therefore not "surely destined for statehood," *Boumedienne v. Bush*, 553 U.S. 753, 757 (2008)—it did not hold that Puerto Rico's current status as an unincorporated territory is immutable.

Subsection (13): As all of the current inhabited territories of the United States (the U.S. Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands, in addition to Puerto Rico) are also considered unincorporated, we recommend changing "unlike territories that are parts of the United States" to "unlike incorporated territories in the past."

Subsections (15)–(19): We note that the validity of the plebiscites identified in these findings is disputed. The Department of Justice has previously stated that the ballot propositions in the 2012 and 2017 plebiscites contained inaccuracies and were potentially misleading and that the premise of the 2020 plebiscite—that the people of Puerto Rico had conclusively rejected the current territorial status in 2012 and 2017—was one with which the Department disagreed. *See, e.g.,* Letter for Juan Ernesto Davila Rivera, Chairman, Puerto Rico State Elections Commission,

from Jeffrey A. Rosen, Deputy Attorney General, *Re: Request of Federal Funds for Puerto Rico Plebiscite* at 3 (July 29, 2020). Although the Department advised that all available status options were required to be included in the ballot for the 2017 plebiscite, we were not provided adequate time to review and approve the finalized ballot in time for the vote.*

Section 3 (Admission)

Section 3 provides:

Subject to the provisions of this Act, and upon issuance of the proclamation required by section 7(c), the Commonwealth of Puerto Rico is hereby declared to be a State of the United States of America, and as such shall be declared admitted into the Union on an equal footing with the other States in all respects.

The language of section 3 is in some tension with the language of section 7(c). According to section 3, Puerto Rico would become a state upon “issuance of the proclamation required by section 7(c).” Section 7(c), however, directs the President to issue a proclamation that declares the date (no more than twelve months after the Governor’s certification) on which Puerto Rico would become a state, in order to “facilitate a transition process.” Under section 7(c), therefore, Puerto Rico becomes a state upon the date specified in the proclamation, not upon the issuance of the proclamation. Section 10, providing for termination of all federal and territorial laws incompatible with a status of statehood for Puerto Rico under the Constitution, similarly is tied to “the date of statehood admission proclaimed by the President under section 7(c).” We presume that one of the purposes of this transition process is to give Congress time to adjust federal law to be consistent with Puerto Rico’s new status as a state (by, for instance, repealing tax and bankruptcy laws unique to Puerto Rico that might implicate the uniformity requirements of the Constitution, discussed further below). Declaring that Puerto Rico will become a state “upon issuance of the proclamation required by section 7(c)” will not afford time for these adjustments.

The Department therefore recommends that section 3 be revised as follows:

Subject to the provisions of this Act, and upon **the date declared by the President for admission of Puerto Rico as a State in issuance of** the proclamation required by section 7(c), the Commonwealth of Puerto Rico is hereby declared to be a State of the United States of America, and as such shall be ~~declared~~ admitted into the Union on an equal footing with the other States in all respects.

Section 4 (Physical Territory)

The Department has no concerns with this section.

* The Department has assumed a role in approving the ballots and voter education materials for the recent plebiscites upon Puerto Rico’s requests for disbursement of funding for a plebiscite under the Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5, 61 (2014).

Section 5 (Constitution)

Section 5 provides:

The constitution of the State of Puerto Rico shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. The constitution of the Commonwealth of Puerto Rico, as approved by Public Law 82-447 and subsequently amended, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed as the constitution of said State.

This provision seems to leave open the possibility of further amendments to the Constitution of Puerto Rico that would not have been known to Congress or the President at the time this bill is enacted into law. The Department recommends that section 5 be revised as follows:

The constitution of the State of Puerto Rico shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. The constitution of the Commonwealth of Puerto Rico, as approved by Public Law 82-447 and subsequently amended **as of the date of enactment of this statute**, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed as the constitution of said State.

Section 6 (Certification by President)

Section 6 provides:

Upon enactment of this Act, the President of the United States shall certify such fact to the Governor of Puerto Rico. Thereupon the Governor shall, within 30 days after receipt of the official notification of such approval, issue a proclamation for the election of Senators and Representatives in Congress.

This language could be read to imply that Puerto Rico will be entitled to Senators and Representatives in Congress as soon as the bill is enacted, instead of on the date set by the President in section 7(c) for Puerto Rico's admission as a state. To avoid that implication, the Department recommends that section 6 be revised as follows:

Upon enactment of this Act, the President of the United States shall certify such fact to the Governor of Puerto Rico. Thereupon the Governor shall, within 30 days after receipt of the official notification of such approval, issue a proclamation for the election of Senators and Representatives **to serve** in Congress **upon admission of Puerto Rico as a State**.

Section 7 (Ratification Vote)

Subsection (a) (Ratification of Proposition): Subsection (a) prescribes the method by which the Puerto Rican people may vote to approve making Puerto Rico into a state. It requires a ballot with the following question:

Shall Puerto Rico immediately be admitted into the Union as a State, in accordance with terms prescribed in the Act of Congress approved [date of approval of this Act]? Yes ___ No ___.

Because this language incorporates by reference the terms of this bill, including the territorial bounds of the new state (section 4) and other legal effects (sections 9 and 10), the Department believes it is constitutionally adequate to provide the voters of Puerto Rico with clear notice of what they would be approving. There is some tension, however, between voting that Puerto Rico be “immediately” admitted as a state and voting that Puerto Rico be admitted “in accordance with terms prescribed in the Act of Congress,” since that Act provides for the President to declare a later date on which Puerto Rico would be admitted. We recommend deleting the word “immediately.”

It should also be noted that the prescribed ballots for Alaska and Hawaii statehood included some additional detail about the legal effects of statehood that might have prompted voters to inspect the acts of Congress more closely. *See* Hawaii Statehood Act, Pub. L. No. 86-3, § 7(b), 73 Stat. 4, 7 (1959) (“(2) The boundaries of the State of Hawaii shall be as prescribed in the Act of Congress approved [on date of enactment], and all claims of this State to any areas of land or sea outside the boundaries so prescribed are hereby irrevocably relinquished to the United States. (3) All provisions of the Act of Congress approved [on date of enactment] reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii[,] are consented to fully by said State and its people.”); Alaska Statehood Act, Pub. L. No. 85-508, § 8(b), 72 Stat. 339, 343 (1958) (“(2) The boundaries of the State of Alaska shall be as prescribed in the Act of Congress approved [on date of enactment] and all claims of this State to any areas of land or sea outside the boundaries so prescribed are hereby irrevocably relinquished to the United States. (3) All provisions of the Act of Congress approved [on date of enactment] reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people.”). Congress might consider instructing Puerto Rico to include similar informative language on the ballot, which might include language making clear the effect of statehood on any federal laws found to be at odds with constitutional uniformity requirements, discussed further below.

Subsection (b) (Certified Results): Subsection (b) prescribes a process by which the Governor of Puerto Rico would certify to the President and to Congress the results of the voter referendum in subsection (a). The Department does not recommend changes to this provision.

Subsection (c) (Presidential Proclamation): Subsection (c) would direct the President, upon receiving the Governor’s certification in subsection (b), to issue a proclamation “declaring

. . . the date Puerto Rico is admitted as a State of the Union on an equal footing with all other States.” In this proclamation, the President would certify that the people of Puerto Rico have voted in favor of statehood (based on a certification by the Governor of Puerto Rico to that fact) and would designate a date on which Puerto Rico would become a state. The President could declare that Puerto Rico is to be admitted as a state as much as twelve months after the certification of results by the Governor, “in order to facilitate a transition process.” Confusingly, however, the final sentence of subsection (c) provides: “Upon issuance of the proclamation by the President, Puerto Rico shall be deemed admitted into the Union as a State.” This contradiction is similar to the one noted above in section 3. Assuming that Congress intends for the transition process to be effective, the Department recommends deleting the final sentence in section 7(c).

Section 8 (Election of Officers)

Section 8 provides that, upon issuing the proclamation required by section 6, the Governor of Puerto Rico shall institute a process for the voters of Puerto Rico to elect Senators and Representatives. “Puerto Rico shall be entitled to the same number of Representatives as the State whose most recent Census population was closest to, but less than, that of Puerto Rico,” H.R. 1522, § 8(2), and that number of Representatives would be added temporarily to the current total of 435 Representatives in the House, until the next apportionment, at which time the number of Representatives in the House would revert to 435. “Thereafter, the State of Puerto Rico shall be entitled to such number of Representatives as provided for by applicable law based on the next reapportionment.” *Id.*

According to the Census Bureau’s recently issued population counts and apportionments based on the 2020 Census, Puerto Rico’s population in 2020 was 3,285,874. Utah was the State with the closest population that was less than Puerto Rico’s, with a population of 3,275,252 and four Representatives. As a result, under section 8 Puerto Rico would be temporarily entitled to four Representatives and the House would increase temporarily to 439 members. This arrangement would last until the next apportionment following the next decennial census, likely in 2031.

The temporary designation of Representatives for Puerto Rico based on its population count in the most recent census would comply with the constitutional requirements for apportionment of Representatives. Other than stating that “Representatives shall be apportioned among the several States *according to their respective numbers*, counting the whole number of persons in each State excluding Indians not taxed,” U.S. Const. amend. XIV, § 2 (Apportionment Clause) (emphasis added), the Constitution does not prescribe a precise formula by which population is to be used in determining how many Representatives each state will receive. Exact apportionment “according to [the states’] respective numbers” is not possible, since it would yield a non-whole number of Representatives for each state, and the Apportionment Clause necessarily accords Congress some flexibility in devising a formula to distribute Representatives among the states. Congress has used a variety of methods over time to determine the number of Representatives for each state, settling on the current method of equal proportions in 1941. See Royce Crocker, Cong. Research Serv., *The U.S. House of Representatives Apportionment Formula in Theory and Practice*, No. [R41357](#), at 1–2 (Aug. 4, 2013); Pub. L. No. 77-291, § 1, 55

Stat. 761, 762 (1941), *codified as amended at* 2 U.S.C. § 2a. Although the apportionment of Representatives to Puerto Rico equivalent to the number apportioned to the state with the closest, but lower, population than Puerto Rico deviates slightly from simple application of the equal proportions approach, it appears well within the range of discretion accorded to Congress by the Apportionment Clause and is consistent with historical practice when a territory is newly admitted as a state. For example, Hawaii received one Representative following its admission to statehood, and its apportionment then rose to two Representatives under the equal proportions approach after the 1960 census. *See* Cong. Research Serv., *Puerto Rican Statehood: Effects on House Apportionment*, No. R41113, at 2, 5 (Mar. 16, 2011); Hawaii Statehood Act, Pub. L. No. 86-3, § 8, 73 Stat. 4, 8 (1959).

In addition, temporarily increasing the number of Representatives to 439 would come nowhere close to contravening the constitutional requirement that “[t]he number of Representatives shall not exceed one for every Thirty Thousand.” U.S. Const. art. I, § 2, cl. 3. Here, too, this approach accords with historical practice. With the admission of Alaska and Hawaii, each of which received one Representative, the House of Representatives increased temporarily from 435 to 437 members until the next apportionment following the 1960 census. At that time, the House reverted to 435 members and the newly admitted states received Representatives along with the other 48 states in accordance with the method of equal proportions.

Section 9 (Continuity of Laws, Government, and Obligations)

Subsection (1) (Continuity of Laws): Subsection (1) would provide that laws both of the United States and of Puerto Rico shall remain in effect following Puerto Rico’s admission as a state, if they are “not in conflict with this Act.” Section 10, discussed next, would provide for the repeal of any law “incompatible with the political and legal status of statehood under the Constitution.” To make these provisions parallel, the Department recommends that subsection (1) be modified to provide that the laws of the United States and of Puerto Rico shall remain in effect if they are “not in conflict with this Act *or with the Constitution.*”

The Department additionally recommends that Congress consider providing a more tailored solution for continuity in the operations of the Financial Managements and Oversight Board for Puerto Rico (“Oversight Board”). The Oversight Board was established by the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”), Pub. L. No. 114-187, § 101, 130 Stat. 549, 553 (2016), *codified at* 48 U.S.C. § 2121, to approve plans for restructuring Puerto Rico’s debt as well as Puerto Rico’s budget and fiscal plans, *id.* §§ 201–212, *codified at* 48 U.S.C. §§ 2141–2152. PROMESA created the Oversight Board “as an entity within the territorial government for which it is established,” pursuant to Congress’s authority under the Territory Clause, Article IV, Section 3. Pub. L. No. 114-187, § 101(b), (c). The Supreme Court recently held that the members of the Oversight Board were local or territorial officers because they have “primarily local duties.” *Fin. Oversight & Management Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1663 (2020).

Subsection (2) (Continuity of Government): Subsection (2) would provide that “individuals holding legislative, executive, and judicial offices of Puerto Rico shall continue to

discharge the duties of their respective offices when Puerto Rico becomes a State.” As the Oversight Board is statutorily denominated part of the territorial government, and the Board members are territorial officers, the Oversight Board would appear to become part of the new state government if Puerto Rico becomes a state. This would accord with historical practice, although the statehood admission acts for Alaska and Hawaii more clearly provided that, upon admission as a state, “officers not required to be elected . . . shall be selected or continued in office as provided by the constitution and laws of said State” and would “exercise all the functions pertaining to their offices” in, under, or by the authority of the government of said State. Alaska Statehood Act, Pub. L. No. 85-508, § 8(c), 72 Stat. 339, 344 (1958); Hawaii Statehood Act, Pub. L. No. 86-3, § 7(c), 73 Stat. 4, 8 (1959).

One complication, however, is that PROMESA provides that the seven members of the Oversight Board will be appointed by the President and sets out an elaborate structure whereby the President can select from congressionally provided lists, thereby avoiding the need for Senate confirmation, or can appoint “off-list” in which case Senate advice and consent is required. 48 U.S.C. § 2121(e)(2). It is unclear whether or how this appointment structure would transfer over to the state level upon Puerto Rico’s becoming a state. Questions about the Oversight Board’s composition might undercut its capacity to operate.

The Department thus recommends that Congress expressly provide in H.R. 1522, or in separate legislation enacted during the transition period effected by the President’s proclamation of a date for admission of Puerto Rico, for an orderly transition of the Oversight Board into an entity of the new State of Puerto Rico. Alternatively, of course, Congress may decide that the Oversight Board should terminate operations if Puerto Rico becomes a state, in which case the Department would also recommend express legislation to that effect.

Section 10 (Repeals)

Section 10 provides that “[a]ll Federal . . . laws, rules, and regulations, or parts of Federal . . . laws, rules, and regulations, applicable to Puerto Rico that are incompatible with the political and legal status of statehood under the Constitution and the provisions of this Act are repealed and terminated as of the date of statehood admission proclaimed by the President under section 7(c) of this Act.” This abrupt transition oversimplifies what it will take to admit Puerto Rico on an equal footing with other states. Some additional legislation will likely be required to address instances where federal law regarding Puerto Rico is not compatible “with the political and legal status of statehood.”

Under current federal tax and bankruptcy law, for example, Puerto Rico is treated differently than states. *See, e.g.*, 26 U.S.C. § 933 (providing tax credit to “a bona fide resident of Puerto Rico” for “income derived from sources within Puerto Rico”); *id.* § 7653(b) (“Articles, goods, wares, or merchandise going into Puerto Rico, the Virgin Islands, Guam, and American Samoa from the United States shall be exempted from the payment of any tax imposed by the internal revenue laws of the United States.”); PROMESA, Pub. L. No. 114-187, 130 Stat. 549 (2016), *codified at* 48 U.S.C. ch. 20 (providing special process for restructuring the debt of Puerto Rico). The Constitution meanwhile requires that all “Duties, Imposts, and Excises shall be uniform throughout the United States,” U.S. Const. art. I, § 8, cl. 1, and authorizes Congress

to make “uniform Laws on the subject of Bankruptcies throughout the United States,” *id.* cl. 4; *see also id.* § 9, cl. 6 (“No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay Duties to another.”). These uniformity requirements have not applied to Puerto Rico given its status as an unincorporated territory, *Downes v. Bidwell*, 182 U.S. 244, 282–84, 287 (1901); *id.* at 291, 339–40 (White, J., concurring, joined by Shiras and McKenna, JJ.), but would become applicable upon Puerto Rico’s becoming a state.

Presumably, one reason why the Act allows up to a year between a vote by Puerto Rico in favor of statehood and Puerto Rico’s admission as a state is to provide a window within which Congress can address this conflict between current law and uniformity requirements, as well as any other issues implicated by Puerto Rico’s transition to statehood. It is possible, however, that Puerto Rico would become an incorporated territory, and thus fully subject to the Constitution and the uniformity requirements of Article I, even before the date the President designates for Puerto Rico to be admitted as a state. Although the case law on when a territory is deemed to be incorporated is not “altogether harmonious,” *Downes*, 182 U.S. at 258, one formulation the Supreme Court has frequently used is that an incorporated territory is one that is “surely destined for statehood.” *Boumediene*, 553 U.S. at 757; *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (an “unincorporated territory” is one “not clearly destined for statehood”). Under H.R. 1522, Puerto Rico would appear to be “surely destined for statehood” when the President of the State Elections Commission for Puerto Rico certifies under section 7(b) that a majority of Puerto Rican voters have cast ballots in favor of statehood. At that point, section 7(c) requires the President to proclaim the date on which Puerto Rico would succeed to statehood.

Attorney General Thornburgh took a similar view in 1991, regarding a bill that would have authorized a referendum on the legal status of Puerto Rico accompanied by a non-binding “commitment by Congress to implement the status receiving a majority.” S. 244, § 101(e)(2). The bill contemplated that the implementing legislation would include a five-year transition period to phase out the special tax treatments for Puerto Rico that would have come into conflict with the Uniformity Clause. Attorney General Thornburgh testified that Puerto Rico “would become subject to the requirements of the [U]niformity [C]lause as soon as Congress passe[d] implementing legislation to make Puerto Rico a State,” because at that point in time it would have to be considered “destined for statehood.” *Political Status of Puerto Rico: Hearings on S. 244 Before the S. Comm. on Energy and Natural Resources*, 102d Cong. at 189–90 (Feb. 7, 1991) (“1991 Hearings”).

We nevertheless believe that Congress should be able to enact legislation providing for a delayed or gradual application of the Constitution’s uniformity requirements, including the potential delay of up to a year before these requirements apply envisioned by the combination of sections 7(c) and 10. Some case law suggests that incorporation rests on the intent of Congress as expressed in statutes (or on the intent of the President and Senate, as expressed in treaties), and not just on an independent judicial assessment of the likelihood that a particular territory will eventually become a state. *See Balzac v. People of Porto Rico*, 258 U.S. 298, 309 (1922) (“[I]n the absence of other and countervailing evidence, a law of Congress or a provision in a treaty acquiring territory, declaring an intention to confer political and civil rights on the inhabitants of

the new lands as American citizens, may be properly interpreted to mean an incorporation of it into the Union[.]”); *see also Rassmussen v. United States*, 197 U.S. 516, 523 (1905) (“That Congress, shortly following the adoption of the treaty with Russia, clearly contemplated the incorporation of Alaska into the United States as a part thereof, we think plainly results from the act[s] . . . concerning internal revenue taxation, . . . extending the laws of the United States relating to customs, commerce and navigation over Alaska and establishing a collection district therein.”) In *Balzac*, the Court reasoned that, “[h]ad Congress intended to take the important step of changing the treaty status of Porto Rico by incorporating it into the Union, it is reasonable to suppose that it would have done so by the plain declaration, and would not have left it to mere inference.” 258 U.S. at 306; *see also id.* (“[I]ncorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view.”). The Supreme Court has also highlighted the role of “practical considerations” in determining which constitutional provisions apply to a given territory, noting “a common thread” in the relevant case law: “the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.” *Boumediene*, 553 U.S. at 757–64.

H.R. 1522 does not contain an express declaration of intent to make Puerto Rico an “incorporated” territory immediately upon certification of a pro-statehood vote. To the contrary, H.R. 1522 seems designed to postpone incorporation until the effective date in the President’s declaration, at which time Puerto Rico would skip past the intermediate step of being considered an incorporated territory and be admitted directly into the Union as a state. Moreover, the immediate disruption that would result were Puerto Rico to quickly become subject to the Constitution’s uniformity provisions should count strongly against such a result. To reduce the possibility of immediate incorporation even further, however, the Department recommends that Congress state expressly that Puerto Rico shall remain unincorporated until its admission as a state under section 3.

Even if the uniformity requirements of Article I were to become immediately applicable upon certification of a pro-statehood vote, we think that legislation providing for a gradual transition to tax and bankruptcy uniformity for Puerto Rico would be constitutional. In *United States v. Ptasynski*, 462 U.S. 74 (1983), the Court upheld a tax exemption for crude oil produced in a geographically defined area that encompassed Alaska and “certain offshore territorial waters” that were “beyond the limits of any State” against a uniformity challenge. *Id.* at 78. Previously, the Court had made clear that the Uniformity Clause “does not require Congress to devise a tax that falls equally or proportionately on each State” and thus had confirmed Congress’s authority to draw “distinctions between similar classes” in “defining the subject of a tax,” as long as the tax applied evenly “wherever the classification is found.” *Id.* at 82. The Court appeared to regard the geographic classification in *Ptasynski* as a logical extension of this principle, in view of credible evidence amassed by Congress of “climatic and geographic conditions” unique to the covered geographic region. *Id.* at 78; *see id.* at 78–79 & nn.6–7 (discussing evidence).

Although the tax exemptions for Puerto Rico in 26 U.S.C. §§ 933 and 7653 are arguably distinct in being expressly “drawn on state political lines,” *id.* at 78, the reasoning of *Ptasynski* suggests that a geographic classification based on state boundaries does not violate the Uniformity Clause if Congress can demonstrate that the classification arises from genuine

differences in economic circumstance that fall incidentally along state lines. In the case of Puerto Rico, the objective of maintaining the tax preferences for a short transition period would be to ameliorate the economic dislocation that would result from a sudden loss of pre-existing tax preferences accompanying the switch from commonwealth status to statehood. Attorney General Thornburgh testified to similar effect in 1991, stating that “the uniformity clause permits tax transition provisions, provided they are narrowly tailored, to prevent specific and identified problems of economic dislocation that Congress concludes would otherwise result from the transition from a non-incorporated territorial status to either an incorporated territorial or State status.” 1991 Hearings at 190; *see also Puerto Rico’s Political Status: Hearings on S. 712 Before the S. Comm. on Finance*, 101st Cong. at 7 (1989) (“1989 Hearings”) (testimony of Shirley D. Peterson, Assistant Attorney General for the Tax Division of the Department, that the Uniformity Clause did not “disable Congress from fashioning reasonable and necessary transitional measures”).

To the best of our knowledge, no court has addressed the extent to which Congress may provide for transitional disuniformity in the tax treatment of an incoming state, so any attempt to suggest an outer limit on how long the transition period could last would be speculative at best. In 1989, the Department testified that a three-year transition period to phase out special tax treatment was permissible, *see* 1989 Hearings at 7 (testimony of Peterson); in 1991, the Department intimated that five years might be too much, *see* 1991 Hearings at 189 (testimony of Thornburgh). Notably, at least one statute, retained from the period before Alaska and Hawaii were admitted as states, continues to single out portions of the routes to and from those states for a reduced tax on air transportation. *See* 26 U.S.C. § 4262(b)(2), (c)(1); 26 C.F.R. § 49.4262–2(b). It does not appear that this differential treatment has been challenged constitutionally, and this treatment may be justified by a uniform principle of reducing the incidence of the tax on routes of longer distances. By similar logic, Congress might be able to cite economic circumstances unique to Puerto Rico—perhaps, for example, patterns of investment undertaken in reliance on Puerto Rico’s disuniform tax treatment—as a basis for a continuation or longer phase-out of tax statutes that treat Puerto Rico differently.

We believe a transition period should also be permissible for the special bankruptcy provisions for Puerto Rico in PROMESA. In *Railway Labor Executives Ass’n v. Gibbons*, 455 U.S. 457 (1982) (“*Rock Island*”), the Court struck down on uniformity grounds a federal law designed solely for the bankruptcy of the Rock Island Railroad, reasoning that “[t]o survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors,” and “a bankruptcy law . . . confined as it is to the affairs of one named debtor can hardly be considered uniform.” *Id.* at 473. Yet the Court also stated, similar to *Ptasyski*, that the uniformity requirement “does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems.” *Id.* at 469 (quoting *Regional Railroad Reorganization Act Cases*, 419 U.S. 102, 159 (1974)). Arguably, legislation limited to Puerto Rico should be viewed not as legislation directed at Puerto Rico as a specific debtor, but at Puerto Rico as a specific region for which it is necessary to resolve “geographically isolated problems.” In advising on the constitutionality of PROMESA before it was enacted, we had considerable doubts that this argument would prevail. But we believe that such an argument would be more likely to succeed

as a justification for disuniformity during a transition period, given that Puerto Rico’s change in status to a state is a factor distinct from its status as a debtor.

More broadly, we think a good argument can be made that PROMESA would not violate the uniformity requirements of the Bankruptcy Clause at all were Puerto Rico to become a state. PROMESA was enacted under the Territories Clause and its bankruptcy provisions would attach to any relevant debt *before* Puerto Rico becomes a state and uniformity requirements applied. Congress could also determine that it is “necessary and proper for carrying into Execution” its Article IV powers to fashion a broader solution for territories entering the Union, thereby avoiding the pitfall of “a bankruptcy law . . . confined as it is to the affairs of one named debtor.” *Rock Island*, 455 U.S. at 473. “As stated by the Supreme Court in the *Railroad Rail Reorganization Cases*,” the Bankruptcy Clause ““was not intended to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for a remedy only in certain regions.”” 1989 Hearings at 8 (quoting 419 U.S. at 159) (testimony of Peterson).

In short, regardless of whether Puerto Rico becomes subject to the uniformity requirements in Article I at the time a pro-statehood vote is certified or on the date set by the President for admission to statehood, we think there will be opportunity for Congress to enact further legislation providing for a phase-out of those tax and bankruptcy laws that single out Puerto Rico for special treatment. We recommend, however, that Congress include findings in any such bill, ideally supported by expert testimony in public hearings, explaining why a phase-out period is necessary to avoid specific economic problems unique to Puerto Rico.

Section 11 (Severability)

The Department has no concerns with this section.