On the nature of commonwealth VI

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With this column, I end the series addressing the nature of commonwealth: sovereign or territorial? Going back to the Articles of Confederation and reviewing the constitutional history of the U.S., I have presented the principles that sustain the sovereign nature of the commonwealth within the constitutional system of the U.S. This sovereignty is akin to the sovereignty of the states of the union and different in scope from sovereignty under the law of nations.

The main objection that has been raised by some to this conclusion is that the U.S. Congress may not abdicate its powers granted by the Constitution. Since Congress had plenary powers over Puerto Rico, as recognized by the Supreme Court in the Insular Cases, it is alleged that Puerto Rico isn't sovereign—that it is a territory—because Congress can't give up its powers.

This argument is mistaken because the doctrine that Congress may not abdicate its powers doesn't apply to the territorial power.

In U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), the Supreme Court said fundamental differences exist between the powers of the federal government with respect to external affairs and those with respect to domestic affairs. The court pointed out, "The investment of the federal government with the powers of external sovereignty didn't depend on the affirmative grants of the Constitution." In Cincinnati Soap Co. v. U.S., 301 U.S. 304, answering a charge of illegal delegation of congressional power to the Philippines when it was a commonwealth still under U.S. sovereignty, the court held: "In dealing with the territories, possessions, and dependencies of the United States, this nation has all the powers of other sovereign nations, and Congress, in legislating, is not subject to the same restrictions that are imposed in respect of laws for the United States considered as a political body of states in union."

The Supreme Court has consistently affirmed the inherent sovereign powers of the federal government with respect to territorial and external affairs. This doctrine is maintained because it bears no harmful impact upon the federal system and is absolutely necessary for the conduct of international relations. The court can be generous with the power it recognizes in the federal government in this respect because it doesn't involve a corresponding diminution of the powers of the states.

The rule that prevents congressional abdication of power has no application to the territorial power. Basically, it is a doctrine to maintain the constitutional allocation of powers between the branches of the federal government and between the federal and state governments. Within that framework, its application is understandable and necessary. The application of this doctrine to the external powers of the

nation, however, is devoid of sense and reason because the constitutional plan isn't altered by the relationships that may exist between the nation and nonstate political subdivisions.

The philosophy of the Supreme Court has consistently been to free the hands of the federal government with respect to external affairs and to recognize power in that government to protect the rights and fulfill the duties of the U.S. as a sovereign nation among other foreign nations. One such duty is to assist nonself-governing territories to self-government as expeditiously as possible. By fostering the creation of the commonwealth, the U.S. believes it has fulfilled that duty. Is there any reason for the doctrine against abdication of congressional power to subvert the discharge of that obligation? To apply the doctrine in this situation would unduly hamstring the federal government in the sensitive area of foreign affairs for no valid reason at all. This is a clear example of why the doctrine against congressional abdication of power must be kept in its proper place and limited to internal situations where its application becomes meaningful.

And more so, this doctrine can't stand in the way of the basic tenet of constitutional interpretation as expressed in U.S. v. Classic, 313 U.S. 299 (1941): "The language of the federal Constitution is to be read not as a legislative code subject to continuous revision with the changing course of events, but rather as a revelation of the great purposes that were intended to be achieved by it as a continuing instrument of government."

The greatest and most noble purposes of the Constitution are served by the creative relationship called commonwealth, which puts an end to colonialism, ensures stability, fosters international goodwill, provides for the common defense, promotes the welfare of all concerned, develops democratic institutions, and provides for liberty and freedom.

The direct precedent for the Puerto Rican status is found in the status of the Commonwealth of the Philippines during the 10-year period that followed the enactment of the Tydings-McDuffie Independence Law of 1934. During that preparatory period, the Philippines enjoyed a commonwealth status ushered in by the making of its own constitution while it remained under American sovereignty. Though the Philippines Commonwealth possessed some powers that Puerto Rico doesn't, basically, for that 10-year period, it was in the same constitutional position that Puerto Rico is now. That is, it was a body politic organized by a constitution created by the people and within the sphere of American sovereignty.

The question of whether this fact brought about a change in the status was squarely raised before the U.S. Supreme Court in the case of Cincinnati Soap Co. v. U.S. No less a conservative than Justice Sutherland, in the opinion for a unanimous court, held: "Undoubtedly, these acts have brought a profound change in the status; but the sovereignty of the United States hasn't been, and for a long time may not be, finally withdrawn.... Thus, while the power of the United States has been modified, it hasn't been abolished."

The difference between the Commonwealth of the Philippines and the Commonwealth of Puerto Rico is one of degree only. That is, the Philippines had powers that Puerto Rico doesn't. The extent of the powers

isn't the important latter. The vital question is that the court recognizes that commonwealth status is constitutional and brings about a modification of congressional power over the former territory.

Under the commonwealth relationship, Puerto Rico might well acquire, some day, the limited power of international participation that the Philippines had when it was a commonwealth, or even more. Presently, the powers entrusted to the commonwealth are similar to those of a state of the union. But, in contrast with the case of the states, there is no constitutional limitation on the powers that the federal government may surrender in favor of the commonwealth. Thus, liberty and freedom under self-government are capable of growth.

In this growth lies the development of commonwealth, which throughout the years the people of Puerto Rico have requested from Congress through plebiscites and statehooders and *independentistas* have opposed as unconstitutional, since they have been unable to oppose it with a majority of the votes in those democratic exercises.

The platform of the New Progressive Party (NPP) for the November election frames the alternatives to be requested from Congress in the all-too-familiar terms of political advantage for that party. Only noncolonial alternatives may be presented as status solutions to the people. According to the NPP, a noncolonial commonwealth is unconstitutional. In order to be included on the plebiscite ballot, the alternatives must be constitutional. And who decides whether they are constitutional? Not the Supreme Court of the U.S., but the members of Congress who, like Don Young, will be introducing the legislation to Congress to authorize the plebiscite on behalf of the would-be New Progressive Party government.

This is equivalent to stripping the majority of the people of Puerto Rico of their right to self-determination. Nothing less is involved in the November election.