On the nature of commonwealth II

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The nature of the commonwealth relationship between Puerto Rico and the U.S. is a constitutional question and, as such, its final arbiter is the Supreme Court of the U.S. Since the commonwealth was established, the lower courts, and the Supreme Court itself, have decided a good number of cases touching on the matter, but the essential question regarding the sovereign or colonial nature of commonwealth hasn't been decided by the Supreme Court.

It may never be decided, because to put in question the essential nature of commonwealth would require an act on the part of Congress that is politically inconceivable: Congress would have to abrogate the powers granted in our constitution to the government of Puerto Rico by the people of Puerto Rico. It is a safe assumption this will never happen; so, the question of whether Congress has plenary powers over Puerto Rico—not powers, which nobody disputes, but plenary, which means colonial powers—will remain a matter of theoretical or political discussion. I intend to contribute to this discussion through this series of columns.

In my first column in this series, I traced the legislative history of the territorial power from the Articles of Confederation, under which the union was originally governed, to the present U.S. Constitution. Turning now to the states, it will be noted the Constitution doesn't define what they are. The instrument, of course, was concerned mainly with allocating power and establishing a federal government. State governments were already in existence, and though their powers were sharply curtailed, they remained sovereign, political communities occupying well-defined sections of the North American continent. The most important factor to note about the states at this point is that they didn't owe their existence to the Constitution. The states were created by their own peoples, whose consent embodied in their own particular constitutions imparted the status of the states. The Constitution bound these entities into a federal union.

On the other hand, territory is a word that draws its meaning from a particular act, an exercise of power by Congress. That is, territory, when it signifies a political status, is but a conceptualization of the result of the exercise of the power to erect temporary governments upon land belonging to the U.S.

There has been some discussion on the source of this power, though its existence has never been in dispute. Three sources, not mutually exclusive, have been said to grant it: (1) the territorial clause in Article IV, Section 3 of the Constitution; (2) the implied power to govern derived from the right to acquire territory (corollary of this would be the right derived from the treaty of cession); and (3) the inherent power as sovereign nation.

That the Supreme Court has pointed to these three sources for the territorial power is of great importance for an analysis of the matter. The problems of the West at the time the Constitution was framed and their paramount importance determined to a considerable extent the express granting of the territorial power. The Founding Fathers weren't known for a disposition to make unrestrained grants of authority. Only where the situation strictly demanded it, as in the Western case, can we hold them to have entertained such an intent.

As noted, the power of the Articles of Confederation over the Western territory was a subject of dispute. In Federalist No. 38, James Madison pointed out that the Northwest Ordinances were passed "without the least color of constitutional authority." Further, in No. 43 he said Article IV, Section 3 was directed to supply the lack of power of the Confederate Congress in this respect. After the Constitution went into effect, the First Congress repassed the Northwest Ordinance.

In view of the nature of the union that the framers were creating, the necessity of expressly granting the territorial power to the federal government may be seriously questioned. The U.S. wasn't to be the loose, unworkable confederation that had existed previously. Under the Articles of Confederation, wherein the states retained their sovereignty and independence, a reasonable doubt could be entertained about the power of Congress to govern the Western territory. But under the Constitution, a federal nation was born. The states unrestrictedly abdicated all power over foreign affairs. The main of internal political power was formally placed in the federal government.

In view of this, and of the corresponding restriction of the power of the states under the constitutional plan, the express grant of the territorial power under Article IV, Section 3 may be deemed superfluous. Its inclusion may be explained, however, by the desire to settle once and for all the power of Congress in this respect.

That the Supreme Court since early times has recognized that Article IV, Section 3 isn't the only source of the power bears out this point. Other constitutional powers aren't of this nature. If they hadn't been granted to Congress, they would have remained with the states according to the 10th Amendment. No legal gymnastics would have availed to transfer them to Congress. As a member nation of the international community, the U.S., represented by the federal government, must have the power to govern territory. Otherwise, it would be severely limited in its international relations and transactions. Thus the reason why this territorial power must be considered inherent in the federal government, different from the delegated powers because Congress may abdicate it totally or partially with regards to a particular territory and exercisable in ways consistent with the international obligations of the U.S., such as providing for self-determination for Puerto Rico.

Not once in history has the Supreme Court denied the U.S. had power to acquire and govern new territory. When that power is exercised by instituting a local government, the resulting entity is termed a territory. This word represents the combined idea of the people, land, and government. A territory is then a political subdivision of the outlying dominion of the U.S.

Characteristic of the political subdivision is that, contrary to the states, its powers are conferred by Congress, not by the people. Therefore, the government is dependent upon Congress, to whom it owes its existence. The people in the territory don't constitute a sovereign power, for they are under federal sovereignty and tutelage. They haven't formed a state.

The power of Congress over this creature it has brought into being is plenary, or absolute. Congress can repeal the organic act that created the territory and leave no government at all. It can legislate directly for the people in the territory. The acts of the territorial legislature are voidable at congressional whim. The powers of the territory are enclosed in the organic act to which it owes its existence. Neither the government nor the people of the territory can add or detract from these powers. The only one that can is Congress.

A realistic analysis of any theory of constitutional law may not stop here. In this decision of cases, the central responsibility of the Supreme Court is to adapt constitutional theory to an ever-changing social, economic, and political pattern. Precedents satisfactory for the time of their establishment may seem incongruous as guides for later periods.

Congressional government of dependent territory has only limited desirability in the 21st century. Useful as it was when the country was expanding to its manifest destiny, it doesn't partake of the prevailing philosophy for governing dependent territory. The guiding thread in the modern trend is the principle that all peoples are entitled to a government of their own choosing and determination.

It now has become a reality that the U.S. is sovereign over territories that desire to remain attached to the U.S. but are unwilling to gain, or are precluded from gaining, membership in the union. The case of Puerto Rico has been the first attempt toward a status consistent with self-government and with association with the U.S. Then came the Freely Associated States in the Pacific. The Supreme Court has ahead the task of contrasting and adapting the territorial doctrine to the new relationships blossoming between the territories and the nation.