On the nature of commonwealth III

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The colonial or noncolonial nature of commonwealth—not the imperfections of the compact—hinges on whether Congress possesses plenary territorial powers over Puerto Rico. That is, whether the commonwealth partakes of the nature of a state, over which Congress doesn't have plenary powers, or whether it partakes of the nature of a territory, over which it does have plenary powers.

Distinguishing between a territory and a state may be impossible if only the entity is considered. Both words represent an idea formed by a combination of people, land, and government. Both are political subdivisions of the U.S. The Constitution, predicated upon the existence of the states, doesn't define them. Nor does it make any attempt to establish any requirements that these political subdivisions ought to have to be considered states. Therefore, to determine the properties of this entity, we must look beyond the Constitution to the 13 original states, which created the union.

These 13 states were sovereign, free, and independent political entities when they passed from the confederation into the union. The territories were created after the Constitution was adopted by an exercise of power of Congress. The states didn't owe their existence to Congress. They were created and empowered by their people. Thus, state constitutions, which are the documents wherein these governments are organized and empowered, are the product of the people of the states. Organic acts, which do the same for territorial governments, are the product of Congress.

The classic definition of state by the Supreme Court in Texas v. White gathers with concision all the elements necessary for the existence of a state: "A state in the ordinary sense of the Constitution is a political community of free citizens, occupying a territory of defined boundaries, organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed."

If we summarize the essential characteristics of a territory, we come up with a definition such as this: A territory is a political community organized by Congress, all of whose powers are granted by Congress, and all of whose acts are subject to congressional supervision.

The distinction between territory and state becomes quite clear when the foregoing definitions are contrasted. It is the source of power organizing the government that makes the difference. In this distinction lies the answer to the question of why a congressional statute may have plenary effect within a territory while it may not in the case of a state, and it can apply only to interstate transactions.

In a federal system of government, such as that of the U.S., two governments operate on the same people: the federal government and the state government. Each government is legally independent of the other. Since each is empowered by the people, each is said to be sovereign within its sphere. The states aren't legally subordinate to the federal government. Federal and state governments are coordinate with each other. The existence of sovereign state governments is what prevents federal laws from regulating local matters within the states. The territories aren't sovereign, and so federal law may regulate local matters even though the territorial government has power to regulate these matters by itself.

Countless inarticulate values are present in the concept of state sovereignty. The maintenance of strong state governments imparts a democratic strength to the federal system not found in a centralized monolithic administration. Liberty is much more protected when political authority is exercised by many than when it is concentrated in any one place. The clash of the many competing interests is reduced by the existence of state forums where they can press their demands. The states are one more rallying point for any aggrieved minority. Social institutions dear to a locality are protected against the detached regulation of a far-off government.

When state sovereignty prevents the federal government from trespassing on the state's sphere, these are the values that do it. There is still much sense left in the old states' rights theory. The history of the U.S. teaches us that. Federalism has been modified with modern times, but there is still enough strength left in it.

The doctrine of state sovereignty is easily comprehended when the 13 original states are called to mind. However, to speak of state sovereignty with regard to states that formerly were territories ruled by Congress is more difficult. The matter requires a somewhat more detailed analysis for a satisfactory explanation, due to the importance of this question for determining the legal status of Puerto Rico.

A total of 37 new states have been admitted to the union since 1789. In 32 of these cases, the states were originally territories. They were admitted by virtue of congressional enactments under Article IV, Section 3 of the Constitution: "New States may be admitted by the Congress into this union...." The Constitution didn't outline the way or modus operandi for the exercise of this power. Congress, however, has employed a fairly consistent method in the case of former territories.

The first step consists of passing an enabling act that authorizes the people in the territory to frame a constitution, prescribes the manner in which it shall be framed, and lays down certain requirements that must be met. Once the constitution has been framed and ratified by the people, it is submitted to Congress, which examines it to determine if the government provided for is republican in character and whether any other conditions it had demanded were met. If Congress accepts the constitution, it then passes a resolution admitting the state into the union.

What are the legal effects of the steps taken by Congress in the admission procedure? Let us first analyze the enabling act: The U.S. as a nation has the power to acquire and govern a territory. The people in the

territory are subject to congressional rule. Their fundamental right to self-government has been taken from them. However, the nation, just as much as it has the inherent power to acquire and govern territory, also has the inherent power to withdraw its sovereignty from the territory and acknowledge the latter as an independent nation. Still another possibility is open. Congress may withdraw the plenary sovereignty it has over the territory and limit it to the federal sphere of action, leaving the intrastate sphere to the state government.

When Congress creates a territorial government, it relinquishes no sovereignty; it merely creates an agency to carry out the functions of government. However, when Congress authorizes the people in a territory to create for themselves a constitution, intra-territorial sovereignty must of necessity be withdrawn. The term enabling act given these statutes is significant. To enable in law means to empower someone to do something that had been illegal for him to do, or to remove the disability affecting someone. Thus, the people in the territory, under the plenary authority of Congress, weren't able to create for themselves a constitution, for they were subject to the national sovereignty. The enabling act empowers them to do this: It removes the disability.

At this point, the national intra-territorial sovereignty is withdrawn. The rights to self-government of the people in the territory are recognized, and the power that prevented their exercise retreats to the federal sphere. The people then are free within the intrastate sphere to create a government for themselves. If the withdrawal of intrastate sovereignty is fixed at another point, then the inevitable conclusion must be that the state constitution wasn't a product of a sovereign people, and then how can the so often repeated statement that states are sovereign within their sphere of action be justified?

The effect of an enabling act is to relinquish the power or sovereignty that the federal government had over the intrastate affairs of the territory. As a consequence, the people therein are left free to exercise their inherent right of self-government to that extent. These legal consequences of the enabling acts for the formation of new states must be borne in mind when we evaluate the juridical effects of Law 600 of 1950, authorizing the people of Puerto Rico to adopt their own constitution. But before we go into that, we must examine in my next column the legal effects of the additional steps necessary to bring new states into the union.