On the nature of commonwealth IV

By : RAFAEL HERNANDEZ COLON

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In this series of columns on the nature of commonwealth, I have examined the nature of the states of the union and the nature of the territories in order to determine the factor—the source of power to create them—that makes the states sovereign governments within the federal system and makes the territories colonial entities subject to the plenary powers of Congress. The legal principles applicable to these entities and to the process by which they are created are the principles upon which the colonial or noncolonial nature of commonwealth rests.

In my previous column, I examined how new states admitted into the union are created. First, we looked at the enabling act, which is an empowerment by Congress to the people of a territory so they may ordain their own constitution. The next step in turning a territory into a state of the union is framing and ratifying the state constitution.

Framing and ratifying a constitution is organizing a government by the people to be governed. This element completes the required factors that the Supreme Court of the U.S. has told us must be present for the existence of a state in the sense of the U.S. Constitution. The former territory is now a political community of free citizens because they have been enabled. They occupy a territory of defined boundaries, and they have, by their own volition, organized a government sanctioned and limited by a written constitution.

A legal entity is thus brought to life: the state. Because it was created by an enabled people this juristic person becomes sovereign. The people have entrusted the sovereignty residing in them to this entity. At this point, there exists in the conceptual reality of the law that which is known as a state.

After the state constitution has been ratified by the people of the state, it is submitted to Congress. The state lives from the moment the people have ordained their constitution. But before it becomes a member of the union, such constitution must be laid before Congress, which reserves its approval as one of the conditions for admittance into the union. If Congress should reject the constitution, the state that was created isn't thus destroyed. But the constitution must be modified if the state wants the privileges of membership in the union.

The process of admitting a new state into the union is one of bargaining, of negotiation between the leaders of the territory and Congress. Since the latter needn't pass an enabling act until it so desires, a great deal of persuasion is required to move it to take the step. The most onerous conditions may be required of the territory. If it won't comply, there is no appeal. If an enabling act is passed and the territory makes a constitution, there can be no question but that it lies within the power of Congress to

arbitrarily refuse its approval. The Supreme Court would never compel Congress to approve a constitution or to admit a state. The matter is a political question beyond all doubt, and the courts would refuse to take jurisdiction. Should Congress, after passing an enabling act, return the people to territorial status, the courts wouldn't intervene.

Until the procedure for admitting a new state to the union is carried through to completion, the matter is beyond the jurisdiction of the courts. When the political process has come to an end and the state has been admitted, the legal consequences of the different steps become cognizable by the judiciary. Though the Supreme Court hasn't yet passed on the consequences of enacting an enabling act or of framing a constitution to be approved by Congress, it has decided many cases bearing on the effects of making a constitution and being admitted to the union as a state.

When a new state has been formed, and Congress has approved its constitution, it becomes proper to exercise the admission power and take the new state into the union. This subjects the state to the rights and duties emanating from the federal Constitution. It acquires the right, for instance, to send representation to Congress. It comes under the obligation not to enter into any treaty, coin money, impair the obligation of contracts, etc.

The legal rights and duties of the states in the union are equally shared. Thus, upon being admitted, the new state is no longer subject to any restrictions that Congress may have imposed as requirements for admission, if those restrictions don't equally burden the other members of the union and if they are beyond the powers of Congress with regard to the states. Neither may the state enjoy any privileges that the other states don't.

The admission power of Congress isn't responsible for the birth of the new state. The consequences of admission are in general those outlined. But some people confuse the proper function of this power, which is to admit on an equal footing a state that has already been created. Superficial analysis brings some to the conclusion that it is the fact of admission that creates a new state. Yet, Congress has no power to create a state.

During the Civil War, the issue came up. A question as to the constitutionality of the act for the admission of West Virginia had been submitted to the attorney general by President Abraham Lincoln. The reply reads, in part, as follows:

"I observe in the first place, that the Congress can admit new states in to this Union, but cannot form states. Congress has no creative power in that respect, and cannot admit into this union any territory, district, or other political entity less than a state. And such state must exist, as a separate independent body politic, before it can be admitted under the clause of the Constitution and there is no other clause. The new state which Congress may admit, by virtue of that clause, does not owe its existence by the fact of admission, and does not begin to exist coeval with that fact; for if that be so, then Congress makes the State; for no power but Congress can admit a state into the Union. And that result (i.e., the making of the

state by Congress) would falsify the universal and fundamental principle of this country—that a free American State can be made only by the people, its component members. Congress has no power to make states."

To summarize in conclusion, the procedure for admitting former territories into the union as new states is as follows:

1. Congress has all the sovereignty over the territory, but by passing an enabling act, it withdraws the intrastate sovereignty.
2. The people create the constitution and the state emerges as a legal entity.
3. Congress reviews the constitution in the exercise of its admission power and of its power to guarantee a republican form of government to the state.
4. If the constitution is approved, the state is admitted into the union. It becomes a member on an equal footing with all other states.

The process just outlined has been repeated 32 times in American history.

The constitutional situation presented by a state whose people have created and ratified its constitution but which hasn't yet been admitted into the union has never presented itself for judicial construction, because in every case that a territory was turned into a state of the union, all the necessary steps were taken and swiftly followed one another. Determination of the status of the Commonwealth of Puerto Rico squarely raises the above question. I turn to this matter in my next column.