## Commonwealth and the U.S. Constitution (IV)

By : RAFAEL HERNANDEZ COLON

Volume: 34 | No: 15
Page : 24
Issued : 04/20/2006

In my previous columns of this series on Commonwealth and the U. S. Constitution, I established that binding compacts between the Congress, the States and the territories are well-recognized and accepted in U. S. constitutional history harking back to the Northwest Ordinance approved by the very First Congress in 1789. I turn, now to another legal foundation sustaining the validity of the compact between Congress and the people of Puerto Rico: The inherent power of the federal government and the treaty power.

In the early case of Secre vs. Pitot (1810) Chief Justice John Marshall disclosed the special nature of the territorial power by characterizing it as "the inevitable consequence of the right to acquire and hold territory." Eighteen years later, in American Insurance Co. vs. Canter, he said this power "might result necessarily from the fact that it [a territory] wasn't within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States." Marshall pointed out these sources as alternatives to the specific grant of territorial power in Article IV, Section 3 of the Constitution. Later cases, prior to the Civil War, followed the same line of reasoning.

After the Civil War, in line with the general tendency to enhance the powers of the federal government, the Supreme Court was quick to find the existence of this and other inherent powers necessary to enable the United States to maintain its position as a sovereign state among other sovereign states. United States vs. Kagama, 118 US 375, 30 Law Ed. 228 (1885), decided in 1886, referred to the territorial power as arising "not so much from Article IV, Section 3, as from the ownership of the country in which its territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else." In Chae Chang Ping vs. United States, the court characterized the United States as "one nation, invested with powers which belong to independent nations." The court justified the taking of the Guano Islands on the grounds that "by the law of nations, recognized by all civilized states, dominion of the new territory may be acquired by discovery and occupation as well as by cession and conquest."

In Fong Yue Ting vs. United States (1893), the court declared: "The United States is a sovereign and independent nation, and is vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective." Following this decision, the doctrine of the inherent sovereign powers of the United States in external affairs received wide popular support in connection with problems arising out of the annexation of Puerto Rico and the Philippine Islands.

During this period, the court developed its doctrine of the unincorporated territories in a group of cases known as the Insular Cases. Some students have hailed this doctrine as an outstanding example of judicial

improvisation to meet new conditions. Careful scrutiny of the precedents in this area of the law reveals however, that this doctrine had deep roots in American expansion all the way back to the doctrine of Manifest Destiny and its precedents in the case law of the Supreme Court date back to Marshall.

The trend of Supreme Court precedents we have been discussing—and of American history—lead logically to the doctrine of the unincorporated territory. No other decision would have been consistent with the repeated affirmations of American international sovereignty by the executive, legislative and judicial branches of the government.

The doctrine is simple enough: a territory acquired by the United States doesn't become part of it so that all constitutional provisions will extend to it, unless the Congress expressly or implicitly incorporates the same to the nation.

Such a doctrine is the necessary result of the emergence of the federal nation into an active role in world affairs. We may say it is vital to any system of international relations. If the alternative prevailed American institutions would have to be imposed upon every territory acquired, notwithstanding the fact that the taxing system could have ruined almost any nation that came under U.S. sovereignty, and that the democratic process presupposes certain attitudes, habits and culture not acquired through a mere transfer of sovereignty.

Therefore the United States had to be free in war, or in treaty, to acquire and govern territory untrammeled by limitations such as the doctrine that one Congress can't bind another devised for the body of States in Union. Indeed, the doctrine of the lack of application of the Constitution to unincorporated territories intended and contemplated the need, which the emerging world power would have to fashion ad hoc relationships with the people in acquired territories. This is made clear in the following passage from the opinion of Justice White in the Downes case—the first of the Insular Cases—in which he rejected the strict interpretation of the powers of Congress as to territories then being pressed upon the court.

In dismissing an argument for such an interpretation of the Constitution, the opinion states: "Certainly, if there be no power to acquire subject to a condition, it must follow that there is no authority to dispose of subject to conditions, since it can't be that the mere change of form of the transaction could bestow a power that the Constitution hasn't conferred. It would follow, then, that any conditions annexed to a disposition that looked to the protection of the people of the United States, or to enable them to safeguard the disposal of territory, would be void; and thus it would be that either the United States must hold on absolutely, or must dispose of unconditionally.

"A practical illustration will at once make the consequences clear. Suppose Congress should determine the millions of inhabitants of the Philippine Islands shouldn't continue appurtenant to the United States, but that they should be allowed to establish an autonomous government, outside of the Constitution of the United States, coupled, however, with such conditions providing for control as far only as essential to the

guarantee of life and property and to protest against foreign encroachment. If the proposition of incorporation be well founded, at once the question would arise whether the ability to impose these conditions existed, since no power was conferred by the Constitution to annex conditions that would limit the disposition."

The court then proceeded to reject the proposition for incorporation to recognize the faculty of Congress to use the territorial power flexibly, unrestrained by the provisions of the Constitution.

This language from Downes is particularly illuminating. In the very same case in which the court established the unincorporated territorial doctrine, Justice White explains the territorial power is a flexible one that can be molded to the particular relationship that Congress seeks to establish with a territory. The argument that the doctrine that one Congress can't bind another Congress forbids a binding commitment with the people of a territory because the territorial power can't be renounced runs foul of the very same opinion that established the unincorporated territorial doctrine. This opinion, invoked by those who argue Puerto Rico is a territory subject to the plenary powers of Congress, actually stands for the opposite: That the territorial power is flexible and it may be committed in whatever form is chosen by Congress. This includes, logically, a binding compact.

In my next column, I will trace the case law and treaties pertaining to the particular relationship with the Commonwealth of Puerto Rico.