Commonwealth and the U.S. Constitution

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Last week, Resident Commissioner Luis Fortuño finally gathered his co-sponsors to introduce the NPP-White House Task Force bill for the resolution of the status issue in Puerto Rico. The Fortuño bill differs from the Kennedy / Lott bill previously introduced in the Senate in that it excludes commonwealth as a permanent status from the ballot, allegedly because it cannot pass constitutional muster since Puerto Rico supposedly is and always will be an unincorporated territory subject to the plenary powers of Congress.

In a series of columns I will begin today, I intend to demonstrate that this basic premise of the Fortuño bill, which relies on recent opinions of the U.S. Justice Department, is wrong. I will do so by going to the sources of American Constitutional Law; an exercise in which the Justice Department under Attorney General Richard Thornburgh should have seriously engaged before reversing its long-held position supporting commonwealth to accommodate a pro-statehood U.S. administration.

Commonwealth is excluded from the ballot because it is said the U.S. Constitution recognizes only two political subdivisions within the U.S. federal system: states or territories. The disingenuous conclusion is that since Puerto Rico isn't a state of the Union it must be a territory. It isn't that simple.

The U.S. Constitution doesn't recognize territories as political entities. Nowhere in the U.S. Constitution do you find such a political body.

The U.S. Constitution addresses the question of territories in Article IV, Section 3. The word "territory" appears in Article IV, Section 3, not as a political entity but as equivalent to the word "land." In United States v. Gratiot, 14 Peters 526, 537 (1840), the Supreme Court expressly held that the word "territory" as used in this section "is merely descriptive of one kind of property and is equivalent to the word lands." See also, O. Donaghue v. United States, 289 U. S. 516, at 537 (1932).

Article IV, Section 3, wasn't in the original draft of the Constitution as returned by the Committee of Detail Aug. 6, 1787.

On Saturday, Aug. 18, 1787, the *Journal of the Constitutional Convention* reports: "The following additional powers proposed to be vested in the Legislature of the U.S. having been submitted to the consideration of the convention, it was moved and seconded to refer them to the committee to whom the proceedings of the convention were referred. The propositions are as follows: To dispose of the unappropriated lands of the U.S. To institute temporary governments for new states arising thereon."

Madison reports the return of this proposition to the convention as proposed by Gov. Morris: "The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the U.S.; and nothing in this Constitution contained, shall be so construed as to prejudice any claims either of the U.S. or any particular state."

The Committee of Style altered only three words of the above presentation: "Congress" was substituted for "Legislature" and "contained" and "either" were deleted. With these minor changes, the above became the second paragraph or Article IV, Section 3, as we know it today: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the U.S. and nothing in this Constitution shall be so construed as to prejudice any claims of the U.S., or of any particular state."

It is clear from the very first presentation of this constitutional provision that it is a clause granting a power to Congress. It isn't a clause creating a political status.

Now, once Congress exercised this power by organizing governments with delegated powers over the people in the territories, the resulting political entities were termed "territories" by the courts and Congress. Thus developed the political entity that results from the creation by Congress of a government for people upon land belonging to the U.S. This political entity exercising powers delegated by Congress was held to be subject to complete congressional supervision and regulation and could even be dissolved by congressional action.

The fact that the political entity resulting from the exercise by delegation of the power under Article IV, Section 3, was termed a "territory" doesn't imply Congress couldn't exercise its power under this provision in another fashion; by granting it away to new states of the Union; or by independence such as the case of the Philippines; or by authorizing the people of Puerto Rico to establish a government under a constitution of their own adoption. In our case, the resulting political entity was then termed a "commonwealth" because the traditional concept of "territory" was inapplicable to this new governmental entity since it derived its powers not by delegation from Congress but from the people of Puerto Rico.

Law 600, approved by Congress in 1950, was adopted in the nature of a compact. It authorized the people of Puerto Rico to frame a constitution for the organization of their government and also provided for the eventual repeal of certain sections of the organic act of 1917 and continued certain others in force. The people of Puerto Rico approved the law in a referendum. A constitutional convention met and framed a constitution. This constitution proclaimed the power exercised by the government organized therein is derived from the people of Puerto Rico. Congress approved the constitution. The provisions of the organic act of 1917, which organized the government of Puerto Rico, were repealed and others were continued in force as the Puerto Rican Federal Relations Act. Law 447, approving the constitution, specifies that all of this was done as a compact.

It is absurd to argue that Congress couldn't exercise its power as it did in the case of Puerto Rico because the Constitution only conceives of states or territories within the American system. It is absurd because "territory" is only a label given to the political entity resulting from an exercise of power in a certain way: delegation. This fact doesn't and can't preclude the exercise of the power in another way—partial divestiture—if it can otherwise be done consistently with other principles of constitutional law.

The permanency of commonwealth is questioned in the Fortuño bill on the basis that it is subject to modification or repeal by unilateral actions from Congress. But the procedure started in 1950 entailed a partial divestiture of congressional power to govern local Puerto Rican affairs, and Congress was bound through the compact to respect those matters of federal concern such as citizenship, free trade or taxation, contained in the federal relations statute as they were established therein.

This, in turn, has been questioned upon the proposition that Congress may not divest itself permanently of its plenary power to govern Puerto Rico. This same argument has been presented in terms of whether Congress may bind another Congress.

In my next article, I will go into the question whether the doctrine that one Congress may not bind another Congress prohibits this divestiture.