Commonwealth and the U.S. Constitution (V)

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This summary of Supreme Court decisions reaching far back in U.S history, which I presented in previous columns, points to the clear rule of constitutional law regarding the power of Congress to govern territory, expressed forcefully in the case of Cincinnati vs. United States, as follows: “In dealing with the territories, possessions and dependencies of the U.S., this nation has all the powers of other sovereign nations, and Congress, in legislating isn’t subject to the same restrictions as are imposed in respect of laws for the U.S. considered as a political body of States in union.”

We all know of the British experience with the Dominions. Under the Commonwealth they are constantly experimenting with new relationships to reconcile competing interests to bring former colonies to appropriate levels of dignity. The French have used the concept of the associated state extensively. The experience of Suriname vis-à-vis the Netherlands is too close to avoid notice.

If other foreign nations such as France, Britain and the Netherlands have the power to enter into such relationships, then, under the doctrine expounded by the Supreme Court in the cases mentioned in this and previous columns, the U.S. also possesses that power.

If, through democratic process, the people of Puerto Rico determine that they wish to be associated with the U.S. under a sovereign commonwealth and through binding compact, American constitutional law will not stand in their way. On the contrary, it recognizes in Congress the most absolute freedom to use its territorial power in such a way if Congress so desires.

The Treaty of Paris of 1898 between the U.S. and Spain through which Puerto Rico was ceded to the U.S. provides in Article 9: “The civil rights and political status of the native inhabitants of the territories hereby ceded to the U.S. shall be determined by the Congress.”

Interpreting this language the Supreme Court held in Dorr vs. U.S. (195 US 138), as follows: “In this language it is clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly acquired possessions.”

A free hand means a hand free to govern according to the will of Congress. If that will is to enter into a binding compact; the will is free from restrictions to bind itself so. “The right to make binding obligations,” said the Supreme Court, “is a competence attaching to sovereignty.”

Therefore Congress may draw upon "the free hand" to deal with Puerto Rico as recognized by the Supreme Court and fashion whatever relationship it may desire to create with Puerto Rico, including one through a mutually binding compact.

But there is more. The rights and powers acquired by Congress under Article 9 of the Treaty of Paris should now be read in relation to the obligations incurred by the U.S. along with other sovereign nations under the Charter of the United Nations. This charter has been held to be a treaty and as such it is the supreme law of the land in the United States.

In the case of Asakura vs. Seattle, 265 US 332, 68 L. Ed. 1041 (1924) the Supreme Court held that a treaty stands on the same footing of supremacy as do the provisions of the Constitution.

Article 73 of that charter insofar as it is relevant here reads as follows: "Members of the United Nations, which have or assume responsibilities for the administration of territories whose peoples haven't yet attained a full measure of self-government, recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present charter, the well-being of the inhabitants of these territories and, to this end: ... (b) to develop self-government, to take due account of the political aspiration of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement."

If Congress has the power to govern Puerto Rico, and the U.S. has undertaken through treaty to develop a full measure of self-government on this island, and if association by compact is one way under the treaty to reach self-government, and if this treaty is the supreme law of the land on the same footing of supremacy as the Constitution, who, in the name of reason, will deny this nation the power to bring about an association by compact with Puerto Rico? If the United Nations recognizes Commonwealth as a status of self-government it must be because the member nations have sovereign powers to affect such an association with dependent territories. Will the U.S. be the exception? Who so mighty that its sole power supports the entire apparatus of the United Nations and yet so weak that it can't comply with an obligation under the charter?

Some will argue that perhaps the U.S. may bring about free association with Puerto Rico but that it must be done through a previous grant of independence followed by a treaty of association. They will even go along with this procedure if independence could be had only for a fleeting moment.

It should be made clear that it isn't necessary to grant independence to Puerto Rico so that congressional action may be undertaken within the framework of international law. The Curtis-Wright opinion makes evident that there are powers with which the United States is invested which don't depend for their existence on the affirmative grants of the Constitution. They are inherent in the nation. The power to acquire and govern territory is one of them. Such powers attain necessarily because they are recognized in

the law of nations. When they are exercised, international law is the legal order that sanctions their validity.

These powers may be exercised with regard to other objects besides foreign nations. They may be exercised to expel aliens or to govern acquired territory. Whether the powers are exercised to deal with foreign nations or to deal with domestic matters is immaterial in determining their source. The source remains the law of nations. In this sense, international law complements American constitutional law, providing a broad legal framework within which the validity of congressional action is assessed by the Supreme Court.

The association after independence procedure finds its appeal in a conceptual symbolism that modern law abhors. It is simply a preference of form over substance and won't provide a broader legal frame of reference than direct association. If there were any compelling reason why Congress couldn't enter into a binding compact with Puerto Rico, the court wouldn't allow Congress to get away with it by following such a simple expedient. If the power of Congress over Puerto Rico may be relinquished in part, all that is wanting is the clear expression of Congress to that effect. If it may not be relinquished, no procedural magic will produce the result. Modern jurisprudence is no longer fascinated by symbols.

It is surprising that the Report by the President's Task Force on Puerto Rico's Status would deny the U.S. the powers that all sovereign nations have to enter into associated relationships with former colonies. Fortunately, neither the Task Force nor the Justice Department, which has been compliant to the NPP constitutional constructs, has the authority to rule over the validity of the Commonwealth compact. This authority belongs to the U.S. Supreme Court, which is quite clear as to the powers the U.S. must have as a sovereign nation, and which has an extensive history in the application of compacts as legally binding instruments of American Constitutional Law.

With this column, I rest my case on the undeniable viability of Commonwealth as a legitimate status option for the people of Puerto Rico under the U.S. Constitution.