The fruit of the poisonous tree II

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In my previous column regarding the White House Report on the status of Puerto Rico and its progeny, H.R. 900, recently reported out of committee, established Commonwealth is not a form of territorial status and that its development or enhancement is a legitimate option for self-determination for the people of Puerto Rico. In this column, I will look into *Harris v. Rosario*, 446 U.S. 651 (1980), which is the case decided by the Supreme Court of the United States upon which the opponents of Commonwealth predicate the alleged territorial status which the White House Report has espoused.

The *Harris* decision is a two-paragraph *per curiam* opinion issued by a divided court—six to three—refusing to note probable jurisdiction to review a case that arose from the U.S. District Court for the District of Puerto Rico in which the constitutionality of lower welfare benefits for residents of Puerto Rico, as compared with those in the states, was challenged. The distinction made by Congress to provide for the lower benefits was found to be based, not on invidious discrimination, but on rational factors. According to the majority, these factors were that federal taxes do not apply in Puerto Rico, that the cost of extending the same benefits as those enjoyed by residents in the states would be high and that greater benefits would disrupt the Puerto Rican economy. This rationale was strongly challenged by Justice Thurgood Marshall in a dissenting opinion.

The majority of the court relied on Art. IV, Sec. 3 of the federal Constitution—the territorial clause—to justify that Congress may treat Puerto Rico differently from the states so long as there is a rational basis for its actions. Opponents of Commonwealth argue that the recognition of the existence of congressional powers under this provision of the U.S. Constitution makes Puerto Rico a territory subject to the plenary powers of Congress.

They are wrong. It does not follow that the existence of powers under Art. IV, Sec. 3, by which Congress can legislate for Puerto Rico, turns the Commonwealth into territorial status. The essence of territorial status is the lack of sovereignty of the government of the territory. As I established in my previous column, the Commonwealth is a sovereign political entity within the constitutional system of the U.S. Therefore, those powers that exist under the territorial clause are not plenary but limited to federal matters such as the Aid to Families with Dependent Children statute, which was at issue in *Harris*. *Harris* is no authority under which Congress could deprive us of our Constitution as the White House Report and other opponents of Commonwealth pretend.

The territorial power of Congress as regards the Commonwealth of Puerto Rico is not untrammeled. It is not plenary. It is bounded—limited—by the Constitution of the Commonwealth and by the Federal

Relations Act. It is limited by the compact which the people of Puerto Rico entered into with the Congress of the United States in 1952.

This is made clear in the 1981 decision of the U.S. Court of Appeals for the First Circuit in *Córdova v. Chase Manhattan Bank*, 649 F. 2d. 36. In that opinion, written by then Circuit Judge Stephen Breyer—today a Supreme Court justice—the court concluded that Sec. 3 of the Sherman Antitrust Act, applying the provisions of the act to the territories, did not apply to Puerto Rico because Puerto Rico is not a territory under Commonwealth.

After reviewing the events that led to the creation of Commonwealth, the court concluded:

"In sum, Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth. And the federal government's relations with Puerto Rico changed from being bounded merely by the territorial clause, to being bounded by the United States and Puerto Rico Constitutions, Public Law 600, the Puerto Rican Federal Relations Act and the rights of the people of Puerto Rico as United States citizens."

Córdova was decided by the First Circuit after *Harris* was decided by the Supreme Court. The *Harris per curiam* decision in no way troubled the First Circuit. After *Córdova* was decided by the First Circuit, the U.S. Supreme Court decided *Rodríguez v. Popular Democratic Party*, 457 U.S. 1 (1982). In that case, a unanimous Court through Chief Justice Warren Burger, expressed the following:

"Puerto Rico, like a state, is an autonomous political entity, sovereign over matters not ruled by the Constitution."

This statement rules out the contention that Commonwealth is a territorial status because no territory has sovereignty within the U.S. constitutional system. No justice in the Court was troubled by the *Harris* opinion. The Court did not even mention it. No justice read *Harris* as the opponents of Commonwealth would have us read that *per curiam*. The misguided interpretation of *Harris* by the opponents of Commonwealth should have been laid to rest by *Rodríguez* but we are not dealing with juridical conclusions. We are dealing with political demagoguery which has no bounds.

That this misguided interpretation of *Harris* is inadmissible is made clearer by the reference to *Córdova* made by the Supreme Court in the *Rodríguez* opinion. Right after asserting that Puerto Rico, like a state, is sovereign, the Court refers us, with approval, to the First Circuit's *Córdova* decision.

"No hay peor ciego, que el que no quiere ver," we say in Spanish. (Nobody is blinder than one who refuses to see.) This is the problem with the opponents of Commonwealth.

There is something else that should let them see the light of day. In numerous occasions, the U.S. Supreme Court, the final arbiter of what is and what is not territorial status under the U.S. constitutional system, has referred to Commonwealth as a unique or unparalleled status.

In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), a case which I argued before the U.S. Supreme Court as attorney general for Puerto Rico, the Court referred to Commonwealth as a "unique historic relationship" and cited with approval a law review article by Judge Calvert Magruder—15 U. Pitt. L. Rev. 1 (1953)—which contains one of the strongest statements on the sovereign nature of Commonwealth that has been made by any jurist.

In *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976), the U.S. Supreme Court stated:

"We readily concede that Puerto Rico occupies a relationship to the United States that has no parallel in our history...."

The opponents of Commonwealth enter into what psychologists call denial concerning statements like these from the U.S. Supreme Court. If Puerto Rico were a territory, the Supreme Court could not readily concede our relationship to the U.S. has no parallel in the history of the U.S. American history abounds with precedents on what a territorial relationship is. The Union formed by the original 13 colonies has 50 states today. Thirty-six of these states were territories before they entered the Union. Only Texas was an independent country. If the Commonwealth relationship is unparalleled as the Supreme Court says it is, then it cannot be a territorial relationship.

Harris will not stand in the way of the people of Puerto Rico if they seek to review the present compact with the U.S. to resolve the democratic deficit that it contains and provide for a more perfect union.