4 MEMORANDUM

4 Re: Power of the United States to conclude with the Commonwealth of Puerto Rico a compact which could be modified only by mutual consent. 4 7/23/63

A pending proposal designed to clarify the status of Puerto Rico envisages the conclusion of a compact, which could be modified only by common agreement, between the United States and the Commonwealth of Puerto Rico under which the United States would relinquish some of its power to legislate with respect to Puerto Rico. It is understood that questions have been raised as to whether the United States can enter into a binding compact with one of its political subdivisions and as to whether such a compact, even if it were legally feasible, could, in any event, abridge the power of subsequent Congresses to enact legislation in violation of the compact. For the reasons set forth below, it is concluded herein that the United States and the Commonwealth of Puerto Rico have the legal capacity to enter into a compact with each other and Congress has the power to work out forms of government for Puerto Rico which involve grants of self-government which can be modified only by mutual consent.

101. 7 The power of the United States and of the Commonwealth of Puerto Rico to enter into a compact.

The argument that the United States and the Commonwealth of Puerto Rico lack the capacity to enter into a compact appears to be based on the conceptual notion that the whole cannot enter into a contract with a part, the Commonwealth of Puerto Rico being a political subdivision of the United States.

It is true that the Commonwealth of Puerto Rico is "under the American flag" (Mora v. Mejias, 206 F. 2d 377, 382 (C.A. 1)) and not included in any State. While there

is some question as to the exact status of Puerto Rico, 1/ it is assumed for the purposes of this memorandum that it is a political subdivision of the United States. Cf. National Bank v. County of Yankton, 101 U.S. 129, 133; Snow v. United States, 18 Wall. 317, 320. The Commonwealth of Puerto Rico, however, also constitutes a separate legal entity. It has been recognized from the early times that the several territorial governments constitute corporate entities. McCulloch v. Maryland, 4 Wheat. 316, 422. Moreover, Puerto Rico was expressly incorporated as a body politic by section 7 of the Foraker Act of April 12, 1900, 31 Stat. 79.

Even assuming that the legal relationship between the United States and Puerto Rico is analogous to that between a State and a municipal corporation thereof, or between a corporation and its wholly owned subsidiary, they have the capacity to enter into binding agreements. The legal capacity of a city to enter into an agreement with the State of which it is a part never has been challenged seriously. City of Louisville v. University of Louisville, 15 B. Mon. (Ky.) 642, 675; King v. City of Mobile, 273 Ala. 109, 134 So. 2d 746; McQuillin, Municipal Corporations (3rd Ed.), sec. 29.05, p. 184. Similarly, it is generally recognized that a subsidiary has the capacity to contract

1/ The act of July 3, 1950 (64 Stat. 319), popularly known as Public Law 600, the Constitution which Puerto Rico thereafter adopted, and the act of July 3, 1952 (66 Stat. 327), popularly known as Public Law 447, which approved that Constitution, subject to certain conditions which Puerto Rico subsequently met, established Puerto Rico as a Commonwealth. Public Law 600 described itself as being "in the nature of a compact" and Public Law 447 referred to the earlier statute as having been "adopted by the Congress as a compact with the people of Puerto Rico." There have been substantial differences of opinion as to the nature of the "compact" and as to its legal consequences. None of these questions need be resolved in this memorandum. The conclusions would be the same even if Puerto Rico is now, what it was before 1952, an unincorporated territory of the United States.

with its parent corporation, although the courts are apt to scrutinize such transactions for mismanagement, overreaching, or some other taint. (See, e.g., Kraft Foods Co. v. C.I.R., 232 F. 2d 118, 124-125 (C.A. 2); 6A Fletcher, Cyclopedia of Corporations, section 2822.)

Even closer is the analogy to the compacts contained in the legislation admitting new States. These compacts are normally concluded while the new State is still in the territorial stage.

For example, section 4 of the Hawaii Statehood Act (73 Stat. 5) provides for a compact between the United States and Hawaii with respect to the allocation of public property. The enactment of section 4, of course, preceded the time when Hawaii became a State. This compact was submitted to the voters of Hawaii for adoption or rejection (section 7(b), 73 Stat. 7). Only after the approval of this compact by the people of Hawaii did the Territory become a State. (Section 7(c), 73 Stat. 8, Proclamation No. 3309, 73 Stat. C 74.) The Hawaii Statehood Act thus envisaged that the offer and acceptance of the compact were to be effectuated while Hawaii was still a political subdivision of the United States. Similar provisions may be found, e.g., in the Alaska Statehood Act, sections 4, 8(b), (c), 72 Stat. 339, 343-344. The Minnesota Statehood Act of February 26, 1857, 11 Stat. 166, also provided for a compact between the United States and the people of Minnesota to be concluded before the Territory would become a State, cf. Stearns v. Minnesota, 179 U.S. 223, 245. Analogous provisions may be found in the Missouri Enabling Act of March 6, 1820, 3 Stat. 545. In view of this well-established constitutional custom pursuant to which the United States has concluded compacts with its Territories for at least 140 years, the power of the United States to enter into a compact with the Commonwealth of Puerto Rico cannot be questioned at this late date. Inland Waterways Corp. v. Young, 309 U.S. 517, 525; Ex Parte Quirin, 317 U.S. 1, 41-42.

10 2. The power of Congress to provide that the compact can be amended only by mutual consent.

4 Under Article IV, section 3, clause 2 of the Constitution,

the Congress has the power to "make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States." This power has been held to be unlimited, general, and plenary. United States v. Gratiot, 14 Pet. 526, 537; Mormon Church v. United States, 136 U.S. 1, 42; Downes v. Bidwell, 182 U.S. 244, 267-268. The argument has been made that while Congress may choose not to exercise the full extent of this authority, it cannot agree to relinquish those powers, for to do so would be a nugatory attempt to limit the authority of a subsequent Congress.

The maxim that a legislature cannot limit or preclude the power of amendment of a subsequent legislature (1 Sutherland, Statutes and Statutory Construction (Third Ed.), section 1902), must, like any other legal maxim, be taken with a grain of salt. A legislature unquestionably can bind its successors by creating vested rights of a contractual nature. Woodruff v. Trapnall, 10 How. 190, 208; Lynch v. United States, 292 U.S. 571. In a similar vein, Chief Justice Marshall held in Fletcher v. Peck, 6 Cranch 87, 133, with respect to legislative grants of property rights:

> "* * * The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact."

Mr. Justice Brown expressed this notion tersely in the words: "There are steps which can never be taken backward." Downes v. Bidwell, 182 U.S. 244, 261.

Similar vested rights or accomplished facts can be created in the political field, and, indeed, in the specific area of the political evolution of the Territories of the United States. /2/ The grant of statehood or independence to a Territory by one Congress unquestionably has the effect of precluding all subsequent Congresses from exercising any further powers under Article IV of the Constitution with respect to that Territory. The repeal of an act granting statehood or independence cannot undo the past and restore the territorial status. The argument could be made that this example is not conclusive because a Territory loses that status by virtue of the grant of statehood or of independence, but that the unlimited and plenary power of Congress over a Territory may not be bargained away, as long as territorial status is retained. In at least one field, however, such a contention would be clearly incorrect. Thus, Congress can limit its plenary power over a Territory by extending the Constitution to it either by express statute, or by incorporating it into the Union. And this step which does not terminate territorial status as such cannot "be taken backward." Downes v. Bidwell, supra, 261-271; see also Rassmussen v. United States, 197 U.S. 516.

The fact that one Congress can restrict the plenary power of its successors over Territories by extending the Constitution to it would indicate that such a limitation is not inconsistent with the view that Congress may take other irreversible steps on the road of a Territory toward statehood, independence, or some intermediate or novel status.

In 1914, Mr. (now Mr. Justice) Frankfurter submitted a memorandum to the Secretary of War in which he concluded:

"The form of the relationship between the United States and unincorporated territory is

/2/ For a discussion of this problem with specific respect to the Commonwealth of Puerto Rico, see Mabruder, The Commonwealth Status of Puerto Rico, 15 University of Pittsburgh Law Review 1, 14-16.

solely a problem of statesmanship.

> "1. History suggests a great diversity of relationships between a central government and dependent territory. The present day shows a great variety in actual operation. One of the great demands upon inventive statesmanship is to help evolve new kinds of relationship so as to combine the advantages of local self-government with those of a confederated union. Luckily, our Constitution has left this field of invention open. The decisions in the Insular cases mean this, if they mean anything; that there is nothing in the Constitution to hamper the responsibility of Congress in working out, step by step, forms of government for our Insular possessions responsive to the largest needs and capacities of their inhabitants, and ascertained by the best wisdom of Congress."

It is therefore concluded that the Constitution does not inflexibly determine the incidents of territorial status, i.e., that Congress must necessarily have the unlimited and plenary power to legislate over it. Rather, Congress can gradually relinquish those powers and give what was once a Territory an ever-increasing measure of self-government. Such legislation could create vested rights of a political nature, hence, it would bind future Congresses and cannot be "taken backward" unless by mutual agreement.