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Micronesian Negotiations

The Department of the Interior would like to have an official expression of the views of the Department of Justice on the following question:

> Assuming that under the new status of Micronesia Congress had the basically plenary power to legislate with respect to Micronesia, under Article IV, section 3 of the Constitution could the United States agree (a) not to exercise certain of those powers, e.g., the power of eminent domain, with respect to Micronesia, or (b) limit the power to legislate to specified topics such as defense, foreign relations, and certain technical services, e.g., the regulation of aviation and broadcasting?

The question is broadly whether one Congress can bind a subsequent one. After the representative of the Department of State had refreshed my recollection, I mentioned that in the past this Office had taken the position that one Congress could bind subsequent ones where it creates interests in the nature of vested rights, e.g., where it makes a grant or brings about a change in status. Thus we concluded in the early 1960's that a statute agreeing that the United States would not unilaterally change the status of Puerto Rico would bind subsequent Congresses. See the attached memorandum dated July 23, 1963, to Mr. White, at pp. 3-6; see also the excerpt from former Legal Adviser Chayes' testimony before the Commission on the Status of Puerto Rico.

The Department of the Interior would appreciate your views on this problem.

Attachments

OK. WHR

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

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 Rasmussen 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 Mayrand, 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.

Status of Puerto Rico

Hearings before United States-Puerto Rico Commission on Status of Puerto Rico

S. Doc. No. 108, 89th Cong., 2d Sess., pp. 245-246

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"Mr. CHAYES. And the insular cases themselves were cases in which a new arrangement was developed by the Court to meet a new situation and the Court rejected old and rigid dogmatic category.

"Finally, I would say that the facts of international life in the world today are such that we all should be very hesitant, and I think the Supreme Court would be very hesitant, to confine the Congress to the categories of independence, statehood, and territories. It's perfectly clear that apart from Puerto Rico I am not speaking about Puerto Rico itself now, but I am speaking--if I may have a minute or two more, Mr. Chairman--as a former State Department official . . .

"The CHAIRMAN. You have 2 more minutes.

"Mr. CHAYES. As a former State Department official, it is perfectly clear that the United States has and other nations have, territories and possessions around the world: many of those territories and possessions are not suitable

either for statehood or for independence. If we establish a constitutional category that says: All you can be is a territory in which case you are totally subservient and there is, as people said this morning, a colonial relationship to the Federal Government, or else you must be either a State or independent, it would be impossible really for the United States to fulfill its obligations under the U.N. Charter with respect to many of its territories.

"Because of the needs of international life in this respect, I would be willing to predict that on that basis alone the Supreme Court would refuse to confine the power of Congress as narrowly as in suggested here, as is suggested by the opponents of this proposition.

"So, to repeat and to end with the conclusion with which I began, it seems to me clear that if Congress manifests its intention, in a proper way, to make an arrangement which will be irrevocable except by mutual consent, and if that arrangement is accepted in a proper way by authorized representatives of Puerto Rico, that Congress can, and Puerto Rico can, achieve a compact status, a status which

will, in a sense, be a final status in the sense that it will be irrevocable and unalterable without the consent of the two parties who entered into it."

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

Respectfully submitted,

(Sgnd.) Felix Frankfurter,
Law Officer.