

**THE POWER OF CONGRESS TO RELINQUISH
SOVEREIGNTY OVER THE PHILIPPINES**
(Concluded.)

BY VICENTE G. SINCO

In several decisions of the United States Supreme Court it is asserted that the right to alienate sovereignty over any territory within the limits of any State is an incident of the treaty-making power. In some, it is maintained that the alienation may only be made with the consent of the State concerned, while in others, it is claimed that such consent is not indispensable. Thus in *Geofroy vs. Riggs* (133 U. S. 258, 33 L. ed. 642) the court said: "The treaty power, as expressed in the Constitution, is in terms unlimited except by the restraints which are found in that instrument. . . It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a *cession of any portion of the territory of the latter, without its consent*. . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country." Mr. Justice White in *Downes vs. Bidwell* (182 U. S. 289) asserted that territory forming part of a State or an *incorporated* territory cannot be sold or ceded to any foreign power. But he qualified that statement by saying: "True, from the exigency of a calamitous war or the necessity of a settlement of boundaries, it may be that citizens of the United States may be expatriated by the action of the treaty-making power, impliedly or expressly ratified by Congress. But the arising of these particular conditions cannot justify the general proposition that territory which is an *integral part* of the United States may, as a mere act of sale, be disposed of." It is to be noted that he carefully excludes *unincorporated* territory from the rule which he enunciated. Kent in his *Commentaries* (I, 167 note 6.) acknowledges the power of the Federal Government, under the treaty-making power, to cede territory belonging to a State of the Union. He says: "The better opinion would seem to be, that such a power of cession of the territory of a state without its consent does reside exclusively in the treaty-making power, under the Constitution of the United States, yet sound discretion would forbid the exercise of it without consent of the local government who are interested, except in cases of great necessity, in which the consent might be presumed." And in the case of *Lattimer vs. Poteet* (14 Pet. 4, 10 L. ed. 328) the Supreme Court of the United States upheld the validity of a treaty entered into by the United States with the Cherokee Indians by which a portion of territory claimed by North Caro-

lina was ceded by the Federal Government to the Indian nation. The court says: "It is a sound principle of international law, and applies to the treaty-making power of this government, whether exercised with a foreign nation or an Indian tribe, that all questions of disputed boundaries may be settled by the parties to the treaty. And to the exercise of these high functions by the government, within its constitutional power, *neither the rights of the State nor those of an individual can be interposed.*" Incidentally, those who contend that the United States government has no constitutional right to prejudice the claims of the states and the people may well ponder on these words of the United States Supreme Court which declare emphatically that there is no illegal invasion of such claims by the cession of territory belonging to the United States or the States to another people.

Let us now consider in greater detail the power of Congress to alienate territory not forming part of any State. Article IV, section 3, in the second paragraph, of the United States Constitution says: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. . . ." Gouverneur Morris, who was the author of this clause, writing to Livingston reveals his object in inserting that clause in this wise: "I perceive I mistook the drift of your inquiry, which substantially is, whether Congress can admit, as a new State, territory which did not belong to the United States when the Constitution was made. In my opinion they cannot. I always thought, when we should acquire Canada and Louisiana, it should be proper to govern them as provinces and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief that had it been more pointedly expressed, a strong opposition would have been made."¹ These words show that the above quoted clause of the Constitution was intended to give Congress the sovereign powers of government and legislation over territories not incorporated into the United States. It is true that the term "territory" there used followed by the phrase "or other property" may be fairly construed as public lands. In that case, Congress would only have proprietary rather than governmental powers over a territory. As a matter of fact, an *obiter dictum* of the Supreme Court of the United States gives such an interpretation. "The term Territory," the court said, "as here used is

¹ Life and Writings (Sparks), III, 192, quoted in Willoughby's Constitutional Law, I, 328.

merely descriptive of one kind of property; and is equivalent to the word lands."¹ And Chief Justice Taney in the case of *Scott vs. Sanford* (19 Howard 393, 432) was of the opinion that the power to make all needful rules and regulations respecting the territory, etc." refers solely to lands ceded by the States to the Nation. But a much broader scope had been given to it earlier by no less an authority on constitutional law than Chief Justice Marshall in the case of *Seré vs. Pitot* (6 Cranch 332, 336) in these words: "The power of governing and legislating for territory is the inevitable consequence of the right to hold territory. Could this proposition be contested, the Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.'" And the same illustrious jurist in a subsequent case (*American Ins. Co. vs. Canter*, 1 Pet. 511, 542) reiterated the same construction in these words: "In the meantime Florida continues to be a Territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.'" In arguing this case before the supreme court, Webster declared the omnipotent power of Congress over new territories in these words: "What is Florida? It is no part of the United States. How can it be?... Florida was to be governed by Congress as she thought proper. What has Congress done? *She might have done anything*. She might have refused the trial by jury, and refused legislature." (Italics supplied). Incidentally, it might be stated that the narrow interpretation given to the territorial clause of the Constitution by Chief Justice Taney in the *Dred Scott* case arose out of his personal desire to restrict the powers of Congress in legislating for the territories west of the Mississippi to those defined by the Constitution. As A. Lawrence Lowell said: "He (referring to Chief Justice Taney) was confronted by the prohibition of slavery in the Ordinance for the North West Territory, and he wanted to deny to Congress the right to extend that measure beyond the Mississippi. Judge Curtis in his dissenting opinion rejects this doctrine, and it has received no support in later decisions of the court."² And it should be further said that the Supreme Court of the United States subsequent to the *Dred Scott* case reverted to the doctrine of Chief Justice Marshall.³ Thus in a later case *Terri-*

¹ *U. S. vs. Gratiot*, 14 Pet. 526, 527.

² Abbot Lawrence Lowell, *The Status of our New Possessions*, Harvard Law Review vol. XIII, pp. 165-166.

³ *Clinton vs. Engelbrecht*, 13 Wall. 434, 441, 447, and other cases cited in this article.

teritories are defined as "political subdivisions of the outlying dominion of the United States." (National Bank vs. County of Yankton, 101 U. S. 129, 133). Other sources of the power of Congress to govern territories were named by Chief Justice Marshall, and subsequently acknowledged in all decisions of the United States Supreme Court having to do with such power: "Perhaps the power of governing a territory belonging to the United States which has not by becoming a State acquired the means of self-government may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory." (American Ins. Co. vs. Canter, 1 Pet. 511, 542).

The extent of the power of Congress over territories has been clearly defined in many decisions of the United States Supreme Court. The States of the American Union are, as we know, under the jurisdiction of two legislative bodies,—Congress and the State legislature. The power of Congress over the State is strictly limited to those enumerated in the Constitution. The State legislature possesses residuary powers, always, of course, subject to the restrictions in the Constitution. The territories, on the other hand, are under the exclusive control of Congress. The United States Supreme Court has proclaimed and defined this position of the supremacy of Congress over the territories in various decisions. In *Shively vs. Bowlby* (152 U. S. 1, 48) the court said: "By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the *entire dominion and sovereignty*, national and municipal, federal and state, over all the Territories, so long as they remain in a territorial condition." In the case of *National Bank vs. County of Yankton* (101 U. S. 129, 133) the court said: "Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. *It may do for the territories what the people, under the Constitution of the United States, may do for the States.*" (Italics supplied.) No words can be clearer than these which declare the plenary jurisdiction of Congress over territories. The American people may exercise their sovereign

functions for the States either indirectly, thru Congress, or more directly, thru constitutional conventions called for the purpose of amending the Constitution. Bearing in mind this fact, it becomes apparent, therefore, that even granting that an amendment to the Constitution is necessary to cede territory within a State, the cession of territory outside of any State may be legally done by Congress for, as the Court says "Congress may do for the territories what the *people*, under the Constitution of the United States, may do for the states." Mr. Justice Brown, in the case of *De Lima vs. Bidwell* (182 U. S. 1, 196) quoted with approval this portion of the decision of Mr. Chief Justice Waite, and further reiterated the well-established doctrine of the plenary power of Congress over territories in these words: "Indeed, it is scarcely too much to say that there has not been a session of Congress since the territory of Louisiana was purchased, that that body has not enacted legislation based upon the assumed authority to govern and control the territories. It is an authority which arises, not necessarily from the territorial clause of the Constitution, but from the necessities of the case, and from the inability of the states to act upon the subject. Under this power Congress may deal with territory acquired by treaty; may administer its government as it does that of the District of Columbia; it may organize a local territorial government; it may admit it as a state upon an equality with other states; it may sell its public lands to individual citizens, or may donate them as homesteads to actual settlers. In short, when once acquired by treaty, it belongs to the United States, and is subject to the *disposition* of Congress."

Congressional control is certainly not limited to the enactment of mere *regulatory* legislation for the territory. For, as shown above, the statement of the United States supreme court to the effect that Congress "may do for the territories what the people, under the Constitution of the United States, may do for the States" simply mean the recognition of the sovereign powers of Congress to control or dispose of the territories, in the same degree as may be exercised by the people of the United States. Mr. Justice Brown delivering the majority opinion of the United States supreme court in the case of *De Lima vs. Bidwell* (182 U. S. 1, 196, 45 L. ed. 1056), after reviewing the various cases which discussed the sources of the power of the United States to acquire territories, makes this conclusion: "But whatever be the source of this power, its uninterrupted exercise by Congress for a century, and the repeated declarations of this court, have settled the law that the right to acquire ter-

ritory involves the right to govern and *dispose of it.*" To *dispose of territory* can only mean to relinquish sovereignty over it. And it is worthy of notice that even in the dissenting opinion, in that same case, penned by Mr. Justice Shiras and Mr. Justice White, these broad powers of the government of the United States over territories are fully admitted in the statement that the Constitution is "a charter of great and vital authorities, with limitations indeed, but with such limitations as serve and assist government, not destroy it; which, though fully enforced, yet enable the United States to have—what it was intended to have—'an equal station among the Powers of the earth,' and to do *all* 'Acts and Things which Independent States may of right do,'—and confidently do, able to secure the fullest fruits of their performance." It being true that of the "Acts and Things which Independent States may of right do" the right to dispose of territory, to relinquish sovereignty over territory, is one of them, the conclusion is irresistible that the United States government, thru Congress, has the right to declare the Philippines independent.

The supremacy of the government of the United States over the territories was also clearly brought out by the United States supreme court in *Mormon Church vs. United States* (136 U. S. 1, 42) where the idea of national sovereignty was added to the other sources, which we have already discussed, of the right of the United States to acquire and govern territories. The court said: "The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution) is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of *national sovereignty*, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty." The court then makes this significant conclusion: "Having rightfully acquired said Territories, the United States government was the only one which could impose laws upon them, and its sovereignty upon them was complete. No

State of the Union had any such right of sovereignty over them; no other country or government had any such right."

It is interesting to note that even if we are among those who contend that sovereignty resides in the American people even over territories, still we have to concede that Congress, by delegation at least, exercises all sovereign functions over the territories. This is indicated by the United States Supreme Court in *Murphy vs. Ramsey* (114 U. S. 15, 44) in which the sovereignty of the people of the United States was acknowledged but at the same time it was clearly stated that the government of the United States represents them and acts in their behalf, with sovereign powers, over the territories. The court said: "The people of the United States as sovereign owners of national Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom *all* the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms." The Constitution contains no clause prohibiting Congress from ceding any territory owned by the United States to any state or people; it is apparent, therefore, that Congress may cede territory and relinquish sovereignty over it in favor of any people. The doctrine in the *Murphy case* is again asserted and approved in the case of *U. S. vs. Kagama* (118 U. S. 375) in which the court, thru Mr. Justice Miller, said: "But this power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the Territories are, and *the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else.*"

Congressional control over unincorporated territories is even more absolute and plenary than over incorporated territories to which most of the decisions above cited refer. This is shown in the *Insular cases* and in subsequent decisions affecting these Islands. The case of *Downes vs. Bidwell* finally determined the status of the territories acquired by the United States from Spain thru the Treaty of Paris to be that of *unincorporated territories* until Congress incorporates them into the Union. Up to this date no such action has as yet been taken by Congress in regard to the Philippines, which therefore re-

mains an unincorporated territory. In respect to such territory, only the most fundamental limitations named in the Constitution control congressional action. Congress, therefore, is free to do anything with the Philippines as long as it does not violate those constitutional "prohibitions as go to the very root of the power of Congress to act at all, irrespective of time and place. . . . Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States' it goes to the competency of Congress to pass a bill of that description." In other words, only those guaranties to the personal rights of an individual adapted to the conditions of the place, limit the action of Congress toward territories, and of these the right to relinquish sovereignty over the Philippines is not included, either expressly or by implication. "The result of what has been said," says the court, "is that while in an international sense Porto Rico (and the Philippines) was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession." Let us note particularly the words of Mr. Justice Gray, in that case (*Downes vs. Bidwell*): "In a conquered territory, civil government must take effect either by the action of the treaty-making power, or by that of the Congress of the United States. The office of a treaty of cession ordinarily is to put an end to all authority of the foreign government over the territory, and to *subject the territory to the disposition of the government of the United States.*

"The government and disposition of territory so acquired belong to the government of the United States, consisting of the President, the Senate, elected by the States, and the House of Representatives, chosen by and immediately representing the people of the United States. Treaties by which territory is acquired from a foreign state usually recognize this.

"It is clearly recognized in the recent treaty with Spain, especially in the 9th article, by which 'the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.'" (Italics supplied).

It is decisively important to remember the distinction between incorporated and unincorporated territories of the United States in order that the power of Congress over them may be clearly distinguished and, further, in order that the principles

and rulings laid down by the United States Supreme Court in cases involving incorporated territories may not be indiscriminately applied to unincorporated territories such as the Philippine Islands.

After the decision of the Insular cases were handed down, Congress passed the Act of July 1, 1902, entitled "An Act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," which expressly provided in its first section that Section 1891 of the Revised Statutes was not to be extended and enforced in the Philippines. This section of the Revised Statutes gives force and effect to the Constitution and laws of the United States not inapplicable within all the organized territories and every territory thereafter organized as elsewhere in the United States. This action of Congress is tantamount to a confirmation of the ruling in the *Downes* case. The United States Supreme Court, subsequently, in the case of *Dorr vs. United States* (195 U. S. 138, 49 L. ed. 128) decided in 1904 had occasion to hold the validity of this Act of July 1, 1902, which denies to an individual in the Philippines the right to a trial by jury, in spite of the fact that it is one of the rights guaranteed by the Constitution. The language of the court in this case is significant: "If the treaty-making power could incorporate territory into the United States without congressional action, it is apparent that the treaty with Spain, ceding the Philippines to the United States, carefully refrained from so doing; for it is expressly provided that (article 9) 'the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.' 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. The legislation upon the subject shows that not only has Congress hitherto refrained from incorporating the Philippines into the United States, but in the act of 1902, providing for the temporary civil government (32 Stat. at L. 691, Chapter 1369), there is express provision that sec. 1891 of the Revised Statutes of 1878 shall not apply to the Philippine Islands." This ruling was subsequently followed expressly in the case of *Rasmussen vs. United States* (197 U. S. 516, 49 L. ed. 862) decided in 1905, in which Mr. Justice Brown made plain his position in *Downes vs. Bidwell* saying "that the Constitution does not apply to Territories acquired by Treaty until Congress has so declared, and that in

the meantime, under its power to regulate the territories, it may deal with them *regardless of the Constitution*, except in so far as concerns the natural rights of the inhabitants to life, liberty, and property.”

That the principle established in the Insular Cases still holds good at present is demonstrated by the statement of the Supreme Court of the United States in the case of Board of Public Utility Commrs. vs. Ynchausti and Co. (251 U. S. 401), decided without a dissenting vote, which pointed out the error of an argument of the respondents in this wise: “. . . It makes it clear that the mistake which underlies the entire argument as to the nonexistence of power here relied upon arises from the *erroneous assumption* that the constitutional limitations of power which operate upon the authority of Congress when legislating for the United States are applicable and are controlling upon Congress when it comes to exert, in virtue of the sovereignty of the United States, legislative power over territory not forming part of the United States, because not incorporated therein.” This decision was rendered only in the year 1920.

It has been contended that the power to legislate cannot include the right to alienate sovereignty over a territory. But why cannot legislation include alienation when legislation has been made to include acquisition and establishment of sovereignty? It was thru legislation that acquisition of sovereignty over Texas and Hawaii was brought about. These two territories, both independent states, were brought under the sovereignty of the United States thru joint resolutions passed by Congress and approved by the President of the United States. The doctrine of expatriation is nothing less than the doctrine of the withdrawal of a person from the sovereign control of a nation. When a state recognizes the right of expatriation it simply recognizes the principle that it may alienate or relinquish its sovereign powers over an individual. It is interesting to note that prior to the year 1868, the United States government did not uniformly acknowledge the right of American citizens to expatriate themselves. But by the act of Congress of that year the right of expatriation was declared in the most unqualified manner for, as the act says, it was the recognition of this principle that the United States government had “freely received emigrants from all nations, and invested them with the rights of citizenship.” (Rev. Stat., secs. 1999, 2000). Now, the relinquishment of sovereignty over a person, thru the recognition of the right of expatriation, is certainly very similar

to the relinquishment of sovereignty over a territory. If the first has been accomplished in the United States thru legislation, there can be no plausible reason why the second cannot be done also thru legislation. Both acts involve the withdrawal of sovereign rights. Their similarity is conceded by Mr. Justice White in these words: "True, from the exigency of a calamitous war or the necessity of a settlement of boundaries, it may be that citizens of the United States may be *expatriated* by the action of the treaty-making power, impliedly or expressly ratified by Congress." (*supra*). Again, let us take the doctrine of non-suability of the state by private parties. The fundamental reason of the exemption is the fact of sovereignty, for as stated by the United States Supreme Court, "a sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." (*Kawananakoa vs. Pollyblank*, 205 U. S. 349). And yet it is a well-known fact that the United States, or any state, may, thru legislation, validly give its consent to be sued. In so consenting to be subjected to a suit, the state in effect relinquishes sovereignty over the private parties to the action and the subject-matter of the suit. Other examples may be given showing relinquishment of sovereign rights thru legislation. For what is legislation? It is the expression of the will of the state; and if it is the will of the state to alienate its dominion over a particular possession, then that will may be legally expressed thru legislation.

It has also been argued that the latter part of section 3, article IV of the American Constitution is an express limitation on the power of Congress to alienate sovereignty. This clause runs thus: "And nothing in this Constitution shall be construed as to prejudice any claims of the United States or any particular State." This contention has been previously disposed of, but for greater clearness we shall quote Judge Cooley's interpretation: "The proviso that 'nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State,' had in view claims, some of which were recognized and some disputed, but all of which were subsequently adjusted amicably." (*Principles of Constitutional Law*, 3rd ed., p. 186). As a matter of fact, the government of the United States has made cessions and cessions of claims to sovereign rights the validity of which has never been doubted. Dr. Crandall in his work on *Treaties, Their Making and Enforcement* (2nd ed., p. 227) cites several instances of

cessions of claims by the United States government. On February 25, 1905, the United States relinquished extraterritorial rights in Zanzibar in favor of Great Britain. "By the convention between the United States, Great Britain and Germany, signed December 2, 1899, the United States renounced in favor of Germany all its rights and claims in respect of certain islands of the Samoan group, in consideration of like renunciations by Great Britain and Germany in favor of the United States of all rights and claims to the Island of Tutuila and all other islands of the Samoan group east of longitude 171° west. As the result of decisions of tribunals of arbitration, to which the determinations of disputed boundary lines have been referred, territory over which the United States had theretofore exercised jurisdiction has fallen within the jurisdiction of foreign powers. Thus, to take a recent case, by the decision of the Alaskan boundary tribunal, constituted under the treaty with Great Britain of January 24, 1903, to determine the boundaries of Alaska as described in the treaty between Russia and Great Britain of 1825, Wales Island fell to Great Britain, although Russia, and her successor, the United States, had continuously exercised jurisdiction over the island since 1825, in which Great Britain had acquiesced. It also appears that the government of the United States had erected a public building on the island." These instances certainly constitute valid and sufficient precedents of the right of Congress to alienate sovereignty over territorial claims.

I shall conclude this brief and rather incomplete analysis of the power and right of Congress to relinquish sovereignty over the Philippines by quoting Professor James Bradley Thayer of Harvard, quite eminent on questions of constitutional law: "Let me at once and shortly say that, in my judgment, there is no lack of power in our nation,—of legal, constitutional power, to govern these islands as colonies, substantially as England might govern them; that we have the same power that other nations have; and that we may, subject to the agreements of the treaty, sell them, if we wish, or abandon them, or *set up native governments in them*, with or without a protectorate, or govern them ourselves. I take it for granted that we shall not sell them or abandon them; that we shall hold them and govern them, or provide governments for them."¹

¹ Thayer, *Our New Possessions*, Harvard Law Review, Vol. XII, p. 467.