IS CONGRESS EMPOWERED TO ALIENATE SOVEREIGNTY OF THE UNITED STATES?[1]

(With special reference to the Philippine Islands)

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While planted in general terms, our inquiry as to the constitutional right of Congress to alienate sovereignty will be examined here with special reference to the Philippine Islands, where, if at all, the issue will likely arise.

Acquisition of the Philippines and Validity of Title

By treaty with Spain, ratified in February, 1899, the Philippine Archipelago, theretofore held under Spanish sovereignty, was ceded to the United States. Construing the force and effect of this cession, our Supreme Court, speaking through Chief Justice Fuller in the Diamond Rings case (183 U. S. 176, 179), said:

"By the third article of the treaty Spain ceded to the United States 'the archipelago known as the Philippine Islands,' and the United States agreed to pay Spain the sum of $20,000,000 within three months. The treaty was ratified; Congress appropriated the money; the ratification was proclaimed. The treaty-making power, the executive power, the legislative power, concurred in the completion of the transaction.

"The Philippines thereby ceased, in the language of the treaty, 'to be Spanish.' Ceasing to be Spanish, they ceased to be foreign country. They came under the *complete and absolute sovereignty and dominion of the United States,* and so became *territory of the United States over which civil government could be established.* The result was the same, although there was no stipulation that the native inhabitants should be incorporated into the body politic and none securing to them the right to choose their nationality. Their allegiance became due to the United States, and they became entitled to its protection.

"The Philippines, like Porto Rico, became by virtue of the treaty, ceded conquered territory or territory ceded by way of indemnity. * * * The Philippines were not simply occupied, *but acquired,* and having been granted and delivered to the United States by their former master, were no longer under the sovereignty of any foreign nation." (Italics supplied.) (Ibid. p. 178.)

1 This article takes a view contrary to that of Prof. V. G. Sinco's article concluded in this issue.

Spain's sovereign rights over the Philippine Islands were clearer than are those of most modern countries to their national territory. When Spanish sovereignty was extended to such islands in 1565 no "Filipino nation" was destroyed or supplanted, for none existed. The then inhabitants, estimated at 500,000 and occupying limited areas of the coastal plains, were split into numerous tribal groups, speaking different dialects, and altogether lacking in homogeneity or union. These tribes—of Malay origin—were themselves invaders, the aborigines being the pygmy blacks now known as Negritos, of whom possibly 30,000 are still extant. In the exercise of her dominion Spain took over the unoccupied and unclaimed areas of the archipelago —agricultural, forest, and mineral—and held and administered them as crown lands for over three centuries. At no time, either then or later, were these lands over owned, occupied, or claimed as the territory or patrimony of any Philippine tribe or Filipino body politic. Upon American occupation this "public domain" constituted over 63,000,000 acres, or 80 per cent of the total land area of the islands, while 40 per cent of the archipelago is still given over to pagan and Mohammedan peoples, numbering approximately 1,000,000.

By conquest, purchase, and treaty, therefore, Spain's sovereignty over the Philippines, together with her title to these crown lands and other public holdings in the islands, passed to the United States. Referring to the validity and completeness of this conveyance, Chief Justice Fuller stated in the Diamond Rings case (Ibid., p. 180) :

"The sovereignty of Spain over the Philippines and possession under claim of title had existed for a long series of years prior to the war with the United States. The fact that there were insurrections against her, or that uncivilized tribes may have defied her will, do not affect the validity of her title. She granted the islands to the United States, and the grantee in accepting them *took nothing less than the whole grant.*" (Italics supplied.)

Sovereignty Under Our Form of Government is in the People

The proposition is elementary that in the United States "the people are sovereign." Inasmuch, however, as there is a growing tendency on the part of Americans generally to forget or ignore the fact and to acquiesce in the gradual incroachment upon their rights by governmental agencies, it is well to stress the point. How our system of government differs in this regard from those of European countries (as existing in 1797) was

clearly brought out by Chief Justice Jay in the early case of Chisholm *v.* Georgia (2 U. S. 419, 471), where he said:

"Sovereignty is the right to govern; a nation or state sovereign is the person or persons in whom that resides; in Europe the sovereignty is generally ascribed to the prince; here it rests with the people; there the sovereign actually administers the government; here, never in a single instance; our governors are the agents of the people and at most stand in the same relation to their sovereign in which regents in Europe stand to their sovereigns. Their princes have personal powers, dignities, and preeminences; our rulers have none but official; nor do they partake in the sovereignty otherwise or in any other capacity than as private citizens."

The same principle was thus stated by Justice McLean in Spooner *v.* McConnell (Fed. Cas. No. 13249):

"The sovereignty of a state does not reside in the persons who fill the different departments of the government but in the people from whom the government emanates and who may change it at their discretion. Sovereignty, then, in this country abides with the constituency and not with the agent, and this is true both in reference to the Federal and State Governments."

In Yick Wo *v.* Hopkins (118 U. S. 356, 369) our Supreme Court, per Matthews, J., said:

"When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and to review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and atcion of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power."

It follows as a consequence that sovereignty over all territory belonging to or acquired by the United States is vested *in the American people as a whole*, and is held for their use and benefit. This principle, which is fundamental, finds expression in Shively *v.* Bowlby (152 U. S. 1, 57), as follows:

"Upon the acquisition of a territory by the United States, whether by cession from one of the States or by a treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States *for the benefit of the whole people* and in trust for the several States to be ultimately

created out of the territory." (Italics supplied.) (Cited and approved in Morris *v.* United States, 174 U. S. 196, 237.)

In Dred Scott *v.* Sandford (19 How. (U. S.) 393, 448) Chief Justice Taney, referring to the powers and limitations of the General Government over territories, stated:

"A power in the General Government to obtain and hold colonies and dependent territories, over which they might legislate without restriction, would be inconsistent with its own existence in its present form. Whatever it acquires it acquires for the benefit of the people of the several States who created it. It is their trustee, acting for them and charged with the duty of promoting the interests of the whole people of the Union in the exercise of the powers specifically granted.

"At the time when the territory in question was obtained by cession from France it contained no population fit to be associated together and admitted as a State; and it therefore was absolutely necessary to hold possession of it, as a territory belonging to the United States, until it was settled and inhabited by a civilized community capable of self-government and in a condition to be admitted on equal terms with the other States as a member of the Union. But, as we have before said, it was acquired by the General Government as the representative and trustee of the people of the United States, and it must therefore be held in that character for their common and equal benefit; *for it was the people of the several States, acting through their agent and representative, the Federal Government, who in fact acquired the territory in question,* and the Government holds it for their common use until it shall be associated with the other States as a member of the Union." (Italics supplied.)

It results, therefore, that when the United States, as indemnity for a war financed by the American people, and through payment of $20,000,000 of public funds, acquired from Spain "the complete and absolute sovereignty and dominion" over the Philippines, this sovereignty, together with the ownership of Spain's public holdings in the islands, became and is now vested in "the people of the United States." The acquisition was for their use and benefit as principal, and is now subject to their exclusive control and disposition. Neither Congress nor any other governmental agency has authority or jurisdiction to alienate this sovereignty, or to convey or compromise these rights, except as the power so to do may have been delegated to or conferred upon them by "the sovereign owners."

Alienation of Sovereignty

Since the United States became a Nation—now nearly 150 years—not a square foot of territory once brought under the American boundaries or where question of title was involved there have been adjustments, but the record discloses no single instance where sovereignty, admittedly vested in the people of the United States, has been transferred or withdrawn. Lacking, therefore, any concrete case of alienation, either attempted or consummated, the issue whether or not Congress has constitutional authority in the premises has never come before our courts for decision. It is only now, after the lapse of a century and a half and this through proposals by Congress to alienate United States sovereignty over the Philippines, that controversy has arisen and the subject acquired other than academic interest.

Scarcely was the treaty with Spain ratified and our title to and sovereignty over the Philippines became a fact than agitation began looking to their alienation. The question thus precipitated was, unfortunately, seized upon by party leaders as a "political issue," and the fate of the islands and their people became thereafter a pawn in the game of partisan politics. This action was taken despite the fact that Americans generally were altogether uninformed as to Philippine conditions or the needs of the situation, and in the full knowledge that such "imported issue" would have no actual bearing or influence upon election returns nor represent in any way the considered judgment of our electors upon the policy to be adopted. The Democratic Party aligned itself with those favoring abandonment of the islands and announced it to be the "paramount issue" of the presidential campaign of 1900. Subsequent platforms of such party have carried analogous planks, that for 1924 advocating the immediate grant of Philippine independence.

In 1916, the United States Senate, then Democratic, passed a bill providing for absolute Philippine independence in not less than two nor more than four years, which bill was defeated in the lower House by a narrow margin. In the act finally agreed upon by both Houses in August, 1916, a preamble thereto recites (among other things) that—

"It is, as it has always been, the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government can be established therein."

The truth of this allegation, or at least the authority of a partisan majority in Congress, largely influenced by political commitments, to thus categorically interpret the will of the American people as to the Philippines, might well be questioned were it revelant to our present inquiry. Our only concern here, however, is to evidence that Congress, irrespective of party, has uniformly acted on the assumption that it is vested with authority to alienate the Philippines at its pleasure, and that this idea has thus far gone largely unchallenged. Doubtless the quiescent attitude of our press and public as to the "mandate" or authority of Congress upon such a vital matter finds explanation in *the nature* of the proposed alienation, *i. e.*, the grant of independence to the Filipino people. Had Congress evidenced the less sentimental purpose of making *a gratuitous transfer* of the Philippines to Japan, or like foreign power, including title to 63,000,000 acres of public domain of the United States—comprising of our public to any such proposition and the denial of authority in the premises would unquestionably have been immediate and pronounced. And yet Congress can do this very thing if the power heretofore assumed by it as to the Philippines actually exists.

This disposition of our people to endow Congress with practically unlimited powers, and to acquiesce in measures by that body utterly unrelated to its *legislative functions*, is thus diagnosed by Cooley in his Constitutional Limitations (Cooley, Constitutional Limitations, 7th ed., 124):

"It is natural that we should incline to measure the power of the legislative department in America by the power of the like department in Great Britain, and to concede without reflection that whatever the legislature of the country from which we derive our laws can do may also be done by the department created for the exercise of legislative authority in this country. But to guard against being misled by a comparison between the two we must bear in mind the important distinction already pointed out, that with the Parliament rests practically the sovereignty of the country, so that it may exercise all the powers of the Government if it wills so to do; while, on the other hand, the legislatures of the American States are not the sovereign authority, and, though vested with the exercise of one branch of the sovereignty, they are nevertheless, in wielding it, hedged in on all sides by important limitations, some of which are imposed in express terms and others by implications which are equally imperative."

Given the present trend of international interest to the Pacific, and the constantly increasing political and commercial bearing of the Philippines upon the whole far eastern situation, wisdom would counsel that the constitutional right of Congress to alienate such islands or to state "the purpose" of the people of the United States with respect thereto should be thoroughly canvassed and determined beforehand. Particularly is this true when we consider that should the Philippines once be actually cut adrift by congressional act, or a specific date fixed for our withdrawal therefrom, it might then be difficult, if not impossible, for the American people, in whom sovereignty is vested, to raise the question of authority effectually.

Have the People of the United States Delegated to Congress the Right to Alienate Sovereignty?

Here again it is elementary that if the power to alienate territory of the United States exists in Congress, such authority must be found in the Constitution, which instrument defines and limits the measure of sovereignty surrendered by the people. Cooley, in his Principles of Constitutional Law, says at pages 29 to 31:

"The Government created by the Constitution is one of limited and enumerated powers, and the Constitution is the measure and the test of the powers conferred. Whatever is not conferred is withheld and belongs to the several States and the people thereof. * * *

"The Congress of the United States derives its powers to legislate from the Constitution, which is the measure of its authority; and any enactment of Congress which is opposed to its provisions, or is not within the grant of powers made by it, is unconstitutional, and therefore no law, and obligatory upon no one."

In McCullough *v.* Maryland (4 Wheat. (U. S.) 316, 405), Chief Justice Marshall thus definitely stated the proposition:

"The government of the Union, then, is, emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them and are to be exercised directly on them and for their benefit. This Government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which tis enlightened friends,

while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

A comprehensive statement of the limitations imposed upon the General Government by the Constitution, and the course to be pursued should further powers become necessary, is found in Kansas *v.* Colorado (206 U. S. 46, 89). The court, speaking. through Mr. Justice Brewer, said:

"But the proposition that there are legislative powers affecting the Nation as a whole, which belong to, although not expressed in the grant of powers [in the Constitution], is in direct conflict with the doctrine that this is a Government of enumerated powers.

"That this is such a Government clearly appears from the Constitution, independently of the amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things.

"This natural construction of the original body of the Consitution is made absolutely certain by the tenth amendment. This amendment, which was seemingly adopted with the prescience of just contention as the present disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intented that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, *they should be granted by the people in the manner they had provided for amending that act.* [Italics supplied.] It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the Staes, respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit, 'the people.' Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it—'We, the people of the United States'; not the people of one State but the people of all the States, and Article X reserves to the people of all the States the powers not delegated to the United States.

"The last paragraph of the section [sec. 8, Art. I], which authorizes Congress 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer

thereof,' is not the delegation of a new and independent power but simply provision for making effective the powers theretofore mentioned. * * * No independent and unmentioned power passes to the National Government or can rightfully be exercised by the Congress." (Ibid. p. 88.)

The right to alienate sovereignty is not among the enumerated powers of Congress. It further appears that an attempt to incorporate such a power was rejected by the framers of the Constitution. In the convention of the State of Virginia, which met on June 2, 1788, to consider the question of ratification of the Federal Constitution, an amendment was proposed providing as follows (see Snow, The Administration of Dependencies, 470):

"No treaty ceding, contracting restraining, or suspending the territorial rights or claims of the United States, or any of them * * * shall be made, but in cases of the most urgent and extreme necessity, nor shall any such treaty be ratified without the concurrence of three-fourths of the whole number of the Members of both Houses, respectively."

Gov. Edmund Randolph, who headed the Virginia delegation in the convention and presented the Virginia resolutions, opposed such amendment, saying (ibid.):

"Of all the amendments, this is the most destructive, which requires the consent of three-fourths of both Houses to treaties ceding or restraining territorial rights. * * * *There is no power in the Constitution to cede any part of the Territories of the United States.* But this amendment admits, in the fullest latitude, that Congress have a right *to dismember the empire.*" (Italics supplied.)

The proposed amendment was not adopted, and the Constitution as then ratified and as now existing contains no grant of power to cede the territorial rights of the United States. That such was the understanding of those who shared in the making of the Constitution appears from certain writings of Jefferson and Hamilton, embodied in the opinion of Mr. Justice White in Downes *v.* Bidwell (182 U. S. 244, 315), as follows:

"Undoubtedly the thought that under the Constitution power to dispose of people and territory, and thus annihilate the rights of American citizens, was contrary to the conceptions of the Constitution entertained by Washington and Jefferson. In the written suggestions of Mr. Jefferson, when Secretary of State, reported to President Washington in March, 1792, on the subject of the proposed negotiations between the

United States and Spain, which were intended to be communicated by way of instruction to the commissioners of the United States appointed to manage such negotiations, it was observed, in discussing the possibiilty as to compensation being demanded by Spain 'for the ascertainment of our right' to navigate the lower part of the Mississippi, as follows:

" 'We have nothing else' (than a relinquishment of certain claims on Spain) 'to give in exchange. For as to territory, *we have neither the right nor the disposition to alienate an inch of what belongs to any member of our Union.* (Italics supplied.) Such a proposition, therefore, is totally inadmissible and not to be treated for a moment.' Ford's Writings of Jefferson, vol. 5, p. 476.

"The rough draft of these observations was submitted to Mr. Hamilton, then Secretary of the Treasury, for suggestions, previously to sending it to the President, some time before March 5, and Hamilton made the following (among other) notes upon it: 'Is it true that the United States have no right to *alienate an inch* of the territory in question, except in the case of necessity intimated in another place? Or will it be useful to avow the denial of such a right? It is apprehended that the doctrine which restricts the alienation of territory to cases of *extreme necessity* is applicable to *peopled territory* than to waste and uninhabitated districts. Positions restraining the right of the United States to accommodate to exigencies which may arise ought ever to be advanced with great caution.' (Ford's Writings of Jefferson, vol. 5, p. 443.)

"Respecting this note Mr. Jefferson commented as follows: 'The power to alienate the *unpeopled* territories of any State is not among the enumerated powers given by the Constitution to the General Government, and if we may go out of that instrument and *accommodate to exigencies which may arise* by alienating the *unpeopled* territory of a State, we may accommodate ourselves a little more by alienating that which is *peopled,* and still a little more by selling the *people* themselves. A shade or two more in the degree of exigency is all that will be requisite, and of that degree we shall ourselves be the judge. However, may it not be hoped that these questions are forever laid to rest by the tenth amendment, once made a part of the Constitution, declaring expressly that the powers not delegated to the United States by the Constitution are reserved to the States respectively? And if the General Government has no power to alienate the territory of a State, it is too irresistible

an argument to deny ourselves the use of it on the present occasion.'

"The opinion of Mr. Jefferson, however, met the approval of President Washington."

The only mention of "territory" in the Constitution is found in paragraph 2, section 3, Article IV, which reads:

"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, and nothing in this Constitution shall be construed as to prejudice any claims of the United States or any particular State."

It is argued by some that by virtue of the word "dispose" in this section Congress is authorized to alienate sovereignty *as well as ownership* over territory or other property belonging to the United States. Such view, however, is opposed to both the plain meaning of the section and to the uniform interpretation given it by our Supreme Court. In Scott *v.* Sandford (19 How., U. S. 393, 504) Mr. Justice Campbell, after an exhaustive investigation of the background of section 3, Article IV, as finally adopted, says:

"An examination of this clause of the Constitution, by the light of the circumstances in which the convention was placed, will aid us to determine its significance. The first clause is 'that new States may be admitted by the Congress to this Union.' The condition of Kentucky, Vermont, Rhode Islands, and the new States to be formed in the Northwest suggested this as a necessary addition to the powers of Congress. The next clause, providing for the subdivision of the States, and the parties to consent to such an alteration, was required by the plans on foot for changes in Massachusetts, New York, Pennsylvania, North Carolina, and Georgia. The clause which enables Congress to dispose of and make regulations regarding *the public domain* was demanded by the exigencies of an exhausted Treasury and a disordered finance for relief by sales and the preparation for sales of the public lands, and the last clause, that nothing in the Constitution should prejudice the claims of the United States or a particular State, was to quiet the jealousy and irritation of those who had claimed for the United States all the unappropriated lands. I look in vain among the discussion of the time for the assertion of a supreme sovereignty for Congress over the territory then belonging to the United States,

or that they might thereafter acquire. I seek in vain for an enunciation that a consolidated power had been inaugurated whose subject comprehended an empire and which had no restriction but the discretion of Congress." (Italics supplied.)

"The clauses in the third section of the fourth article of the Constitution relative to the admission of new States, and the disposal and regulation of territory of the United States, were adopted without debate in the convention." (Ibid. p. 504.)

"* * * In Pollards Lessee *v.* Hagan (3 How. 212) the court says: 'The United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in cases where it is delegated, and the court denies the faculty of the Federal Government to add to its powers by treaty or compact.' This is a necessary consequence resulting from the nature of the Federal Constitution, which is a Federal compact among the States, establishing a limited government, with powers delegated by the people of distinct and independent communities, who reserved to their State governments and to themselves the powers they did not grant." (Ibid. p. 508.)

"I have endeavored with the assistance of these [historical documents] to find a solution for the grave and difficult question involved in this inquiry. My opinion is that the claim for Congress of supreme power in the Territories, under the grant 'to dispose of and make needful rules and regulations respecting *territory*,' is not supported by the historical evidence drawn from the Revolution, the Confederation, or the deliberations which preceded the ratification of the Federal Constitution. * * *

"And the advocates for Government sovereignty in the Territories have been compelled to abate a portion of the pretensions originally made in its behalf and to admit that the constitutional prohibitions upon Congress operate in the Territories. But a constitutional prohibition is not requisite to ascertain a limitation upon the authority of the several departments of the Federal Government. Nor are the States or people restrained by any *enumeration* or definition of their rights or liberties. To impair or diminish either the departments *must produce an authority from the people themselves* in their Constitution; and, as we have seen, a power to make rules and regulations respecting the public domain does not confer municipal sovereignty over persons and things upon it. * * *

"We have seen Congress does not dispose of or make rules and regulations respecting domain belonging to themselves, *but*

belonging to the United States. These conferred on their mandatory, Congress, authority to dispose of the territory which belonged to them in common; and to accomplish that object beneficially and effectually they gave an authority to make suitable rules and regulations respecting it. When the power of disposition is fulfilled, the authority to make rules and regulations terminates, for it attaches only upon territory 'belonging to the United States.'

"Consequently, the power to make rules and regulations, from the nature of the subject, *is restricted to such administrative and conservatory acts as are needful for the preservation of the public domain,* and its preparation for sale or disposition. * * * But this clause in the Constitution does not exhaust the powers of Congress within the territorial subdivisions or over the persons who inhabit them. Congress may exercise there all the powers of government which belong to them as the *Legislature of the United States,* of which these territories make a part." (Italics supplied.) (Ibid., p. 512.)

In United States *v.* Gratiot (14 Pet. (U. S.) 526, 537) Mr. Justice Thompson, after quoting from section 3, Article IV of the Constitution, said:

"The term 'territory,' as here used is merely descriptive of *one kind of property,* and is equivalent to the word *lands.* Ang Congress has the same power over it as over *any other property belonging to the United States;* and this power is vested in Congress without limitation and has been considered the foundation upon which *territorial governments* rest." (Italics supplied.)

Mr. Justice White in the case of Downes *v.* Bidwell (182 U. S. 244, 314), referring to the same subject, stated:

"I am not unmindful that there has been some contrariety of decision on the subject of the meaning of the clause empowering Congress to dispose of the Territories and other property of the United States, some adjudged cases treating that article as referring to property as such, and others deriving from it the general grant of power to govern Territories. In view, however, of the relations of the Territories to the Government of the United States at the time of the adoption of the Constitution, and the solemn pledge then existing that they should forever 'remain a part of the Confederacy of the United States of America,' I can not resist the belief that the theory that the disposing clause relates as well *to a relinquishment or cession of sovereignty* as to a mere transfer of rights of property *is altogether erroneous.*" (Italics supplied.)

Given the fact that when the Constitution was adopted the United States was precluded from alienating sovereignty over any of the "Territories" then held by it, to now contend that despite such fact the framers of that instrument intended to confer such a power upon Congress *as to Territories which might thereafter be acquired,* is, to say the least, a forlorn argument.

In Scott *v.* Sandford (19 How. (U. S.) 393, 509), the court, per Campbell, J., said:

"The Constitution permits Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. This power applies as well to territory belonging to the United States within the States as beyond them. It comprehends all of the public domain, wherever it may be."

Another opinion, well worth quoting as to the meaning of the clause in question, is that of Thomas H. Benton, for 30 years a Member of the United States Senate from Missouri, who, in a book issued in 1857 entitled A Historical and Legal Examination of the Dred Scott Case, said:

"Territories are not alluded to in it [the Constituiton.] The body of the instrument shows the same thing, every clause except one being for States; and Territories, *as political entities,* never mentioned once; and the word 'territory' occurring but once, and that *as property,* assimilated to other property —as land, in fact, and as a thing to be disposed of—to be sold. *Now, you never sell a territorial government, but you sell property;* and in that sense alone does the word 'territory' occur, and that but once in the whole instrument. * * *

"The whole Constitution was carried out upon the principle of ignoring the existence of Territories. I speak of Territories, implying political existence and organization, in contradistinction to territory signifying land, and repeat that, as political entities, the Constitution ignores them." (Italics supplied.)

The above holdings evidence clearly and decisively that the Constitution simply confers authority upon Congress to dispose of territory as "lands." If any present confusion exists in the matter, it arises from failure to discriminate between the transfer of ownership in "territory" *as property* and a cession of sovereignty over "Territory" *as a political entity.*

If a further restraint upon the power of Congress to alienate territorial sovereignty is required, it is found in the latter part of the clause (sec. 3, Art. IV), which reads: "And nothing in this Constitution shall be construed as to prejudice any claims

of the United States or any particular State." Ownership of the public domain *within* a territory, no less than sovereignty over the territory *as a whole*, is, as we have seen, vested in the several States and the people thereof. Congress has, for instance, power to dispose of "ownership" in the 63,000,000 acres comprising the public domain of the Philippines, as it has equal authority to dispose of the ownership of the United States in its various military reservations and other property holdings. Should Congress elect, for instance, to "dispose" of Governors Island, N. Y., or the Presidio Military Reservation, San Francisco—that is, sell same to third parties—it would hardly be contended that with a transfer of such or like "property of the United States" *sovereignty* as well as *ownership* could be conveyed. Neither can it be seriously argued that it would not work "to the prejudice" of the several States and their people should Congress, through alienation of the Philippines, deprive the American people not only of their property rights in the public domain of the islands, but their political or "sovereign rights" over the entire archipelago as well.

That the Philippines are Territory of the United States, in a *political* sense, is not subject to dispute. As heretofore seen, Chief Justice Fuller, in the Diamond Rings case (*supra*, note 1), in referring to the title acquired from Spain, said: "They [the Philippines] came under the complete and absolute sovereignty and dominion of the United States and so became territory of the United States over which civil government could be established." He then further states: "This result was the same, although there was no stipulation that the native inhabitants should be incorporated into the body politic and none securing to them the right to choose their nationality." To the same effect opinion of Attorney General Gregory (30 Op. Atty. Gen. 462 (Oct. 28, 1915), where it is held: "While, like Porto Rico, the Philippine Islands are not incorporated into the United States, they clearly are territory of the United States, and, to the extent that Congress has assumed to legislate for them, they have been granted a form of territorial government."

It is to be said that Congress, by its organic act of August 29, 1916, established a complete form of territorial government for the Philippines, including executive, judicial, and legislative departments, and that the officials of the government so organized take oath to support and maintain the Constitution of the United States. This organic act or charter differs only in

matters of detail from the charters of other "Territories" organized by act of Congress.

In National Bank *v.* Yankton (101 U. S. 129, 133), Waite, C. J., defining the nature of territories in their relation to the United States said:

"All territory *within the jurisdiction of the United States* not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but *political subdivisions* of the *outlying dominion of the United States.* Their relation to the General Government is much the same as that which counties bear to the respective States, and Congress *may legislate for them* as a State does for its municipal organizations." (Italics supplied.)

Chief Justice Marshall, in the case of Loughborough *v.* Blake (5 Wheat. (U. S.) 317), decided in 1820, discussing the constitutional provision that "all duties, imposts, and excises shall be uniform throughout the United States," thus stated what territory was included within such provision (p. 319):

"The power then to lay and collect duties, imposts, and excises may be exercised, and must be exercised throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great Republic, which is composed of States and Territories. The District of Columbia or the territory west of the Missouri is not less within the United States than Maryland or Pennsylvania."

This "territory west of the Missouri," declared by Chief Justice Marshall to be no less a part of the "American empire" than Maryland or Pennsylvania, was not held in 1820 under *any firmer title or more complete sovereignty* than is the territory of the Philippines, to-day organized and operating by virtue of lows enacted by the Government of the United States.

It can safely be said, therefore, that the Constitution confers no power upon Congress, either express or implied, to alienate sovereignty over any territory belonging to the United States.

(To be concluded)