
CORRESPONDENCE

THE RIGHT OF CONGRESS TO GRANT THE PHILIPPINES SOVEREIGN INDEPENDENCE

To the Editors of ILLINOIS LAW REVIEW:

It may, perhaps, be assumed without argument that whatever authority Congress has in respect of the foregoing must be found either under express or implied powers granted to it by the Constitution of the United States. An examination of the Constitution discloses that such authority, if any, must be exercised by virtue of the provisions of Paragraph 2, Section 3, Article 4, of the Constitution, which provides that

"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 so construed as to prejudice any claims of the United States or of any particular state."

The Philippines are "territory" of the United States within the meaning of the Constitution.

Before discussing the limitations upon the power of Congress, as set forth in the above paragraph, it is pertinent to consider whether the Philippines fall within the subject matter of this paragraph as constituting "territory" of the United States. This question can very clearly be determined in the affirmative, as both the opinions of attorney generals of the United States as well as of the Supreme Court of the United States have held that the Philippines do constitute territory thereof. It is interesting in this connection to note the opinion of the attorney general (30 Op. Atty. Gen. 462, October 28, 1915), where it is held that "while, like Porto Rico, the Philippine Islands are not incorporated into the United States, *they clearly are territory of the United States* . . . R. S. Sec. 5546,

draws no distinction between 'organized' or 'unorganized,' 'incorporated' or 'unincorporated' territory."

Again, in the *Philippine Insular* case, *Fourteen Diamond Rings v. United States*, 183 U. S. 176, the Supreme Court of the United States designates the Philippine Islands as "territory of the United States."

The same principle was sustained in *Dorr v. United States* (May 31, 1904, 195 U. S. 138), where Mr. Justice Day in his opinion held:

"that the United States may have territory which is incorporated into the United States as a body politic, I think, was recognized by the framers of the Constitution in enacting the Article already considered giving power over the territories, and is sanctioned by the opinions of the justices agreeing in the judgment in *Downes v. Bidwell* (182 U. S. 244). Until Congress sees fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territory, and subject to such constitutional restrictions upon the powers of that body as are applicable to the Constitution."

The foregoing citations seem to show beyond cavil that, although the Philippines may not be what is technically known as "incorporated" territory, nevertheless they do constitute territory within the meaning of the Constitution and are subject to all of the limitations and provisions respecting territories contained in the Constitution.

Congress cannot grant sovereign independence to any "territory" of the United States.

Since it has been established from the foregoing that the Philippines do constitute territory in the United States, and, therefore, fall within the subject matter of Paragraph 2, Section 3, Article 4, of the Constitution, it therefore becomes pertinent to consider the extent of and the limitation upon the rights of Congress as defined in that paragraph.

Those who contend that Congress has the constitutional right to grant the Philippines their independence place especial stress upon the use of the word "dispose" in the above paragraph, and base their argument upon the contention that, as so used, this word is synonymous with "get rid of" or "sell." It must be recognized, however, that the word "dispose" has another well defined and distinct meaning synonymous with "arrange," and it is apparent from the context of the sentence in question, as well as from the express statements of those who actively participated in the drafting of the Constitution, that the word in the present paragraph was used in its latter sense. It will be noted that the power granted is "to dispose of *and* make all needful rules and regulations respecting the territory." If this constitutes the granting of a single power to be conjunctively and not disjunctively exercised, it is evident that the word "dispose" cannot mean to "get rid of" or "sell." Such a meaning would be inconsistent, because, obviously, it would be unnecessary and would be futile to provide for the making of needful rules and regulations

respecting territory which was to be sold or otherwise alienated so that the United States no longer retained any jurisdiction thereover. It may be admitted that the word "and" might conceivably have been used in the grant of the foregoing power in a disjunctive as well as in a conjunctive sense, but if such a meaning is to be given it should be evident from the wording of the clause taken as a whole. An examination of the entire clause not only discloses no such meaning, but, on the contrary, very clearly shows that "and" was used conjunctively only in that particular instance.

The fact that the word "and" was used conjunctively, and that the word "dispose" was used in the sense of "arrange" is conclusively established by the proviso contained in the above quoted Paragraph 2, Section 3, Article 4, of the Constitution, wherein the power to dispose is coupled with the limitation that "nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular state."

It is well known to those familiar with the history of the drafting of the Constitution that the proviso in question was inserted because of the conflicting claims of certain states to the then so-called Western Territory, which conflicting claims finally led to the unanimous ceding of all claims by each state to the nation, on condition that the territory should ultimately be admitted to the Union as states. This condition was covered in the Constitution by the above proviso.

It is interesting to note in this connection that at the time when the adoption of the Constitution itself was under consideration by the various states, the statements made by those who participated chiefly in the drafting thereof confirm the fact that the above meaning is the correct interpretation of this paragraph of the Constitution. Madison, one of the chief draftsmen of the Constitution, in speaking of the proviso in this particular paragraph, in 43 Federalist, said:

"This is a power of very great importance and required by considerations similar to those which showed the property of the former. (Note: The 'former' paragraph referred to by Madison was Paragraph 1, Section 3, Article 4, of the Constitution, which reads: 'New states may be admitted by the Congress into this Union, but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of States, without the consent of the legislatures of the states concerned as well as of Congress.') *The proviso annexed* is power in itself and *was probably rendered absolutely necessary* by jealousies and questions concerning the Western Territory so far known to the public."

The jealousies and questions to which Madison has reference were those above mentioned, and which resulted in the ceding of the Western Territory with the understanding that the same should be eventually incorporated into the Union as states. His recognition of the necessity of the proviso clearly shows that he recognized this limitation of the right of Congress to deal with territory of the United States.

Again Madison in 14 Federalist, in commenting upon this paragraph, used the following language:

"A second observation to be made is that the immediate object of the Federal Constitution is to secure the union of the thirteen primitive states, which we know to be practicable; and to add to them such other states as may arise in their own bosoms, or in their neighborhoods, which we cannot doubt to be equally practicable."

It will be noted from the last quotation that Madison's sole thought in respect of territory of the United States seems to be that this territory is to be held until such time as it can be incorporated as an additional state or states constituting a part of the Union of the theretofore existing states. Madison speaks of such new states so to be incorporated as those that may arise "in their own bosoms or in their neighborhoods," and it is apparent that he had in mind either the creation of new states by the division of theretofore existing states, as contemplated by Paragraph 1, Section 2, Article 4, of the Constitution, or the creation of new states from territory of the United States, which territory, at the time when Madison spoke, was all in the "neighborhood" of the then existing states. The mere fact that the Philippines happen to be territory which is geographically distant from the present existing states of the United States does not affect the original intention of the framers of the Constitution in respect of the procedure to be followed in dealing with all territory of the United States, which procedure is outlined in the general rule so prescribed as set forth in Paragraph 2, Section 3, Article 4, of the Constitution.

The general thought above discussed is reaffirmed by Hamilton, who stated in 7th Federalist:

"It has been the prudent policy of Congress to appease this controversy (Note: Referring to the dispute over the Western Territory) by prevailing upon the states to make cessions to the United States for the benefit of the whole . . . At present a large part of the vacant Western Territory is, by cession at least, if not by any anterior right, the common property of the Union."

Hamilton's statement is worthy of careful study because it accentuates the theory which undoubtedly must have been present in the minds of all of the framers of the Constitution, namely, that in respect of territory of the United States the federal government stood in the position of a trustee for the benefit of each and every state, and that as such trustee, while it might provide for the government and regulation of territories, nevertheless it could not, by the express prohibition of the proviso in Paragraph 2, Section 3, Article 4, of the Constitution, do anything which would prejudice either "any claims of the United States or of any particular state."

If, as is undoubtedly true, the various states are the beneficiaries for whom the federal government holds the territory of the United States, then it would seem to necessarily follow that unless the consent by appropriate procedure is obtained from each of the beneficiaries, each such non-assenting beneficiary would be prejudiced so

far as concerned any claim on its part to a beneficial interest in such territory, if the United States (in the absence of a further constitutional amendment) should attempt to sell or alienate any territory thereof.

The foregoing analysis of the pertinent provisions of the Constitution itself, as well as the conditions which surrounded the enactment of these provisions and the statements of the authors thereof, all lead inevitably to the conclusion that there is no power in Congress or any other governmental agency or officer at the present time to grant the Philippines their sovereign independence. On the contrary, the Constitution of the United States—the supreme law of the land—contains definite prohibition against any such action, and shows that the United States must hold all territory or other property as a trustee for the benefit of the individual states. One of the fundamental principles of our government, which may be regarded as now definitely fixed, is that no state or group of states has the right to withdraw from the Union and establish an independent sovereignty. Neither can any state or group of states be permitted or authorized to so withdraw, by Congress or other governmental representatives. Each state has an undivided beneficial interest in any territory of the United States, and it would, indeed, be a strange doctrine which would permit the legislative or executive branches of the United States government to establish an independent sovereignty out of any portion of such territory (which territory is really the undivided property of the several states), and at the same time not permit a like procedure in respect of any individual state or group of states. Such a result would allow greater freedom to merely potential states than is possessed by the states themselves. It would give to the ward more powers than are possessed by the guardian.

Any such alienation and setting up of an independent government, either on the part of any state or in respect of any territory of the United States, is contrary to the implied continued integrity of the Union, is contrary to the express provisions of the Constitution of the United States now in force, and, except by appropriate constitutional amendment, cannot be accomplished.

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