MPSC-Gen-USCourt

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Memo: The application of Art. IV, § 3, cl. 2 to Puerto Rico as interpreted by the United States courts.

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Summary: The status of the Commonwealth of Puerto Rico has not been dealt with by the Supreme Court. The lower federal courts have not been uniform in their treatment of the Commonwealth and no court has decided the broad question of the general applicability of the territorial clause.

The District Court of Puerto Rico has, since the creation of the Commonwealth, indicated in dicta its belief that a unilaterally irrevocable compact has been created between Puerto Rico and the United States. The court has, however, refrained from firmly grounding a decision on the concept that the compact represents a revocation by Congress of its plenary power under the territorial clause.

In other federal courts the question has arisen where the territorial clause was needed to justify otherwise unconstitutional congressional action. These cases have arisen in the context of diversity jurisdiction, full faith and credit, and the delegation of the power to change the admiralty and maritime law. All these cases indicate that at least insofar as the specific question at issue Congress still exercises Art. IV, § 3, cl. 2 powers over Puerto Rico.

Since 1952 four sections of the compact legislation have been repealed. In one case the repeal was bilateral. In two cases the District Court of Puerto Rico has held that unilateral repeal did not violate the principle of irrevocability since the sections in question were "peripheral" in that they dealt with the U.S. district court. The fourth repeal has not been contested in the courts.

The ad hoc, almost random, nature of the

cases in the territorial clause preclude the drawing of general conclusions. At best the cases show that the courts have simply not directly decided the issue of Puerto Rico's status. At worst they stand for the proposition that Puerto Rico is a territory subject to Congress' plenary power over the territories. In between one can speculate at will about "degrees" of territorial clause applicability.

1st possible path
Structure the compact
so as to express the
view that PR is not a
territory ; thereby removing
the Art. IV pwr by definition -
leaving situs
in view of history,
relationship to US, etc. - surely developing

The question of the continuing applicability to "post-compact" Puerto Rico of Article IV, section 3, clause 2 ("territorial clause") has not been answered uniformly or clearly by the federal courts. The Supreme Court has not spoken on the issue and the lower court opinions contain much conflicting dicta, although few definitive holdings.

I. The District Court of Puerto Rico

The strongest language concerning the nonapplicability of the clause emanates from the federal district court in Puerto Rico. Since the beginning of the Commonwealth in 1952 the opinions of this court have consistently stated that the compact between Puerto Rico and the United States is not unilaterally revocable, thus implying that the congressional plenary power under the territorial clause is limited at least to the extent of the grant of powers in 48 U.S.C. § 731b to organize a government and adopt a constitution. The earliest assertion of irrevocability by the court was in Mora v. Torres, 113 F.Supp. 309 (D.P.R. 1953). Although the facts of that case only required a decision on the applicability of the due process clause, the district judge extensively explored the issue of Puerto Rico's status and specifically stated that the Commonwealth government does not exercise its powers through a delegation of Congress' plenary power over the territories, that the compact cannot be

unilaterally amended without the consent and approval of the other party, and that "the Fifth Amendment of the Constitution of the United States is no longer applicable on the basis that Puerto Rico is a possession, dependancy or territory subject to the plenary power of Congress. But it continues to be applicable to Puerto Rico as part of the compact . . ." 113 F.Supp. at 319.

More recent cases indicate that the district court continues to believe that the relationship between the Commonwealth and the United States is based upon a unilaterally irrevocable compact. E.g., U.S. v. Valentine 288 F.Supp. 957, 981 (D.P.R. 1968)(The compact is "a binding agreement, irrevocable unilaterally . . . [and] transforming Puerto Rico's status from territory to commonwealth"); Alcoa Steamship Co. v. Perez, 295 F.Supp. 187, 197 (D.P.R. 1968)(the Commonwealth "is a body politic which has received through a compact with the Congress . . . full sovereignty over its internal affairs in such a manner as to preclude a unilateral revocation"); Long v. Continental Casualty Co., 323 F.Supp. 1158, 1160 (D.P.R. 1970).

In all cases, however, the assertions about Puerto Rico's status are only dicta and such assertions have not been made by the courts of appeals. Significantly, in affirming Mora v. Torres, supra., Judge Magruder

explicitly refrained from deciding on the nature of the P.R./U.S. relationship and merely held that "there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States." Mora v. Mejias, 206 F.2d 377, 382 (1st Cir. 1953).*/

Moreover, even the district court in Puerto Rico has refrained from firmly and unambiguously holding that the territorial clause is not applicable despite three clear opportunities to do so. The court has had before it cases involving three separate statutes (Federal Firearms Act, Federal Alcohol Administration Act, Robinson-Patman Act) that purported to regulate purely intra-Commonwealth transactions by defining "interstate or foreign commerce" to include commerce "within any territory or possession or the District of Columbia." 15 U.S.C. § 211(2). See also, 15 U.S.C. § 12; 27 U.S.C. § 211(2).

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*/ Courts other than the district court of Puerto Rico have held that the doctrines of comity and abstention should be exercised to preserve good relations between the Commonwealth and the United States, but this respect for local courts would obtain regardless of the applicability of the territorial clause as long as Congress did not revoke the powers of self-government granted in 48 U.S.C. 631 et seq. See, e.g., Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970); International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 351 F.Supp. 1153, 1229-32 (D.Haw. 1972); Wackenhut Corp. v. Aponte, 266 F.Supp. 401 (D.P.R. 1966), aff'd, 386 U.S. 268 (1967).

Such regulation could, of course, only be justified under the territorial clause since even the well-extended limits of the commerce clause do not justify federal regulation of purely intrastate transactions. See, Cases v. U.S., 131 F.2d 916 (1st Cir. 1942), cert. denied, 319 U.S. 770 (1943)(Federal Firearms Act applicable under the territorial clause to intra-territorial acts in pre-compact Puerto Rico).

In each case the court held that the statutes involved did not apply to transactions within the Commonwealth, but refused to base that holding on a lack of plenary congressional power to regulate Puerto Rican affairs under the territorial clause. In U.S. v. Rios, 140 F.Supp. 376 (D.P.R. 1956)(Firearms Act), the court supplied a variety of reasons for not applying the federal act to local transactions:

- if Congress had forseen the Commonwealth it would have changed the act thus it did not intend to apply it to a political entity such as the Commonwealth
- the definition is now "locally inapplicable" and thus does not apply to Puerto Rico under § 9 of the Federal Relations Act. 48 U.S.C. § 734
- § 9 serves a function substantially similar to the commerce clause and thus limits the federal power.

But the court explicitly stated that it was not deciding that Congress had renounced its powers under the territorial clause or that the Commonwealth had ceased to be a territory under that clause. 140 F.Supp. at 381-82.

Similarly in Trigo Bros. Packing Corp. v. Davis, 159 F.Supp. 841 (D.P.R. 1958)(Alcohol Administration Act), vacated on other grnds. 266 F.2d 174 (1st Cir. 1959), the court clearly refrained from a decision on the territorial clause and chose to rely on § 6 of P.L. 600, which repealed all laws inconsistant with the compact. See 48 U.S.C. § 731b.

In the most recent case of this trilogy, Liquilux Gas Services of Ponce, Inc. v. Tropical Gas Co., 303 F.Supp. 414 (D.P.R. 1969)(Robinson-Patman Act), the court found it unnecessary to delve into the question of the Commonwealth's political status and held that § 9 of the Federal Relations Act showed a congressional "intent not to apply federal regulations to strictly local matters within Puerto Rico." 303 F.Supp. at 418. Specifically the court relied on the language of § 9 stipulating that the U.S. laws "shall have the same force and effect on Puerto Rico as in the United States." 48 U.S.C. § 734.

II. The Diversity Cases

Unlike the dicta and evasive language that characterize the opinions in the district court of Puerto Rico dealing with the territorial clause there is a line of cases on diversity jurisdiction in three different circuits that clearly requires the continuing application of the territorial clause.

Some background on diversity jurisdiction is

in order. Article III, section 2, clause 1 extends the judicial power of the United States to cases "between Citizens of different States." Until 1940, statutes granting diversity jurisdiction to the federal courts did not include cases involving the District of Columbia or the territories. In 1940 Congress extended diversity jurisdiction to such cases and the constitutionality of that extension was decided in National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949). The Court found that the District of Columbia is not a state within Article III, but also held that the statutory extension of diversity jurisdiction was a constitutional exercise of congressional powers under Article I, section 8, clause 17.*/ 337 U.S. at 588-90.+ In Siegmund v. General Commodities Corp. 175 F.2d 952 (9th Cir. 1949) the reasoning of Tidewater was held to apply to litigation between a citizen of a state and a citizen of the territory of Hawaii. The

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*/ Congress shall have the power "to exercise exclusive Legislation in all Cases whatsoever, over such District."

+ As if to make the confusion surrounding the current status of Puerto Rico complete, the 5 justice majority in Tidewater was split 3 - 2 on the reasons for finding diversity jurisdiction. Justices Jackson, Black, and Burton relied on Article I, while Justices Rutledge and Murphy preferred to rely on a broad construction of Article III. If this latter rationale is accepted then the impact of the cases discussed infra is greatly diminished.

court noted that congressional power over territories under Article IV, section 3, clause 2 is also plenary and thus could be exercised in the same manner as the Article I power had been exercised in relation to the District. */ 175 F.2d at 953-4.

Detres v. Lions Bldg. Corp., 234 F.2d 596 (7th Cir. 1956), was the first case to apply Siegmund to post-compact Puerto Rico. The Seventh Circuit held that "Puerto Rico both before and after the adoption and approval of its constitution was a territory . . . within the meaning of the diversity [statute]" and followed the Siegmund court's construction and extension of Tidewater. 234 F.2d at 600, 603.

Subsequent to Detres Congress amended the diversity statute to its current form which defines "states" as used in the section to include "the Territories, the District of Columbia, and the Commonwealth of Puerto Rico." 28 U.S.C. § 1332(d). In Lumus Co. v. Commonwealth Oil Refining Co., 195 F.Supp. 47 (S.D.N.Y. 1961), § 1332(d) was held to be a constitutional exercise of Congress' power under the territorial clause. 195 F.Supp. at 51. Similarly, in Americana of Puerto Rico, Inc. v. Kaplus,

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*/ The Siegmund court, however, did not rely exclusively on the territorial clause; it also indicated that the Tidewater concurring opinion's construction of Article III would also apply to the territory of Hawaii. 175 F.2d at 954.

368 F.2d 431 (3rd Cir. 1966), cert. denied 386 U.S. 943, (1966), the Third Circuit held that "Puerto Rico is a 'Territory' within the purview of Article IV, Section 3" and that the territorial clause "provides the requisite constitutional authority" for § 1332(d). 368 F.2d at 436.

III. The Full Faith and Credit Cases

The Kaplus case also involved a full faith and credit question and the implications of the decision on that issue extend beyond those of the diversity issue. The case arose when the plaintiff secured a default judgment in the Superior Court of Puerto Rico and won a summary judgment in the U.S. District Court of New Jersey in a suit on the Puerto Rican judgment. The lower court based its decision on 28 U.S.C. § 1738 which extends the requirements of full faith and credit to the "territories and possessions." The defendant contended that since Article IV, section 1 of the U.S. Constitution requires only that each state give full faith and credit to the "Public Acts, Records, and judicial Proceedings of every other State" (emphasis added), then § 1738's coverage of territories and possessions is beyond the constitutional power of Congress.

Once again the background is gleaned from cases decided long before the concept of compact or commonwealth had arisen and begins with a decision concerning the District of Columbia. In Embry v. Palmer 107 U.S. (17 Otto)

3 (1882), the Court upheld the constitutionality of a predecessor to § 1738 using the following reasoning:

> (1) Insofar as the statute relates to state proceedings it is founded on art. IV, § 1.
>
> (2) The power to determine the effect given to judicial proceedings of courts of the United States is conferred inter alia by Article III, the necessary and proper clause, and the supremacy clause.
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> (3) The Supreme Court of the District of Columbia is a court of the United States because of the plenary power over the District granted to Congress by the Constitution.
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> (4) Therefore full faith and credit must be given to the District's Courts as courts of the United States.

107 U.S. at 9-10.

Seventeen years later the Court held that Embry's reasoning "is equally applicable to legislative acts of the Territory, as the passage of such laws is the exercise of authority under the United States." Atchison, Topeka & Santa Fe Ry. v. Sowers, 213 U.S. 55, 65 (1909).

The Kaplus court combined Embry (judicial proceedings) with Sowers (territory) and held that:

> . . . Congress has the power to legislate what effect must be given judicial proceedings of those territorial courts of the United States created by Congress as "legislative courts" under Article I, Section 8 [D.C.] and Article IV, Section 3 [territories] of the Constitution. In view of this authority there is no doubt that the extension of full faith and credit by Section 1738 to include judgments of the courts of the territories and possessions of the United States is constitutional. 368 F.2d at 437-38 (emphasis added).

The court also specifically held that judgments of the Commonwealth's courts are among those contemplated by the statute.*/ 368 F.2d at 438. Kaplus, then, stands for the propositions that (1) the Commonwealth courts are courts of the United States (i.e., "legislative" or "territorial" courts) created under the territorial clause and that (by implication) (2) the judicial proceedings and legislative acts of the Commonwealth are simply "exercise of authority under the United States." Sowers, 213 U.S. at 65. It is doubtful that the court intended to so crudely upset the delicate balance between the United States and the Commonwealth, while deciding "in favor" of Puerto Rico, but the rationale of the opinion threatens to completely undermine the possibility of Puerto Rico establishing its status as a commonwealth unfettered by the plenary congressional powers of the territorial clause.

IV. The Admiralty and Maritime Cases

A third line of cases that required either an explicit or implicit decision on the constitutional power of Congress to pass legislation concerning Puerto Rico involves the application of the admiralty and maritime

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*/ The court treated this issue primarily in terms of congressional intent rather than power. The discussion in this memo assumes that the court was also deciding that Congress had the power to apply § 1738 to Puerto Rico.

law in the Commonwealth. In 1920 the Supreme Court held that the constitutionally granted power of Congress to legislate on admiralty and maritime law could not be delegated to the states. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920). See also Washington v. Dawson & Co., 264 U.S. 219 (1924). In Knickerbocker the Court held unconstitutional a federal statute that attempted to give suitors in admiralty "the rights and remedies under the workmen's compensation law of any State." Act of Oct. 6, 1917, c.97, 40 Stat. 395.

Shortly after Knickerbocker, and while Puerto Rico was still a territory, the First Circuit held that the Constitution was not applicable to the unincorporated territory and thus the admiralty provision was inapplicable "unless Congress has put it there by legislation." Lastra v. New York & Porto Rico S.S. Co., 2 F.2d 812 (1st Cir. 1924). The court based its decision that Puerto Rico was not bound by the admiralty law on § 8 of the 1917 Organic Act (Jones Act) which granted the Puerto Rican legislature authority over the navigable streams, harbor areas, and the adjacent islands and waters of the island. The court did not discuss the constitutionality of a congressional delegation of power over maritime matters, but implicit in the decision is the premise that such a delegation can be made under the territorial clause.

The first post-compact case on the admiralty law issue was decided by the First Circuit in 1956. In Guerrido v. Alcoa Steamship Co., 234 F.2d at 349 (1st Cir. 1956), the court modified its earlier decision in Lastra and held that

> . . . the rules of the admiralty and maritime law of the United States are presently in force in the navigable waters of the United States in and around the island of Puerto Rico to the extent that they are not locally inapplicable either because they were not designed to apply to Puerto Rican waters or because they have been rendered inapplicable to these waters by inconsistent Puerto Rican legislation.

The court acknowledged the § 7 of the Organic Act is still in force as § 749 of the Puerto Rican Federal Relations Act, but decided that the original enactment in 1917 of the section was in the context of applicability to Puerto Rico of the general maritime law;thus, reasoned the court, since the Jones Act did not repeal the existing maritime law, it only granted the power "to supersede inconsistent rules of the federal maritime law." 234 F.2d at 355. As to the constitutionality of the grant the court simply stated:

> . . . what Congress could not constitutionally delegate to the legislature of a state as the organ of an independent sovereignty, it might well be able to delegate to the legislature which it had created for a territory which it had organized. 234 F.2d at 356. See also Flores v. Prann, 175 F.Supp. 140 (D.P.R. 1959).

This holding does not, of course, require that the territorial clause still be applicable in Puerto Rico since

even if the original grant of power was under Art. IV, § 3, cl. 2, the continuing exercise of that power could be derived from the permanence given to the grant by the compact. Guerrido and subsequent cases, however, seriously undercut this construction of the events. The First Circuit qualified its Guerrido holding by stating that Commonwealth legislation could not supplant and, in fact, would itself be superceded by "a rule of maritime law which Congress in the exercise of its constitutional power has expressly made applicable in Puerto Rican waters. 234 F.2d at 355, 356. See also Fonseca v. Prann, 282 F.2d 153, 156-57 (1st Cir. 1960), cert. denied, 389 U.S. 905 (1967).

In sum the current status of maritime and admiralty law in Puerto Rico is as follows:

- The general maritime law applies unless Puerto Rico has passed inconsistent legislation, then
- Puerto Rican law applies unless Congress has passed inconsistent legislation expressly making it applicable to Puerto Rico, then
- federal law applies.

What then is the source of power for the application of federal law in the last instance? It cannot be the same source from which the general federal power over maritime law is derived since Knickerbocker and subsequent cases hold that such power cannot be delegated. The source

must be the territorial clause, and here, unlike the diversity and full faith and credit cases, the clause is used to intrude upon an area explicitly granted to the Commonwealth by the Puerto Rican Federal Relations Act. */ The implication is that the compact is revocable by the exercise of Congressional power under Art. IV, § 3, cl. 2.

V. Changes in the Compact Legislation

Since the creation of the Commonwealth four sections of the legislation comprising the compact have been repealed: § 793a (1954, Model Housing Board); § 745 (1961, Commonwealth public debt limitations); § 867 (1968, qualifications for jurors in U.S. District Court of Puerto Rico); § 863 (1970, jurisdiction of the U.S. District Court of Puerto Rico).

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*/ In Waterman Steamship Corp. v. Rodriguez, 290 F.2d 175 (1st Cir. 1961), the most poorly reasoned of the admiralty cases, the court suggested that federal admiralty legislation expressly made applicable to Puerto Rico "would not be inconsistent with the compact . . . [because of] section 9 of the Puerto Rican Federal Relations Act." 290 F.2d at 179 n.6. This reasoning fails on two counts. First, the requirement of expressly making applicable has been explicitly rejected in other cases involving § 9. See, e.g. U.S. v. DeJesus, 289 F.2d 37 (2nd Cir. 1961), cert. denied 366 U.S. 963 (1961). Second, whatever the continuing power of Congress under the territorial clause the compact would be totally meaningless if § 9 were used to justify alteration of all other sections.

The first of these, § 793a, not part of the Organic Act of 1917, dissolved the Model Housing Board created in 1934 and provided that remaining funds be added to the Commonwealth treasury.

Sections 863 and 867 both related to the U.S. District Court of Puerto Rico and both have received comment from that court. In U.S. v. Valentine, 288 F.Supp. 957 (D.P.R. 1698), the court, amid strong language about the irrevocable compact, stated that not all the detailed provisions of the compact are irrevocable. Distinguishing between "essential provisions" and "peripheral provisions" the court stated that the latter are in the compact for want of another place to put them. Arguing that the repeal of § 867, in the interest of uniform rules for juries in the federal system, does not reflect the inviolability of the compact, the court noted that it was a federal court and thus governed by rules established by Congress. 288 F.Supp. at 981 n.24. Similarly in Long v. Continental Casualty Co., 323 F.Supp. 1158 (D.P.R. 1970), the court found no violation of the compact in Congress' unilateral revocation of the district court's "territorial jurisdiction."*/ The court quoted

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*/ Section 863 provided that where the amount in controversy exceeded 3000 dollars and where the parties were not domiciled in Puerto Rico the U.S. District Court of Puerto Rico had jurisdiction whether or not there was diversity of citizenship.

Valentine with approval and went on to state that the Commonwealth and the United States had not agreed to maintain in unalterable form the jurisdiction of their respective systems.

In both Valentine and Long the court does little more than assert its conclusion that the compact has not been violated. The distinction between essential and peripheral provisions is unsupported by the legislation itself and appears to reflect only what the district judge felt was in Puerto Rico's interest, rather than providing a coherent method of determining which elements of the compact are irrevocable and which are not. Moreover, although the district court clearly intended no such implication, the logic of the decisions points to a continuing congressional power under the territorial clause. Sections 863 and 867 were initially enacted pursuant to Congress' power over the territories; if the compact did not "freeze" these enactments, then alterations are a further exercise of the territorial power.

The repeal of § 745 was the only change of the compact that was not unilateral. The section provided limits to the public indebtedness that could be incurred by the Commonwealth or its municipalities.*/ In the

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*/ Portions of § 745 relating to tax exemption for bonds issued by the Commonwealth government were retained.

repealing law Congress provided that the repeal should not take effect until the Commonwealth constitution had been amended (according to procedures in that constitution) to include new limits. The importance of the bilateral nature of this repeal should not be overemphasized. Congress may have been more interested in the imposition of new limits than in accepting the premise that modification of the compact must be bilateral. The § 745 repeal does, however, provide a workable procedure that could be applied to changes in provisions of the compact that affect the internal government of the Commonwealth. Whether or not such a procedure is required is a question not yet decided.

VI. Conclusion

Litigation concerning the relationship between the Commonwealth and the United States does not provide clear guidelines concerning the territorial clause. The three series of cases involving the constitutional power of Congress (diversity, full faith and credit, admiralty) indicate that the territorial clause has not been rendered totally inapplicable by the compact legislation, but conclusions on the extent of continuing applicability must involve inference and speculation. Although the cases all move in the direction of upholding Congress' territorial powers, in each case the decision either furthered or had a negligible effect on Puerto Rico's interests. A different direction might be taken if the case involved an intrusion on the internal

affairs of the Commonwealth. The admiralty cases, however, come close to contradicting this hypothesis and serve as a reminder of the uncertainty that results from Puerto Rico's existence in the limbo between state and territory.