

**Remarks of  
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**Civil Rights and Equality for Puerto Rico: *Deconstructing the Insular Cases***  
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Thank you, Rocio, for the introduction. And congratulations to Rafael Rodriguez and the Center for Puerto Rico Equality & Advancement, the United States Council for Puerto Rico Statehood, and Americans for Puerto Rico Statehood for organizing this forum.

My congratulations do not indicate support of statehood. Instead, they are offered for two reasons. One, I applaud citizens of the States focusing attention on the issues of Puerto Rico. Two, I am committed to the United States fulfilling its responsibility to enable Puerto Rico to attain a status that provides democratic representation in the government that makes and implements its national laws if its people want one of the options. The United States took the islands through war without the consent of Puerto Ricans. One hundred ten years later, Puerto Ricans still do not enjoy democracy at the national government level -- a freedom to which all people are entitled, Puerto Rico's ultimate status is undetermined, and Puerto Ricans have questions for the United States about the options, which hinder their determination of their status preference. Since I counsel United States policymakers on the issue, however, I believe I can best advance it by not taking sides in the debate over the options but, rather, by providing objective information. This can assist Puerto Ricans in deciding what status they want.

I have been asked to discuss the *Insular Cases* and their effects, particular in relation to Congress and the White House. I will not go into detail regarding the many cases themselves but address what they really mean.

First, the background: The Constitution provides for four types of political entities: States; a District that is the seat of the federal Government; Indian tribes; and Territory of the United States. As originally written, the political situations of the federal District and the territories were similar. The Constitution gave neither voting representation in the Congress and in the election of the President. The Territory and Seat of Government Clauses gave Congress ultimate governing powers in local as well as national matters.

The regime regarding territories was considered an acceptable lack of democracy because the sparsely populated areas west of the original States were considered permanent parts of the country that would become States as they developed in terms of population, economy, and government. There was no such intent regarding the federal District.

The approach to territories continued as the nation expanded westward. It was called into question, however, by the acquisition of the Philippines as well as Puerto Rico and Guam

through the Spanish-American War. Many national leaders considered the Filipinos unsuited for equality. For the most part, there was not the same feeling with respect to Puerto Ricans. There was a concern; however, that treating Puerto Rico as previously acquired territories had been would lead to statehood for the Philippines too. However, holding territories with established populations without the eventual promise of statehood -- or nationhood -- contradicted the representative government principles of the United States.

This question became a major national debate in the 1900 presidential election. It was quieted by a 5-4 Supreme Court decision in 1901. *Downes v. Bidwell* held that the United States could have territories that it did not incorporate into the country and that the Constitution and the total equality it means do not fully apply in such territories; only fundamental rights, such as freedom of speech, do. With reasoning that one justice termed "occult," the decision invented a new type of territory: unincorporated territory. Such territories would not necessarily become States and can become nations.

In a dissent signed by the minority, the chief justice wrote that the majority's "contention seems to be that if an organized and settled province of another sovereignty is acquired ... Congress has the power to keep it ... in an intermediate state of ambiguous existence for an indefinite period ... to be governed by different rules than those obtaining in the original States and territories, and substitute for ... republican government, a system of domination ... of unrestricted power." He concluded that, "The language of the Constitution is too plain and unambiguous to permit its meaning to be thus inflated."

As the minority recognized, the majority decision was made for political reasons. However, there were practical aspects to the decision that went beyond the racism and that still serve an arguable purpose today. The Philippines could be a territory and eventually become independent. Statehood is not a realistic aspiration for the four current territories with small populations: American Samoa; Guam; the Commonwealth of the Northern Mariana Islands; and the U.S. Virgin Islands. If *Downes v. Bidwell* is overturned and territories have to be States, the United States might have to dispose of these territories despite opposition from their peoples.

Further, the situation of the District of Columbia belies the argument that having an area of the United States that does not have equal democratic representation in the federal government conflicts with the Constitution. I think that the situation is wrong and that the populated areas of DC should be granted statehood -- which the citizens want. However, the law of the land is that the current undemocratic situation is constitutional. The distinction between the situation of DC and Puerto Rico now -- in addition to DC having been granted equal votes in the election of the president -- is that DC is a permanent part of the nation, although not with the promise of eventual statehood, and Puerto Rico has the democratic option of nationhood. In one sense, that makes the undemocratic situation of DC more egregious. In another, it does not. DC was a part of the 13 colonies that voluntarily established the United States and was created with the assent of the State from which it was carved out. Puerto Rico was taken through war. It is not considered a full part of the United States and it may not be a U.S. area in perpetuity. The United States

took it, has not integrated it into the nation, and has an obligation to enable it to obtain democracy at all levels of government -- within or outside of the U.S.

Fear about statehood for the Philippines informed initial decisions about Puerto Rico's status but a 1916 law put the Philippines on the path to independence. The next year, U.S. citizenship was granted to Puerto Ricans. This led to the second *Insular Case* I will single out, *Balzac v. Puerto Rico*. The issue was whether the citizenship grant had incorporated Puerto Rico into the United States. The Supreme Court had decided in 1905 in *Rassmussen v. United States* that that Alaska was an incorporated territory because the Treaty by which it was acquired provided that its residents would have the rights of U.S. citizens. The *Balzac* court in 1922, however, contradicted the *Rassmussen* court by holding that citizenship had not incorporated Puerto Rico. It said that incorporation required an expression of clear intent by Congress -- although that had not occurred in the Alaska case.

The citizenship grant to Puerto Ricans and the decision created a tension between citizenship and political status. The anomaly is that Puerto Ricans are citizens with civil rights in a strict sense but they live in a place that does not have political representation rights. This is at the heart of the recent decisions rejecting claims of a right to vote for president. Territories do not have voting representation in the federal government.

Again, less populated territories have complicated the issue. Citizenship has been extended to the Virgin Islands, Guam, and the Northern Marianas. Reversing *Balzac* and finding citizenship means incorporation would make less sense in light of their situations.

Like four justices in a 1979 Supreme Court ruling upholding inequality in federal benefits in unincorporated territories, I agree with Justice Black in a 1957 decision that "Neither the [*Insular*] cases nor their reasoning should be given any further expansion." However, given the situations of the four less-populated territories and DC, I do not think that overturning the *Cases* is likely or totally desirable. Nor is it a realistic solution to Puerto Rico's status question. Perhaps the United States should not have acquired territories and granted citizenship if it did not intend to make the areas States ... but it did.

The federal position is that Puerto Rico remains an unincorporated area of the U.S. that can become a State or a nation or remain indefinitely as a territory but last week a district court judge in Puerto Rico issued an opinion that raises questions about this, recalling the dissent by Justice Marshall in the 1979 case that said, "the present validity of those [*Insular Cases*] decisions is questionable." The district judge's opinion held that Puerto Rico had been incorporated into the United States by virtue of all of the laws of the United States that treat Puerto Rico equally with the States, asserting that this indicated a clear congressional intent to incorporate Puerto Rico even though there has been no congressional statement to that effect. The judge had interesting arguments, including some distinctions between the treatment of Puerto Rico and the other territories, such as Puerto Rico being within the customs territory of the United States, although the others are also treated like States for the purposes of many laws.

Having participated in the enactment of many laws extending State-like treatment to Puerto Rico, I cannot substantiate the claim of congressional intent to incorporate. And Congress has repeatedly indicated that it considers Puerto Rico to be unincorporated territory. Further, Puerto Rico is not treated like a State in all laws.

The case concerned the limited funding for Puerto Rico in the Medicaid program. The Constitution's Uniformity Clause says that all parts of the United States have to be treated equally in tax and spending laws. Puerto Rico is not treated equally based on the Territory Clause and the *Insular Cases*. The 1979 ruling was that it could be treated unequally so long as there is a rational basis for the unequal treatment, such as federal law exempting Puerto Ricans from having to pay federal tax on Puerto Rico income.

The exceptions to Puerto Rico's equal treatment with the States are primarily in taxes directly benefitting higher income individuals and businesses and in programs almost exclusively benefiting the low-income, for example in addition to Medicaid: Children's Health Insurance; Temporary Assistance for Needy Families; aid to the needy aged, blind, and disabled; and Earned Income refunds of Social Security taxes. The consequences of the *Insular Cases* include billions of dollars less in Puerto Rico's economy and migration of Puerto Ricans to the States -- where they obtain equal benefits.

The *Insular Cases* also greatly fueled the status debate. Many Puerto Ricans looked forward to equality after the United States' invasion. The *Downes* and *Balzac* decisions dashing statehood hopes turned people to nationhood. More recently, a diminishment in support for independence due to initial U.S. negativity and federal largesse and dissatisfaction with the indefinite undemocratic situation 'legitimized' by the *Cases* have led to impossible "commonwealth" proposals to, for example, nullify federal law.

Last week's opinion was not the district judge's final decision in the case and his finding of incorporation of Puerto Rico may or may not be a basis of his ultimate ruling. If his incorporation opinion becomes law, however, the question regarding Puerto Rico's status will not be if Puerto Rico will become a State but when. Another consequence will be that Puerto Rico should be treated equally with the States in all program and tax laws.

The question of when Puerto Rico will become a State, however, would have essentially the same answer that it does now: after Puerto Ricans seek statehood. From the federal perspective, Puerto Rico's status is a primarily an issue of the people of Puerto Rico deciding what status they want from all of the possible options. The Government of the United States will have to make decisions, too, in this matter of mutual determination but its policy is self-determination, that is, to support a Puerto Rican choice among all possible options -- options being status proposals, which can be implemented if chosen. In addition, I believe that U.S. politics will follow U.S. policy and accept a Puerto Rican choice.

I have sympathy for those who want to overturn the *Insular Cases* as a step towards resolving the status issue but I think that a Puerto Rican choice is the way to resolve it.