RECONSIDERING THE INSULAR CASES

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I congratulate the Law and History and the Human Rights Programs of Harvard Law School for hosting this conference. I also thank the organizers for inviting me to participate in this panel with such esteemed colleagues.

Most critiques of the Insular Cases lead to the conclusion that those early twentieth century decisions should be abandoned either because they perpetrated a great injustice against the peoples of the territories at the time of their adoption or because they no longer hold water in light of current political values. As we embark on the project of ¨reconsidering the Insular Cases¨, it is worthwhile to pose several basic questions regarding this notion.

Should the Insular Cases be simply discarded? **Can** they be simply discarded, given the Constitutional text and the interpretative gloss the cases have acquired? What do we mean when we say that the Insular Cases should be repealed?

In the first part of this presentation I will limit myself to raising several additional queries that flow from those basic questions, without pretending to give answers. In the second part, I will briefly address other considerations.

For the sake of argument, let us say that the Insular Cases and their further judicial elaborations stand for, at least, the following thirteen propositions:

a. The United States has an inherent sovereign right to acquire foreign territory.

b. As a corollary to that right, the US government has the power to govern the territory so acquired.

c. The Territorial Clause of the US Constitution grants Congress plenary power to govern US territories.

d. There is a distinction to be made between something called incorporated territory and something else called unincorporated territory.

e. Incorporated territory is to be considered an integral part of the US, while unincorporated territory is only appurtenant to, but not a part of the US.

f. Not all provisions of the US Constitution apply in the territories, whether they are incorporated or not. But there may be some provisions that apply in incorporated territory that do not apply in unincorporated territory (like the right to a jury trial, for example). What constitutional provisions apply in the territories is up to the Court to determine.

g. Congress may decide, in accordance to its plenary powers, to extend all federal laws to the territories under US jurisdiction. It may also provide that some laws will apply and others will not.

h. Political rights of full participation in the governance of the US, including representation in the US Congress and electing

federal officials, have been granted only to residents of the states, not to those residing in the territories.

i. Regarding unincorporated territory (for our argument´s sake, let´s not include here incorporated territory), Congress can dispose of the territory as it sees fit. This includes providing for diverse forms of self-government (without relinquishing its ultimate authority under the Territorial Clause), incorporating the territory into the US political community, admitting it as a state, or getting rid of the territory by granting it independence or even ceding it to another country. Congress has the power to do all those things. However, under the Constitution, it is not obligated to do any of them.

j. The decision to incorporate or not an unincorporated territory belongs exclusively to Congress.

k. The mere extension of US citizenship to its residents does not have the effect of incorporating a territory.

l. Puerto Rico is to be considered an unincorporated territory of the US.

m. Arguably for different reasons, the uniformity clause, the Export Clause and the right to a trial by jury in local courts do not apply in Puerto Rico. Other clauses of the constitution may not apply, but that is up to the Court to decide.

Here are, then, thirteen propositions that the Insular Cases can reasonably be said to stand for. There may be more, at different levels of generality. Which of those propositions would have to be repealed for the

Constitution to be brought in line with current political values and aspirations? The abolition of which would be sufficient to surmount the acute criticism to which the Cases have been subjected over the course of more than a century? Which of them are susceptible of abrogation, given the text of the Constitution and its interpretative history? Which of them can be cast aside without causing a substantial change in the US political system, as we know it? And which of them the Supreme Court of the United States would be actually willing to supersede?

I do not have the time to examine each of those propositions under the lens of those inquiries. Let it be sufficient to say that they entail different levels of complexity. For example, it would be one thing for a court to decide that jury trials should be available in local courts in the unincorporated territory of Puerto Rico, thus repealing one aspect of the decision in *Balzac v. Porto Rico*; but it would be quite another to conclude that Puerto Rico has to be regarded incorporated territory, thus departing from one aspect of the decision in *Downes* and one aspect of the rationale in *Balzac*. Both conclusions, however, would still remain within the discursive framework produced by the Insular Cases.

A more substantial departure would be to abolish altogether the distinction between incorporated and unincorporated territory, introduced in Justice White´s concurring opinion in *Downes v. Bidwell* and accepted by a majority of the Court in *Dorr v. US*. A still more radical stance would be for the Court to proclaim that the Territory Clause should not apply at all to the territories acquired in 1898 and thereafter, returning to the kind of argument adopted by the majority in the *Dred Scott* case.

But even those results would not have the same implications as those emanating from a determination by the Court that the residents of the present

territories should have full participatory rights in federal decision making. Or from a ruling that the US Congress may not keep the residents of unincorporated territory in a permanent condition of political subordination and is obligated, therefore, to provide for a democratic resolution of their political status, meaning, admitting the territory as a state or granting it its independence. These are propositions with hugely different consequences than those attached to some of the others mentioned before.

At this stage of the game, then, what should be the level, depth, and scope of the claim that the Insular Cases should be abandoned? And what are its possibilities at each level? I am content with leaving these questions on the table.

In the time remaining, I would like to move on to something else. I will say a few words about what I consider the long-term socio-historical and political effects of the Insular Cases and their sequel. I will then conclude with a comment on the possibilities left open to us to address the main concerns of the people of the current territories after more than one hundred years of living under the shadow of those decisions. I am assuming that in the case of Puerto Rico the central question is what can be done to do away with its colonial relationship with the US. In the other territorial possessions there may be other ways of formulating their principal claims.

Let me begin by stating that I agree with my colleague and friend Christina Duffy that the Insular Cases did not have the effect of creating an extra-constitutional zone in the so-called unincorporated territories. On the contrary, the decisions were intended to provide a constitutional basis to US rule over those lands. They legitimized, via constitutional argument, the possibility of an

indefinite condition of political subordination. In that sense, the Insular Cases put the US Constitution at the service of colonialism.

I have argued before, and still believe, that one of the main results of the positions that prevailed in the Insular Cases was to give Congress very wide latitude in dealing with the new possessions. The need for that flexibility was premised on the perception by most of the Justices – shared by legislators, military and executive officers, scholars, sectors of the press and others – that those recently acquired possessions posed new challenges and were, somehow, to be treated differently from previous acquisitions. There is ample language in the opinions that supports this contention. Justice McKenna referred to this ¨need¨ for flexibility in his dissent in *De Lima*; Justice Brown explicitly stated that ¨a false step at this time might be fatal to the development of…the American Empire¨. Writing for the majority in *Dorr*, Justice Day underlined that the framers of the Treaty of Paris intended to reserve to Congress ¨a free hand¨ in dealing with the newly acquired possessions. And in *Balzac*, Chief Justice Taft expressed that the real issue of the Insular Cases had been the extent of the power of Congress to deal with these ¨new conditions and requirements¨.

The Insular Cases represented both a continuation and a break from the past. The continuity included resorting to concepts such as the long existing plenary powers doctrine and creating a symbolic space to be inhabited by peripheral populations, similar to those that had been designed for African-Americans, Native Americans, new immigrants and women. The break involved the message that neither Congress nor the Court should feel excessively constrained by previous decisions or doctrines, even those that had been developed for the governance of the former territories of the nation. In a sense,

the Court was constructing for itself and for Congress a relatively clean slate upon which to write the future of the new possessions. This was one of the principal symbolic effects of the doctrine of incorporation.

In the longer term, the Insular Cases have had the following social, political and ideological effects.

Firstly, they created a discursive universe that included categories, concepts, approaches, justifications and understandings that have controlled the nation´s and the territories´ way of thinking, analyzing and imagining solutions even to this day. We all have become inhabitants of the conceptual territory carved out by the Justices in those decisions.

Secondly, the Insular Cases constituted a new legal and political subject: the resident of unincorporated territory. This new social agent would be endowed with entitlements and obligations. The residents of the territories would be capable of willing, making claims and acting, but they also would be submitted to the full political authority of Congress. That authority was considered legitimate by virtue of the inherent powers of the US as a sovereign nation and by the textual foundation provided by the Territorial Clause of the US Constitution.

Thirdly, like all salient legal events, the Cases constructed a context for future action. Most relevant actors in the territorial drama have proceeded under the assumption that the claims, counter-claims, Congressional legislation, Executive determinations and even the processes by virtue of which the colonial condition of the territories are supposed to be resolved have to be formulated, designed, and executed under the fundamental premises adopted by the Insular Cases and their progeny. This is a very powerful constraining effect.

But the Justices in those cases did something else. They produced an understanding akin to a political question doctrine to be applied in the context of the territories. Chief Justice Taft vigorously consolidated this viewpoint in the *Balzac* case. According to this conception, there is a distinction to be made between constitutional and political claims. Constitutional claims, such as those pertaining to certain fundamental rights – due process, freedom of expression, and the like -- are for the Court to decide. But political claims, as defined by the Court -- for example, those relating to participation rights or to the definition of the political condition of the territories -- are for Congress, or for the people of the United States, to determine. In that determination Congress has paramount power, except for the limitations imposed by the Constitution itself, as interpreted by the Court. The historical evidence shows that, in this respect, the Court has always acted in accordance with Congressional policy.

It is in this terrain – and not necessarily in the judicial sphere -- that lie the possibilities to move forward with a resolution of the condition of the territories. Of course, these possibilities confront enormous difficulties. The US Congress has more than five hundred members. Puerto Rico and the other territories are not even in the radar of most of them. Moreover, extracting a consensus on the future of the territories in that complex, partisan and highly divisive body has proven to be a veritable challenge. Yet, this seems to be the most viable route to accomplish the goal of bringing the relationship between the US and its territories in line with current notions of self-determination, democracy and human rights.

Congress, however, needs prodding. The pressure has to come from the peoples of the territories themselves, from sympathetic sectors of the American

people, perhaps even from the White House, and from the international community.

Thank you.