

LENGTH: 25232 words

ARTICLE: THE **INSULAR CASES**: THE ESTABLISHMENT OF A REGIME OF POLITICAL APARTHEID

NAME: By Juan R. **Torruella***

BIO:

* Circuit Judge, United States Court of Appeals for the First Circuit. This article is based on remarks delivered at the University of Virginia School of Law Colloquium: American Colonialism: Citizenship, Membership, and the **Insular Cases** (Mar. 28, 2007) (recording available at http://www.law.virginia.edu/html/news/2007_spr/insular.htm?type=feed). I would like to recognize the assistance of my law clerks, Kimberly Blizzard, Adam Brenneman, Monica Folch, Tom Walsh, Kimberly Sanchez, Anne Lee, Zaid Zaid, and James Bischoff, who provided research and editorial assistance. I would also like to recognize the editorial assistance and moral support of my wife, Judith Wirt, in this endeavor.

SUMMARY:

... I will elaborate on this thesis in support of my contention that the linkage between politics and constitutional law is clearly apparent in the history and outcome of the Supreme Court's decisions in the **Insular Cases** and their progeny. ... " From this minority view in *De Lima* we see the emergence of what will become the eventual doctrine of the **Insular Cases**, encompassing the three key components of American colonial law: (1) plenary congressional authority over the Spanish island territories and their inhabitants, (2) a distinction between these territories and all other prior acquisitions, based on a newly discovered theory of incorporation, and (3) rules to deal with the "Philippine problem," which once established would continue to be the decisive criteria for the consideration of the issues arising from all the territories, even after the Philippine problem had passed. ... Furthermore, Congress's action in legislating the Jones Act after the Treaty of Paris in effect trumped any inconsistent provisions in that prior treaty, and thus gave added validity to the holdings in *Mankichi* and *Rasmussen* regarding the consequences of granting citizenship on the determination of the status of the territory in question. ... There should be little doubt that the non-self-execution declaration in the ICCPR is merely an expression by the Senate concerning a purely domestic issue, and like the reservation in *Power Authority*, did not modify the law (i.e., the ICCPR), and thus lacks binding force. ...

TEXT:

[*284]

1. Introduction

In 1832 the German military theorist Carl von Clausewitz asserted that "war is simply a

continuation of political intercourse, with the addition of other means." ² This sentiment was echoed over one hundred years later in a similar context but by a very dissimilar political thinker, the Chinese leader Mao Zedong. ³

It can be argued that this kind of logical progression between politics and war is also present in the relationship that exists between politics and the law, particularly between politics and public law, and most especially between politics and constitutional law.

I will elaborate on this thesis in support of my contention that the linkage between politics and constitutional law is clearly apparent in the history and outcome of the Supreme Court's decisions in the **Insular Cases** ⁴ and their progeny. ⁵ With the Court [*285] echoing the popular sentiments then prevalent, the **Insular Cases** translated the salient political dispute of the times, regarding the acquisition and governance of the foreign territories acquired as a result of the Spanish-American War of 1898, into the vocabulary of the Constitution. This Article contends that the **Insular Cases** are a display of some of the most notable examples in the history of the Supreme Court in which its decisions interpreting the Constitution evidence an unabashed reflection of contemporaneous politics, ⁶ rather than the pursuit of legal doctrine. ⁷ There are, of course, [*286] others. Another conspicuous instance of this socio-political phenomenon, one that is in fact intimately related to the **Insular Cases** and that will be touched upon, is demonstrated by the case of *Plessy v. Ferguson*. ⁸ As in the instance of the legal framework established by *Plessy*, the **Insular Cases** have had lasting and deleterious effects on a substantial minority of citizens. ⁹ The "redeeming" difference is that *Plessy* is no longer the law of the land, while the Supreme Court remains aloof about the repercussions of its actions in deciding the **Insular Cases** as it did, including the fact that these cases are responsible for the establishment of a regime of de facto political apartheid, which continues in full vigor.

This Article argues that the **Insular Cases** were wrongly decided because, at the time of their ruling, they squarely contradicted long-standing constitutional precedent. Their skewed outcome was strongly influenced by racially motivated biases and by colonial governance theories that were contrary to American territorial practice and experience. Further evidence of this contention, as will be demonstrated, is the discriminatory manner in which the Supreme Court has thereafter applied the doctrines of the **Insular Cases**, ¹⁰ even in more modern times. ¹¹ This Article proposes to establish that the dogma of the **Insular Cases** constitutes an outmoded anachronism when viewed within the framework of present-day constitutional principles and, additionally, that it contravenes international commitments entered into by the United States since then, which constitute superceding "Law of the Land." Ultimately, the present legitimacy of the **Insular Cases** is untenable. The system of governance promoted thereunder can no longer be [*287] reconciled with a rule of law in which all citizens are entitled to equality.

2. Setting the Stage for the **Insular Cases**

2.1. The Historical Context

When placed in their historic context, the **Insular Cases** represent a constitutional law extension of the debate over the Spanish-American War of 1898 ¹² and the imperialist/manifest destiny causes which that conflict promoted. ¹³ That war was the culmination of a national expansionist process that commenced almost from the day that the War for Independence ended in 1783, ¹⁴ and proceeded thereafter in predictable progression with the acquisition, by diverse means, of the continental lands that were contiguous to the United States as it was variously configured during the course of the nineteenth century. It was a process that climaxed in 1848 with the signing of the Treaty of

that are secondary to the principal theme under discussion. The main point is that the United States has become a party to the ICCPR and other similar international agreements, and thereby has announced and committed itself to treat all of its citizens equally. This, of course, is in addition to what the letter and ethos of the Constitution already speak to and require of the United States in its relationship to its citizens.

Unfortunately, we are faced with the undeniable fact that, at least as to the U.S. citizens residing in Puerto Rico and the other territories, the United States has failed and continues to fail in its fiduciary duty as *parens patriae* of all of its citizens to live up to its aforementioned commitments. This failure inevitably emanates from the continued adherence by the United States to the words and spirit of the **Insular Cases** and their progeny.

[*346]

6. Conclusions and Implications

As has become apparent, the **Insular Cases** were wrongly decided. They contravened established doctrine that was based on sound constitutional principles, substituting binding jurisprudence with theories that were unsupported in our traditions or system of government and which were specifically created to meet the political and racial agendas of the times. The basis on which they were premised - that the United States could hold territories and their inhabitants in a colonial status indefinitely - was unprecedented in our history and unauthorized by our Constitution. The interpretation given to the Constitution by the **Insular Cases** and *Balzac*, permitting the perpetuation, without limitation, of a subclass of United States citizens unequal in rights to the rest of the body politic, is a constitutional incongruity that is unsupportable morally, logically, or legally.

Furthermore, whatever underpinnings may have existed for these cases at the time they were decided have been totally eroded since then. If there was a justification dictated by the historical period in which they came about, this justification is no longer available. *Plessy* has been reversed by *Brown*,²⁴² making racial discrimination legally and ethically unacceptable. Discrimination on the basis of locality makes as much sense as such opprobrious conduct based on race, and therefore should also be discarded as a constitutional principle.

Puerto Rico is part of the First Circuit, and a United States court of appeals sits in Puerto Rico several times a year and exercises Article III powers while there. An Article III district court now sits in Puerto Rico with the same jurisdiction as other Article III district courts throughout the nation,²⁴³ and provides nearly one-third of the appellate case work of the First Circuit. One of the appeals judges on that court resides in Puerto Rico, and sits and decides cases of general federal application, yet does not, while in Puerto Rico, have the same civil and political rights as the other judges on the Court of Appeals for the First Circuit. How can the Constitution be applied in such a balkanized, arbitrary, and **[*347]** irrational manner? The language of the Constitution is "too plain and unambiguous to permit its meaning to be thus influenced."²⁴⁴


By its repeated decisions upholding the **Insular Cases** and their progeny, the Supreme Court has created what amounts to a political ghetto in the territories, from which there is no escape or solution by its inhabitants because they lack the political power to influence the political institutions that can make the necessary changes to this situation. Puerto Rico's U.S. citizens have no effective way of exercising the political pressure that is normally available to U.S. citizens residing in the States on the political branches of the national


government, where all the fundamental decisions affecting Puerto Rico are made. Thus, the judicial posture commonly expounded, to the effect that these are issues that must be resolved through political means, is flawed ab initio because, in the case of the U.S. citizens of Puerto Rico, no effective political means exist to correct their colonial condition. The claim of "political question" in the case of Puerto Rico is a flagrant subterfuge to avoid taking the action that has been sanctioned by the Supreme Court as appropriate when extreme circumstances are presented of a pervasive deficit in the democratic processes: when courts are faced with a refusal of the political branches to correct the abuses against a discrete group of citizens that is completely under the sovereignty of the United States, the courts are required to act to correct those abuses.²⁴⁵

Over one hundred years of denigrating colonial status should be sufficient evidence of the need for judicial action. The Supreme Court, as it did with *Plessy*, must step forward to correct the wrong it created by sanctioning the **Insular Cases** and their progeny. The continued vitality of these cases represents a constitutional antediluvian anachronism that has created a de jure and de facto condition of political apartheid for the U.S. citizens that reside in Puerto Rico and the other territories.

Legal Topics:

For related research and practice materials, see the following legal topics:

[Constitutional Law](#) > [Congressional Duties & Powers](#) > [Spending & Taxation](#) 

[Constitutional Law](#) > [Relations Among Governments](#) > [New States & Federal Territory](#) 

[Constitutional Law](#) > [Involuntary Servitude](#) 

FOOTNOTES:

²⁴⁵n2. Carl von Clausewitz, *On War*, bk. 8, ch. 6B, at 731 (Michael Howard & Peter Paret eds. & trans., Alfred A. Knopf 1993) (1832).

²⁴⁵n3. See 2 Mao Tse-Tung, *On Protracted War*, in *Selected Works of Mao Tse-Tung* 153 (2d prtg. 1967) ("Politics is war without bloodshed while war is politics with bloodshed.").

²⁴⁵n4. See generally *De Lima v. Bidwell*, 182 U.S. 1 (1901) (holding that once Puerto Rico was acquired by the United States through cession from Spain it was not a "foreign country" within the meaning of tariff laws); *Goetze v. United States*, 182 U.S. 221 (1901) (holding that Puerto Rico and Hawaii were not foreign countries within the meaning of tariff laws); *Dooley v. United States*, 182 U.S. 222 (1901) (holding that the right of the President to