

American Popular Response to the Insular Cases

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### **The Background**

Following the War of 1898, America acquired the territories of Guam, Puerto Rico, and the Philippines. This situation was without precedent for the United States, so the nation was tasked with a very important decision: should the Constitution follow the flag? Did those who fell under American rule automatically receive citizenship? These questions would be answered by the Insular Cases, which were a series of Supreme Court cases throughout the early twentieth century to decide the status of the American colonies. [1] The number of Insular Cases and which cases are included are debated by scholars, but most agree that they begin with *Downes v Bidwell* and its sister cases, *DeLima v Bidwell* and *Dooley v United States*, all concerning Puerto Rico but having broader implications for the other territories. All three were argued and decided together in 1901.[2] As with many Supreme Court cases, there was a strong popular debate surrounding the case-- which means there was a strong popular opinion after the decision was made. It was this iteration of the Supreme Court that also established the separate but equal doctrine in *Plessy v Ferguson* [3], which is presently regarded as a racially unjust case. While *Plessy* would be overturned, the equally unjust Insular Cases still stand today.

The schisms in the public reaction to these cases can be seen through various press accounts from the early twentieth century. These accounts can help us to see that the question of who was or is deserving of American citizenship has long been a contentious issue among the American people, and that while it has been hotly debated as of late, this debate is nothing new.

*Downes v Bidwell* was the result of a dispute over a piece of legislation written by Senator Joseph Foraker of Ohio. This legislation had levied a fifteen percent tariff on imported goods from Puerto Rico. A merchant challenged this under Article I Section 8 of the

Constitution, which requires uniformity of duties, imposts, and excises throughout the nation, saying that since the duty that had been levied on oranges did not exist in the rest of the United States, it was unconstitutional for it to apply to Puerto Rico. This called into question the degree to which Puerto Rico could be considered a part of the United States. The Court's 5-4 decision held that the Constitution did not necessarily follow the flag, because territories were only due the full protection of the United States after they had been incorporated into the United States--essentially, that the Constitution did not apply to colonies or to any other places under American control *ex proprio vigore*, or "by its own force". [4] The language of the court read that while the land was domestic, the colonies were "not a part of the United States, but only territory belonging to the United States". [5]

### **All Those in Favor**

In 1901, the Associated Press said that Supreme Court had reached its decision after one of the most spirited discussions ever held within the sacred circle of the bench. In order to warrant such a statement, the Insular Cases must have drawn a significant crowd seeing as Court decisions were frequently contentious. They went on to say that "Nothing else was talked of at the national capital to-day but the triumph of the government", and that the executive branch were "elated over their victory", though they had never doubted that this would be the outcome. [6] Terms like "triumph" and "elated" make it clear that the executive's position considered this to be a victory.

Many of those in Congress also claimed that this was a victory. Senator Foraker called it a "complete vindication of the position held by the Republican party". He went on to say that prior to the ratification of the peace treaty, United States forces had occupied the relevant foreign

territories, such as Puerto Rico, because it was a “military necessity” [7], and after the treaty it was no longer foreign but domestic soil. Some in the press also made the argument that the cases were a check on presidential power, saying that they “prevented the President from assuming the powers of a dictator”, meaning that the Supreme Court had “cleared the last snags out of the road to expansion without imperialism”. [8]

Eugene Stevenson, the outgoing president of the New Jersey Bar Association, defended the decision by saying that the people in DC or in any of the territories are not owed the rights of the Constitution because the Constitution does not express such will. However, the fact remains that the people in DC or in any territory that would later become a state were treated differently than any person living in a territory acquired by the Spanish-American War. Because the Court had decided on behalf of those who did not believe that the territories were truly part of the United States, their work was done. Thus, after the decisions, the opposition movement had stronger reactions than their counterparts.

### **All Those Opposed**

However, since the case was so contentious there was also another side to the debate that was vehemently opposed to the majority’s decision. Those who opposed the Insular Cases said that the Supreme Court’s decision was an endorsement of imperialism. In the case of George S. Boutwell, former congressman and cabinet member as well as the first chairman of the Anti-Imperialist League, claimed that the bench’s opinion allowed for the power of acquiring territories to be indefinite, and that there was “no legal obstacle to the transformation of [the] republic into an empire, with unlimited powers to acquire and with unlimited power to rule”. [9] Boutwell had a point: the cases allowed for America to rule its colonies without the check of

power that the Constitution provides to this day. This effectively brought to life everything that the anti-federalists had feared when the Constitution was proposed: there were people under American rule who did not have their rights guaranteed to them.

There were some news outlets, too, who pushed back against the majority decision-- noting that four of the court's own nine members said it "over[threw] the basis of our constitutional law and assert[ed] that the states, and not the people, created the government".[10] This is significant, and a large blow to a nation whose government is supposedly founded "of the people, by the people, and for the people" because by the standards of an extremely narrow minority of its own Supreme Court, the American Government was being hypocritical. The *New York Herald* said that the decision had "inherent weakness", because the Court's lack of unanimity made it vulnerable. The *Denver Post* also lashed out, saying that America was now "in the rank of the land-grabbing nations of Europe" and was "following in the footsteps of England" by "conquering and ruling unwilling alien races". [11] As a nation who had fought a war against European colonization of themselves, the accusations of hypocrisy were abundant.

Charles E. Littlefield, a former Congressmen, essentially thought that factors such as the manner in which the results were reached and the disconcensus under which the conclusion was reached made the Insular Cases "without parallel" in the history of the Supreme Court. He did not believe that this uniqueness was a good thing, and he was not alone. Political Scientist John W Burgess was similarly critical, saying that the bench's decision was nothing but "arbitrary patchwork" based upon the "narrowest possible view of" this idea of political desire that led America to try to expand in the first place.

Other critics of the cases condemned them for amplifying the debate rather than settling it, calling the court's decision unclear. The *Herald* said that the court has issued "so many opinions" that it became "not easy to define the limitations or the scope of what the Court had decided", going on to say that the "vital issues" were left unsettled. [11] The *Philadelphia Record* said that the "self-congratulations of the Imperialists" were premature, because a "mutilated Constitution does follow the flag until Congress shall have determined to the contrary". [12] The Supreme Court is tasked with the job of interpreting the Constitution and applying it to cases, definitively ending debates. However here, somehow the Court's interpretation was *not* final-- in fact, the decision itself became subject to interpretation in the court of public opinion. Clearly, the debate was not over.

### **Concluding Thoughts**

Absent in all of these arguments, however, was any moral logic as it relates to the fact that there were now people subject to American rule who did not have rights as Americans. The argument could have very easily been made using the founding principles of our nation-- that all men were created equal and were therefore due the right to life, liberty, and the pursuit of happiness-- to say that the Insular Cases were making a class of men inherently unequal.

Studying the popular response to the Insular Cases is particularly interesting because those who argued that the cases exacerbated the debate were right: the issue is still not settled. Even just as it relates to Puerto Rico, what rights Puerto Ricans have are still debated and there is a movement to make Puerto Rico the fifty-first state. The larger issue of immigration is even more contentious than the debate that is specific to Puerto Rico and has been a focal point of the last several elections as well as being a recurring theme in the news cycle. Though these cases

were decided more than a century ago, they are relevant, if for no other reason than to exist as proof that history does tend to repeat itself and that the issues that dominate the current era also dominated the public sphere more than one-hundred years ago. In order to avoid making the same mistakes our ancestors did, we must look to the past.

**Notes**

[1] "Insular Cases." Encyclopedia of the American Constitution. . *Encyclopedia.com*.

(November 14, 2018). [Link](#).

[2] Ibid.

[3] Mack, Doug. "The Racist Supreme Court Cases That Cemented Puerto Rico's Second-Class Status." *Slate Magazine*. October 09, 2017. Accessed November 15, 2018. [Link](#).

[4] *Downes v Bidwell*, 182 U.S. 244 (1901).

[5] Ibid.

[6] Sparrow, Bartholomew H. "The Public Response to Controversial Supreme Court Decisions: The Insular Cases." *Journal of Supreme Court History*, no. 3 (November 2005): 197–210., 202

[7] Ibid, 201.

[8] Ibid, 203.

[9] Ibid.

[10] Ibid.

[11] Ibid, 204.

[12] Ibid, 205.

**Further Reading**

Perez, Lisa Maria. "Citizenship Denied: The 'Insular Cases' and the Fourteenth Amendment." *Virginia Law Review* 94, no. 4 (2008): 1029–81.

Vignarajah, Krishanti. "The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the Insular Cases." *The University of Chicago Law Review* 77, no. 2 (2010): 781–845.