judge job is the best job for anyone who wants to impact the delivery of justice. Magistrate Judge Bremer noted that magistrate judges are often the face of the courts, for both civil and criminal cases, because they are often the first judge that parties see. She encouraged women to be involved in bar associations and court outreach programs and to mentor others. She said, "Use your seat at the table locally, in your district, in your circuit, and nationally through [the Administrative Office of the U.S. Courts and the Federal Judicial Center] and the FMJA to amplify your voice. Take time to find out why 'we've always done it that way,' because there might be a better, more inclusive, more transparent way to do things. You have to ask, and to notice things going on around you."

Magistrate Judge Smith advised to maintain your dignity, and do your best, always. She also reminded me that, as the saying goes, "Sure [Fred Astaire] was great, *but* don't forget that *Ginger Rogers* did everything he did, *backwards*…and in *high heels*." (emphasis added).

Both Magistrate Judge Bremer and Magistrate Judge Smith leave big shoes to fill for their successors, but will continue to be inspirations to women magistrate judges.

Editor's note: This article was written before the recent confirmation of a fifth female Supreme Court Justice: Justice Amy Coney Barrett.

Legal History

Plessy by Any Other Name? The Supreme Court and the *Insular Cases*

By C. Evan Stewart

In the May 2019 issue of the *Federal Bar Council Quarterly*, I explored a set of infamous decisions of the Supreme Court – untaught to generations of law students: the *Gold Clause Cases*, 294 U.S. 330 (1935). Now, let us examine one more set of linked, troubling decisions – again, not taught to law students: the *Insular Cases* (*e.g.*, *Huus v. N.Y. & P.R.S.S. Co.*, 182 U.S. 392 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901)). By these cases, the Supreme Court defined the applicability and reach of the Constitution to territories acquired by the United States from Spain after the Spanish-American War of 1898.

The U.S. Ambassador to Great Britain (and soon-to-be Secretary of State) John Hay remarked that the conflict with Spain had been "a splendid little war." When it ended (per the Treaty of Paris), the United States had acquired the Philippines, Guam, and Puerto Rico; Cuba became "independent"; and Spain received $20 million. But with the United States now an international empire came the question: What constitutional rights did the people in these new U.S. territories have? Were they U.S. citizens or colonial subjects?

Historical Background

In the odious *Dred Scott* decision (*see Federal Bar Council Quarterly* (May 2016) ("The Worst Supreme Court Decision, Ever!")), the Court – extraneous to its rulings – had written:

> There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by admission of new States…. [N]o power is given to acquire a territory to be held and governed [in a] permanently [colonial] character.

60 U.S. (19 How.) 393, 446 (1856).

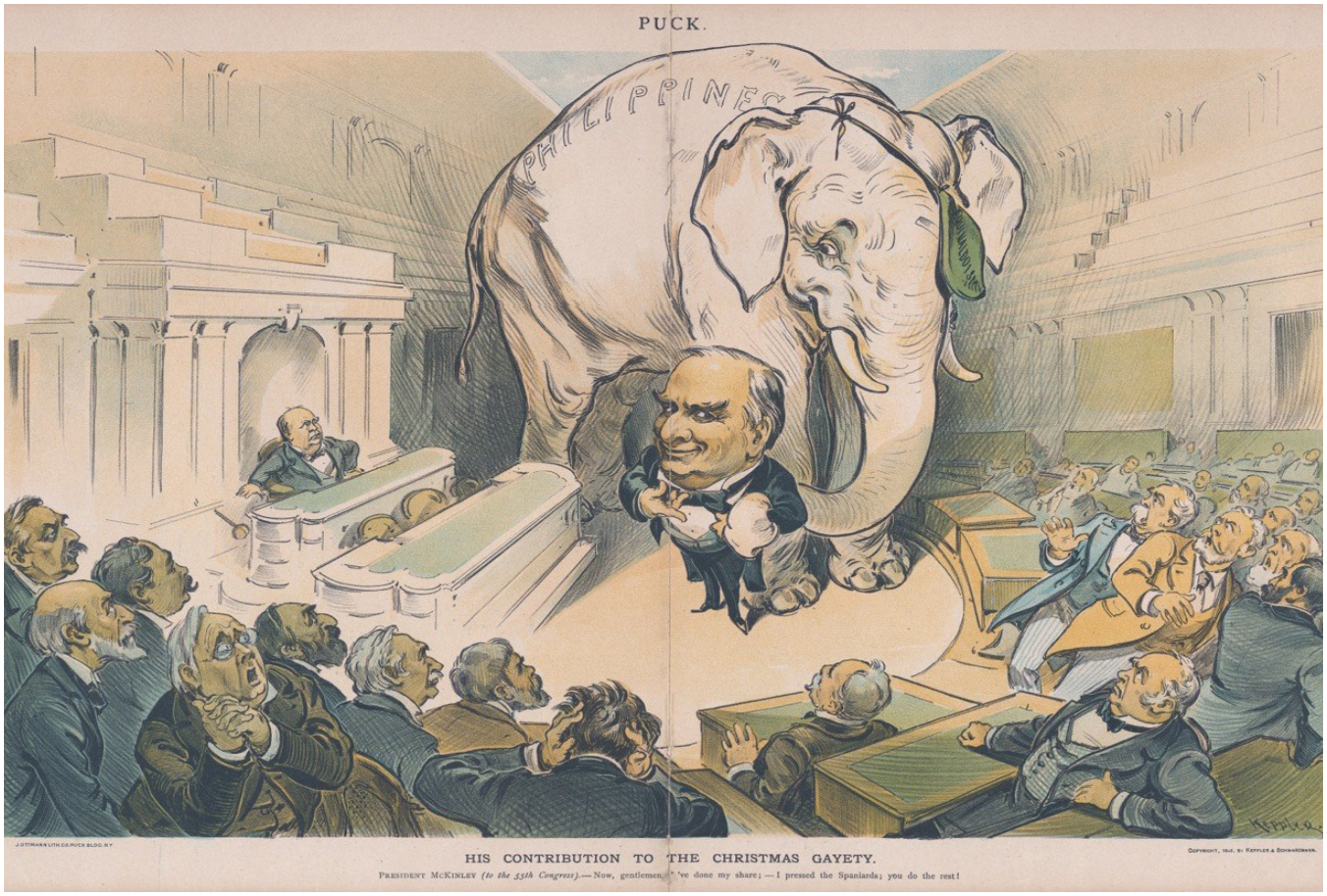
Notwithstanding, as American commerce became increas-

ingly focused on Asia, we acquired the Guano Islands (1856), as well as Alaska (1867) and Midway (1867). This expansion of the country's reach only whetted the appetite of many (e.g., Theodore Roosevelt) to go further and establish an empire akin to what many European nations had done. And the collapsing empire of the Spanish in the Caribbean and in the Philippines seemed a promising choice.

With extensive native rebellions in both Cuba and the Philippines, President William McKinley had stationed the USS Maine off Cuba to pressure the Spanish to end their acts of uncivilized "extermination." After the Maine exploded on February 15, 1898, Roosevelt – then the Assistant Secretary of the Navy – ordered Commodore George Dewey to take the Pacific fleet to Manila Bay. That order was allowed to stand and a reluctant president soon asked for a declaration of war; Congress approved, so long as Cuba would not be taken on as a U.S. possession (the Teller Amendment). Dewey defeated the Spanish in the Battle of Manila Bay in six hours. Thereafter, an army of U.S. troops (including now Colonel Roosevelt) was dispatched to Cuba and Puerto Rico. Within less than four months, the "splendid little war" was over. Not content to stop there, we also acquired Hawaii (1898), and then half of Samoa (1899) as well as Wake Island (1899).

With respect to the Spanish territories acquired as a result of the spoils of war, those tropical areas were densely populated places that (unlike the American West) did not offer potential farming opportunities for recent European immigrants to move to from crowded Northeastern cities. Suddenly, the United States was a global behemoth, but with new and large groups of people thousands of miles away from the

The cartoon below is from the political history collection of the author.



mainland who had no racial, ethnic, or cultural ties to the American citizenry. How would these acquired territories be governed, and (pertinent to this article) what rights would these eight million people have?

Setting the Stage

Although the U.S. government had exercised authority over various North American territories since the country's founding (in very different ways), to many Americans these far-off tropical territories posed a whole new set of issues. And these issues were formally teed up by Congress' passing of the Foraker Act in 1900. That controversial legislation (the Senate's committee report stated that Congress should withhold "the operation of the Constitution and the laws of the United States" from "people of [a] wholly different character, illiterate, and unacquainted with our institutions, and incapable of exercising the rights and privileges guaranteed by the Constitution to the State of the Union") established the civil government for Puerto Rico. The taxation component of that legislation as to goods flowing to and from Puerto Rico (a tariff was imposed on all such trade) would set the spark for the Constitutional brouhaha. Specifically, did the Uniformity Clause of the Constitution (Article I, Section 8, cl. 1) – "all Duties, Imports and Excises…[shall] be uniform throughout the United States") – apply to the taxation of commerce between the U.S. and Puerto Rico. That is, was Puerto Rico part of or excluded from the "United States"?

By these cases, the Supreme Court defined the applicability and reach of the Constitution to territories acquired by the United States from Spain after the Spanish-American War of 1898.

The *Insular Cases*

The Supreme Court heard oral arguments on the first cluster of *Insular Cases* between early December 1900 and mid-January 1901. Importantly, it was essentially the same Court that had established the "separate but equal" principle in *Plessy v. Ferguson* (*see* "Another Awful Decision by the Supreme Court," *Federal Bar Council Quarterly* (August 2016)). Having already found that African-American citizens could legally be deemed constitutionally inferior, how would the Court treat the inhabitants of these new, far-off colonies?

There was heavy lobbying on the Court's members (e.g., Philippine governor William Howard Taft on Justice John Marshall Harlan); and the economic interests of key American industrial groups (e.g., the Sugar Trust) were also weighing heavily on the Court's deliberations. Most public predictions on the decisions were that (i) the Court would rule that "the Constitution does not follow the flag 'ex proprio vigore'" [of its own force], and (ii) the Court's members, based upon the oral arguments, would likely be quite divided in their views. The cases were decided as a group on May 27, 1901, and the most important was *Downes v. Bidwell*, in which the constitutionality of the Foraker Act was front and center. (*New York World*: "No case [has] ever attracted wider attention.").

Downes v. Bidwell

With five votes, the Court upheld the constitutionality of the Foraker Act, but those five justices differed in their approaches. In the Court's lead opinion, for which there was only one vote, Justice Henry Billings Brown (author of *Plessy v. Ferguson*) took the view that the "United States" was made up only of its actual states; Congress was thus free to impose taxes on Puerto Rico or any other territory (this narrow construction adopted the U.S. government's arguments). Although he distinguished *Dred Scott* and other Supreme Court cases, Brown (warning of "savages" and "alien races") also wrote: "It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people…which may require action on the part of Congress that would be quite unnecessary

in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians."

Justice Edward D. White, in a concurrence joined by Justices George J. Shiras and Joseph McKenna, took a different tack. Adopting an approach advanced by Harvard professor Abbott Lawrence Lowell, White endorsed the "incorporation" doctrine – a territory acquired with the intention of incorporating it into the United States would be treated differently from a territory not acquired for that purpose. By White's calculation, because the Treaty of Paris contained "no conditions for incorporation,… [and] expressly provides to the contrary," until Congress declared that the territory "should enter into and form a part of the American family" Puerto Rico, while "not a foreign country… was foreign to the United States in a domestic sense": "the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession." White's opinion shared the racial bias of Brown's, worrying that the country had acquired territories "peopled with an uncivilized race…absolutely unfit to receive" the rights of U.S. citizenship. (Justice Horace Gray, while concurring with White's opinion, also wrote a separate opinion endorsing the prerogatives of Congress and the president to deal with territories and tariffs.)

Chief Justice Melville Weston Fuller issued a dissent on behalf of Justices Harlan (the lone dissenter in *Plessy*), David Josiah Brewer, and Rufus Wheeler Peckham. Fuller wrote that the Constitution clearly stated that the "United States" included all of its territories, regardless of whether statehood existed. He also directly took on White's new doctrine: "Great stress is thrown upon the word 'incorporation,' as if possessed of some occult meaning…. That theory assumes the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original states and territories." Giving Congress such "unrestrictive power" was in contravention of Constitutional provisions "too plain and unambiguous to permit its meaning to be thus influenced."

Harlan also wrote a separate dissent, emphasizing that the Constitution "speaks…to all peoples, whether of States or territories, who are subject to the authority of the United States." He went on to criticize the incorporation doctrine as something alien to our republican form of government, it being something more likely to be utilized by "[m]onarchical or despotic governments, unrestrained by written constitutions." And he concluded: "The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces – the people inhabiting them to enjoy only those rights as Congress chooses to accord them…is wholly inconsistent with the spirit and genius as well as the words of the Constitution."

Incredibly (or perhaps not so much), the press coverage of the rulings was a mess, with some newspapers declaring "The Constitution Follows the Flag," and others pronouncing "The Constitution Does Not Follow the Flag." Some wrote that it was a victory for the government, and some the opposite. At the end of the day, two things were clear: those in favor of the new American empire were happy, while those opposed to American "imperialism" were not.

The *Insular Cases* Go On

The *Insular Cases* decided on May 27, 1901 related to various tariff issues, and those decisions all reflected divergent judicial approaches to the newly acquired territories.

What was also clear in these (almost all) 5-4 decisions was that Justice Brown was the swing vote; he sided with the *Downes* minority to form the majority in *De Lima* (duties levied after the Treaty of Paris, but before the Foraker Act, were impermissible because Puerto Rico was not a "foreign country" as defined by the Congressional statute at issue); he would do so again later that year in *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901) (rings brought back from the Philippines by a soldier could not be subject to import duties). (Brown's concurrence was based upon the fact that the tax in question was only reflected in a Senate resolution). And Brown flipped yet again in

Dooley v. United States, 183 U.S. 151 (1901) (taxes on imports into Puerto Rico did not violate the Constitution's ban on taxing state exports: Article, Section 9) (another 5-4 split). With this messy jurisprudence, what did the future hold, especially with a shifting group of Justices?

Many Supreme Court decisions that followed expanded the jurisprudential legacy of the first cluster of *Insular Cases* beyond tariff issues; but at least four stand out. The first was *Hawaii v. Mankichi,* 190 U.S. 197 (1903).

The criminal defendant in *Mankichi* had been found guilty by a petit jury (by a nine to three vote) of murder. He appealed on the grounds that the Fifth, Sixth, and Fourteenth Amendments had been violated because he had not been indicted by a grand jury nor convicted unanimously. Justice Brown, on behalf of Justices Oliver Wendell Holmes Jr. and William R. Day, continued to reject the incorporation doctrine; instead he believed that only some of the Constitution's protections extended to the people in Hawaii: "the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure." Justice White concurred (joined by Justice McKenna), rejecting the defendant's claims on the ground that Hawaii had not been incorporated into the United States at the time of the trial and conviction and thus Mankichi could not invoke constitutional rights.

The following year came *Dorr v. United States*, 195 U.S. 138 (1904). There, the issue was whether the Fifth Amendment guarantees of a jury trial and an indictment process were available in the Philippines. For the majority, Justice Day ruled that the incorporation doctrine resolved the question without further ado. He then added: "if the United States shall acquire territory peopled by savages,…if this doctrine is sound [defendant's argument], it must establish there the trial by jury. To state such a proposition demonstrates the improbability of carrying it into practice."

The people of Puerto Rico, Guam, the Virgin Islands, the Northern Marianas, and American Samoa – while they can serve in the U.S. military – cannot vote, are not represented in Congress, do not have full Constitutional rights, and have federal laws disparately applied to them.

Next came *Rassmussen v. United States*, 197 U.S. 516 (1905). In that case, a convicted criminal in Alaska was ruled to be entitled to constitutional protections because the treaty with Russia (unlike the Treaty of Paris) expressly manifested a "contrary intention to admit the inhabitants of the ceded territory… to the enjoyment of all the rights, advantages, and immunities of citizens of the United States." The real jurisprudential importance of *Rasmussen* was that the Brown versus White conflict over how to not give the territories constitutional protections came to an end. White's incorporation doctrine had now won a seven vote majority; thereafter (and to this day) that doctrine would be the law of the land.

Finally, even after U.S. citizenship had been granted to the residents of Puerto Rico by the Jones Act of 1917, that did not mean they were (or are) entitled to full constitutional protections. In *Balzac v. People of Puerto Rico*, Chief Justice William Howard Taft, for a unanimous Court, wrote that Puerto Ricans did not have a constitutional right to a jury trial under the incorporation doctrine (which had "become the settled law of the court."). While Puerto Ricans were entitled to "fundamental rights," without express Congressional action, the Fifth and Sixth Amendments were not deemed to be "fundamental" due process rights for people in certain territories. ("Alaska was a very different case from that of Puerto Rico. It was an enormous territory, very sparsely settled, and offering opportunity for immigration and settlement by American citizens.")

So Where Are We Today?

Alaska and Hawaii are, of course, now U.S. states. After World War II, the Philippines became an independent nation. That

leaves Puerto Rico, Guam, the Virgin Islands, the Northern Marianas, and American Samoa. The people in those U.S. territories – while they can serve in the U.S. military – cannot vote, are not represented in Congress, do not have full Constitutional rights, and have federal laws disparately applied to them. Although Supreme Court Justices have (on occasion) mused on whether to re-consider the incorporation doctrine and its impact on the "unincorporated Territories," the basic line of cases discussed herein (*e.g.*, *Downes*; *Balzac*) are (as stated above) still good law. *See*, *e.g.*, *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC.*, No. 18-1324, 590 U.S.____ (June 1, 2020); *Boumediene v. Bush*, 553 U.S. 723, 757-59 (2008); *Harris v. Rorsario*, 446 U.S. 651 (1980); *Tuava v. United States*, 951 F. Supp. 2d 88 (D.D.C. 2017), *aff'd*, 788 F. 3d 300 (D.C. Cir. 2015); *Davis v. Commonwealth Electric Comm'n*, 844 F. 3d 1087 (9th Cir. 2016). *See also* Sam Erman, "Almost Citizens: Puerto Rico, the U.S. Constitution, and Empire" 161 (Cambridge 2019) ("the rare and shocking spectacle of case law as racist as [the *Insular Cases*] remaining largely untouched by time").

Postscripts

- Leading the charge to have the *Insular Cases* jurisprudentially rejected and full constitutional status granted to the U.S. territories has been Juan R. Torruella, a judge on the U.S. Court of Appeals for the First Circuit and chief judge from 1994 to 2001. *See* "Ruling America's Colonies: The *Insular Cases*," 32 Yale Law & Policy Review 57 (2013); "The *Insular Cases*: The Establishment of A Regime of Political Apartheid," 29 U. Pa. J. Int'l L. 283 (2007). For those wanting to understand the *Insular Cases* in a greater historical context, I would recommend Bartholomew H. Sparrow's "The *Insular Cases* and the Emergence of American Empire" (Kansas Press 2006). And for those wanting the best and most comprehensive explanation of America's global expansion in this era, I would recommend Walter LaFeber's "The American Search for Opportunity, 1865-1913" (Cambridge University Press 1993).
- It is important to note that the Court's distinction between "fundamental" and other (less "fundamental") constitutional rights came at a time when the Court had not yet found the protections found in the Bill of Rights to be "incorporated" to the states via the Fourteenth Amendment. *See* Burnett, "United States: American Expansion and Territorial Deannexation," 72 U. Chi. L. Rev. 797 (2005).
- The decisions were called the *Insular Cases* because the territories were islands under the jurisdiction of and administered by the War Department's Bureau of Insular Affairs.

COVID-19

Jury Trials Resume in Second Circuit Courts

By Magistrate Judge Sarah L. Cave

On September 29, 2020, for the first time in over six months, jurors entered a federal courthouse in New York City to participate in a civil jury trial. This milestone was achieved because of the creative thinking of the Ad Hoc Committee on the Resumption of Jury Trials, the cautious advice of experts in epidemiology and air flow technology, the steady leadership of Chief Judge Colleen McMahon, and the hard work of District Executive Ed Friedland and Clerk of the Court Ruby Krajick and countless members of their staff.

On March 16, 2020, within four days of the World Health Organization's classification of COVID-19 as a worldwide pandemic, the last jury trial in the Southern District of New York concluded. Eleven days later, on March 27, 2020, Chief Judge McMahon ordered the suspension of