One Constitution, Indivisible? *The Insular Cases* and American Constitutional Interpretation

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The US Constitution recognizes domestic territories on their way to becoming states. It recognizes foreign sovereign nations. However, it makes no provision for colonies. To facilitate America's entry on the global stage in the wake of the Spanish–American War, the US Supreme Court had to weave a constitutional provision out of whole cloth that might preserve a weak, decentralized government in domestic policy and yet authorize a powerful, centralized, and efficient government for foreign affairs. The *Insular Cases* built on (and around) existing precedent and generated new precedent that would be battled over at the dawn of the Cold War, in the aftermath of September 11, and in cases directly affecting millions living in America's unincorporated territories as recently as 2016. The *Insular Cases* offer important lessons about constitutional amendment by interpretation, about the power of precedent properly understood, and about the risks of trying to divide an indivisible Constitution.

The 1898 treaty that ended the Spanish–American War gave the United States Puerto Rico, Guam, and the Philippines and control over Cuba, including the sought-after harbor at Guantanamo Bay and its hinterlands. It also left the United States with a profound constitutional dilemma: How could a country founded in revolution against colonial control become a colonial power with control over distant lands and foreign peoples? Would it require constitutional amendment? Or could the Justices of the US Supreme Court find a way to make the impossible possible—to effectively annex those territories without either incorporating them into the United States or granting them sovereign autonomy and independence?

It would take the Court six cases and 398 pages of the *US Reports* in 1901 alone—and as many as 35 cases between 1901 and 1922—to get the job done (Sparrow 2006, 257–8). The Justices found a way by creating a new legal entity for which there was no constitutional provision: unincorporated territories. These would be places that were neither on a path to statehood (as were incorporated territories) nor treated as sovereign states that might impose tariffs and excise taxes on goods exchanged with American businesses. They could be governed and regulated by Congress in ways that no state could. Moreover, this could happen without setting a precedent for similar regulation within the states because of this novel legal status.

If this had been a one-off patch to work around a bit of constitutional ambiguity, it might be worth studying simply for an appreciation of the Court's legal craftsmanship (Levinson 2000). However, the *Insular Cases* must be understood as much more than that. They help us to understand how constitutional interpretation has been used in efforts to effectively amend the Constitution. The Court was not only able to find authority for geographic expansion where none is clear; the *Insular Cases* also represent the first—but not the last—judicial effort to find a way to divide the Constitution; to make it possible to preserve a weak and decentralized system for domestic policy; and yet create a powerful, centralized, and efficient government for foreign policy, war, and emergency powers. The *Insular Cases* also offer an excellent object lesson in the complex ways in which precedent—set by Congress and the Executive Branch as well as the courts—shapes and constrains policy, politics, and legal decisions, even where it does not control those decisions. Just as the *Insular Cases* built on (and around) precedent set in the Louisiana Purchase and the *Dred Scott* case, so too would the Court build on the *Insular Cases* at the dawn of the Cold War, in the midst of the second Gulf War in the aftermath of September 11, and in cases as recent as 2016 concerning criminal procedure and economic policy in Puerto Rico.

AMENDMENT BY INTERPRETATION

The US Constitution constructs a government of limited powers. However, does that mean a national government of strictly articulated and limited powers—a government that can do only what is explicitly authorized by the Constitution? Or does it mean a national government with deep and wide powers, authorized to do almost anything except what is explicitly foreclosed or forbidden by the Constitution? Both would be limited governments, but the role, reach, and power of the national government would be diametrically different.

There is textual support for each position.[1] The US government might be one of broad power with specific limits or one of narrow and specific powers, but it cannot be both. Similarly, we could argue that the ambiguous references to US territories in the Constitution suggest that they might be treated as unincorporated parts of the United States, ultimately headed for statehood (and therefore entitled to constitutional rights and privileges). Or they could be treated as foreign sovereign

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states that would not be subject to American domestic law. But to say they are neither? That is a challenging proposition.

That challenge could have been met in one of three ways: (1) return the problem to the elected branches for a constitutional amendment; (2) declare a pragmatic exception; or (3) revise the Constitution by interpretation rather than by amendment.

it also was within the government's power to govern such territory. Why? The Court refused to say. "[W]hatever be the source of this power," Justice Brown wrote for the Court in *DeLima* v. *Bidwell* (1901), "its uninterrupted exercise by Congress for a century and the repeated declarations of this Court have settled the law that the right to acquire territory involves the right to govern and dispose of it."[2] The precedent Jefferson

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This was not the first time that the United States faced a constitutional dilemma concerning the addition of new territory. The problem is acute: the Constitution is nearly silent on the subject of geographic expansion. The most prominent precedent that the Justices in the *Insular Cases* would have consulted was the Louisiana Purchase. That massive expansion was executed without benefit of a constitutional amendment, although President Jefferson himself believed strongly that such an amendment was needed. Furthermore, it was accomplished without formal judicial consideration. Nevertheless, it would set important precedents for future courts, legislators, and presidents alike.

The Louisiana Precedent

When he was offered the opportunity to nearly double the size of the United States, President Jefferson argued that a constitutional amendment was needed to authorize the Louisiana Purchase. However, convinced by his Cabinet that delay could jeopardize the deal, he agreed to forgo the amendment; instead, his administration asserted that the acquisition of property is merely an element of power possessed by all sovereign states (Gallatin 1803). Because the US Constitution does not preclude this exercise of sovereign power—so the logic went—the government was free to complete the deal without a constitutional amendment.

Jefferson resisted, which is unsurprising because he was one of the leading proponents of the view that the Constitution constructs a government of narrow and strictly limited powers—the first position listed previously—yet here he would need to embrace the opposite logic. Jefferson also opposed the idea of constitutional amendment by interpretation, insisting that he would "rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless" (Jefferson 1803). Ultimately, however, he put aside his concerns, confident "that the good sense of our country will correct the evil of construction when it shall produce ill effects" (Jefferson 1803). Jefferson was right to worry.

By 1901, the *Insular Cases* would take it as a given that the power to acquire territory was constitutionally sound and that confidently imagined would be seen as exceptional not only was now the standard understanding, it also had become the foundation for ever greater claims to national power.

PRECEDENT MATTERS

Precedent can pose barriers as well as opportunities, and *Downes* v. *Bidwell*—the leading *Insular Case*—provides a sharp lesson. A unitary view of the Constitution posed a direct challenge for those eager to exploit the territories gained from Spain. If the United States had a government of strictly limited powers in both foreign and domestic affairs, Congress could not impose special tariffs and trade rules for the new territories, for nowhere was such power allocated to the government in dealing with states or territories. Conversely, an expansive view of America's limited government would allow those regulations but could not logically limit them to the new territories alone—thereby posing an existential threat to American federalism.

To split the Constitution and find different limits, the US Supreme Court turned to constitutional interpretation. However, there was a profound barrier in the way—*Dred Scott* v. *Sanford* (1857). *Dred Scott*, of course, was the case that denied citizenship rights to slaves and former slaves and upended the Missouri Compromise of 1820. But *Dred Scott* also was very much a case about the authority of Congress to regulate and legislate in US territories. Chief Justice Roger Taney asserted that the United States could not "enlarge its territorial limits in any way except by the admission of new States." It was vital for Taney to preclude the establishment of colonies or other quasi-domestic, quasi-foreign entities, because otherwise the Constitution and its fundamental rights—including the right to own slaves—might not apply, and the national government would be free to regulate and even ban slavery in those places (*Dred Scott* v. *Sanford* 1857).

If the *Dred Scott* case was an obstacle, it also offered a solution. In *Dred Scott*, the Court argued that some rights (e.g., property) were fundamental and were to be protected at the highest level. Other rights could be limited by legislation and regulation. Justice Brown seized on this distinction in *Downes* v. *Bidwell* (1901). Considering the extension of

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fundamental rights to US territories, he insisted that there "may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights" that could be regulated by Congress (*Downes* v. *Bidwell* 1901).

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The Louisiana Purchase, *Dred Scott*, and the *Insular Cases* complicated rather than clarified the debate about the meaning of a limited government because each involved US territories, a subject about which the Constitution stated so little. However, each case was deeply concerned with the tension between a strong national government and constitutional protection for federalism against central-government interference. This struggle over the vertical separation of powers between the states and the national government became increasingly acute as America's world role grew after the Spanish–American War. Would America be forced to choose between strict limits for the national government, which would largely preclude a major world role? Or would the US Supreme Court Justices embrace the view that the national government enjoyed broad powers with narrow and specific exceptions, enabling the country to assert its international position—but at the cost of empowering that same government to regulate domestic affairs as well? The answer? The Court would try to split the Constitution by interpretation so it could "have its cake" (i.e., strong, central power in war and foreign policy) and "eat it too" (i.e., weak, decentralized power in domestic affairs).

The *Insular Cases* were the first to generate a judicial effort to reinterpret the Constitution to enable a role on the world stage without sacrificing strict limits on government at home. They were not the last. Just as the territories acquired from Spain would force the Court to rethink the allocation of power between the central government and the states, so too would America's profound difficulties in mobilizing for World War I force conservatives to think about the strict limits on central power that they had long embraced. If America was to play its proper role on the world stage, surely it could not do so as a fractured set of federated states. Yet, would that same world role make it impossible to protect domestic policy from the reach of that same central government? This was the core issue of *US* v. *Curtiss-Wright Export Corp.* (1936).

Curtiss-Wright was a case concerning the power of the national government and its limits: Could the national government (i.e., Congress *together with* the president) impose limits on arms sales in a war-torn region of South America? Or was this a violation of the economic rights of the Curtiss-Wright Corporation? To claim that the government was constrained would be to limit the national government's role in world affairs. To claim that it was not so constrained would be a profound challenge to the Court's clear agenda to protect economic rights from national regulation. Justice George Sutherland's answer was to split the Constitution—and to claim that the allocation of powers was different in foreign affairs than it was in domestic policy. Foreign-policy powers, he wrote, belonged by right to every sovereign nation. They were indivisible and passed exclusively from sovereign to sovereign. In the United States, he argued, these powers passed from the King of England to the US national government. Domestic power, conversely, was power delegated from the people to the states and then, in strictly limited ways, from the states to the national government (*US* v. *Curtiss-Wright Export Corp.* 1936).

Sutherland's Constitution-splitting seemed to provide a way to maintain strict limits on the national government at home while significantly empowering it in foreign affairs. Ultimately, the empowerment would hold, but the attempt to restrain national power in domestic affairs would collapse in the wake of the Great Depression, World War II, and the expansion of the administrative state (Silverstein 1997). It would not, however, be the last effort to split the Constitution and neither would its collapse undermine the precendent set by the *Insular Cases* that would continue to govern those who lived, worked, or traded with the unincorporated territories of the United States and would come to play a key role in the struggle over Executive power in the wake of the September 11 attacks.

SPLITTING THE CONSTITUTION: THE HORIZONTAL AXIS

After World War II, efforts to split the Constitution would shift from the vertical to the horizontal axis. The Great Depression and the war produced a huge and centralized administrative state and the US Supreme Court's withdrawal from the protection of individual economic rights against national regulation (*US* v. *Carolene Products* 1938). The effort to minimize national intervention in economic life would falter; instead, the focus would shift to the struggle across the horizontal separation of power, as the Executive Branch squared off against the Legislative Branch. The question no longer was where the national government might find the power to oversee foreign affairs but rather which branch of the national government would have that authority. This shift would emerge in the Truman administration; rise under Eisenhower, Kennedy, and Johnson; attain new heights with Richard Nixon; and reach a zenith in the administration of George W. Bush, who would assert that the Executive enjoyed nearly unlimited power in foreign policy, war, and emergency powers (Goldsmith 2007; Silverstein 1997; 2009; 2011).

The 45 square miles encompassing the Guantanamo Bay naval base were "leased" in perpetuity to the United States as part of the 1903 treaty with Cuba.[3] Although Cuba retained

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ultimate sovereignty, its government ceded complete jurisdiction and control over the leased area to the United States. In *Rasul* v. *Bush* (2004), the Bush administration asserted that US federal courts "lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad" who are incarcerated in Guantanamo. The reason? Because these were foreign nationals and Guantanamo Bay is not a territory over which the United States holds formal sovereignty. Indeed, the administration argued, Guantanamo was neither foreign nor domestic—and it was not even protected by the limited rights the Court had found in the *Insular Cases.*

"Petitioners' reliance on the '*Insular Cases*'—in which the Court has recognized that certain constitutional rights or privileges may extend to inhabitants of American territories or insular possessions—is misplaced," the Bush administration insisted in its brief on the merits to the US Supreme Court in *Rasul* v. *Bush* (2004). "Guantanamo," the Justice Department wrote, "is not a US territory, or even an unincorporated territory like Guam or Puerto Rico." Guantanamo "is not a US territory or insular possession. It is a leased military base on foreign soil…." The Court rejected this assertion, but the Bush administration was unwilling to accept that ruling. It finally turned to Congress; this time, however, it would try to formally cut out the Court entirely. The Detainee Treatment Act of 2005 explicitly stripped the federal courts of the jurisdiction to hear *habeas corpus* appeals from prisoners at Guantanamo—appeals asserting that the government is improperly holding someone and denying them liberty without due process of law.

This was a step too far for the US Supreme Court. In *Boumediene* v. *Bush* (2008), the Court struck this down, arguing that the Bush administration was applying a far too stringently formalistic reading of the Constitution and the *Insular Cases.* Indeed, the Court held that if the government's view were correct, it would mark "not only a change in, but a complete repudiation of, the *Insular Cases'*…functional approach to questions of extraterritoriality" (*Boumediene* v. *Bush* 2008). The *Insular Cases* had not stated, of course, that the Constitution had no application in the unincorporated territories. Instead, the Court had taken hundreds of pages in the *US Reports* to split the Constitution, trying to distinguish areas such as commerce and trade, in which the national government would have broad but not unfettered authority from a narrow set of fundamental rights where constitutional constraints would be more tightly applied.

In *Boumediene*, Justice Anthony Kennedy argued that the *Insular Cases* stood for the proposition that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." Guantanamo was and has long been under the complete control of the United States. Although the Constitution might not apply in all of the ways it would in incorporated territories or in the states, the Court ruled, it could not be excluded wholesale. Whatever Guantanamo was, it was not beyond the reach of the Constitution. Furthermore, if there is any fundamental right in the US Constitution, it is the privilege of the writ of *habeas corpus*. Congress most assuredly can suspend that right, but it cannot simply delegate to the Executive Branch the authority to do so at will.

The question no longer was where the national government might find the power to oversee foreign affairs but rather which branch of the national government would have that authority.

This most recent "creative" effort to divide the Constitution—that is, to amend it through interpretation—failed, as had Sutherland's previous attempt.[4] However, the idea that an indivisible constitution could be divided survived. The *Insular Cases* live on, continuing to structure (and constrain) life in Puerto Rico and other US territories. That should be reason enough to include their study in undergraduate courses but they also belong there because they so well illustrate and illuminate the power and place of precedent and the challenges of constitutional amendment by interpretation. Yet, the *Insular Cases* merit hardly a mention in most textbooks. One reason is that they are long cases with complex rulings. (*Downes* v. *Bidwell*, for example, was decided by a 5–4 vote, with even the five in the majority divided into three separate opinions.) This may lead some to conclude that these are artifacts of a different era with limited modern application—but that conclusion would be a mistake. The *Insular Cases* structure life for the more than four million people who live in the US territories today—and millions more whose own economic future may be profoundly affected by how those territories are governed (see *Puerto Rico* v. *Sanchez Valle* 2016 and *Puerto Rico* v. *Franklin California Tax-Free Trust* 2016). They also belong in the casebooks because they illuminate just how tenuous is the constitutional foundation on which a world superpower has been built. They make clear the risks involved in amending our eighteenth-century Constitution by interpretation. Furthermore, the *Insular Cases* offer object lessons in a proper understanding of precedent—both in their dance around *Dred Scott* and in the effort to use them to keep the Constitution out of Guantanamo. They are well worth studying in an effort to help students understand the costs and consequences of the continuing effort to divide America's indivisible Constitution. ■

NOTES

1. Article I, Section 1, specifies that Congress is to have all legislative powers "herein granted." Those specific powers are then listed in Article I, Section 8, suggesting these and no others. Conversely, Article I, Section 8, also contains the "elastic" Necessary and Proper clause, which—in the right interpretive hands—goes a long way to support the view that the Constitution established a government of broad power with specific limits. This view is reinforced by Article I, Section 9, which lists specific limits and exceptions, raising the question of why limits on power would need to be

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listed if the assumption was that the government could do only what the Constitution specifically authorized?

2. One of the few cases that gave the US Supreme Court a chance to weigh in on the Louisiana Purchase—*Sere* v. *Pitot* (1810)—offered no clear constitutional argument for the power to acquire territory. It stated simply that the "power of governing and legislating for a territory is the inevitable consequence of the right to acquire and to hold territory."
3. Guantanamo was part of the unincorporated territory of Cuba that the United States took over in 1898. It later would be perpetually "leased" to the United States under a 1903 agreement, giving the United States "complete jurisdiction and control" over the territory, although the United States agreed to recognize Cuba's "ultimate sovereignty." (See *Agreement between the United States and Cuba*, February 23, 1903. Available at http://avalon.law.yale.edu/20th_century/dip_cuba002.asp.)
4. Reacting to the Court's ruling in *Hamdan* v. *Rumsfeld* (2006), John Yoo told the *New York Times* that the US Supreme Court "is attempting to suppress creative thinking" (Liptak 2006).

REFERENCES

Agreement between the United States and Cuba. February 23, 1903. Available at http://avalon.law.yale.edu/20th_century/dip_cuba002.asp.

Boumediene v. *Bush*, 553 US 723 (2008).

DeLima v. *Bidwell*, 182 US 1 (1901).

Downes v. *Bidwell*, 182 US 244 (1901).

Dred Scott v. *Sanford*, 60 US 393 (1857).

Gallatin, Albert. 1803. Letter to Thomas Jefferson. Available at http://founders.archives.gov/documents/Jefferson/01-39-02-0281.

Goldsmith, Jack. 2007. *The Terror Presidency: Law and Judgment inside the Bush Administration*. New York: W.W. Norton.

Hamdan v. *Rumsfeld*, 548 US 557 (2006).

Jefferson, Thomas. 1803. Letter to Wilson Cary Nicholas, September 7.

Liptak, Adam. 2006. "The Court Enters the War, Loudly." *New York Times*, July 2.

Levinson, Sanford. 2000. "Why the Canon Should be Expanded to Include the Insular Cases and the Saga of American Expansionism [Symposium: The Canon(s) of Constitutional Law] 17 *Constitutional Commentary* 241.

Puerto Rico v. *Franklin California Tax-Free Trust*, 579 US ____ (2016).

Puerto Rico v. *Sanchez Valle*, 579 US ____ (2016).

Rasul v. *Bush*, 542 US 466 (2004).

Ryan, Allan. 2015. *The 9/11 Terror Cases: Constitutional Challenges in the War against Al Qaeda*. Lawrence: University Press of Kansas.

Sere v. *Pitot*, 10 US 332, 337 (1810).

Silverstein, Gordon. 1997. *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy*. New York: Oxford University Press.

———. 2009. "The Law: Bush, Cheney and the Separation of Powers—A Lasting Legal Legacy?" *Presidential Studies Quarterly* 39: 878–95.

———. 2011. "U.S. War and Emergency Power: The Virtues of Constitutional Ambiguity." *Annual Review of Law and Social Science*. 237–67.

Sparrow, Bartholomew. 2006. *The Insular Cases and the Emergence of American Empire*. Lawrence: University Press of Kansas.

US v. *Carolene Products*, 304 US 144 (1938).

US v. *Curtiss-Wright Export Corp*., 299 US 304, (1936).

Yoo, John. 2005. *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11*. Chicago: University of Chicago Press.