

Closing Remarks on Judge Juan Torruella

José A. Cabranes

An assignment to comment on the life of Juan Torruella presents some challenges. It is not an easy thing to choose for comment only one or two salient aspects of his well-lived life.

Torruella lived life to the full, pursuing anything and everything that stimulated his great curiosity.

He has been rightly celebrated as a judge of the highest caliber, and not least, as one whose avocational interests and achievements ranged well beyond our courthouses – including the performing art of music, the fine art of painting, and the athletic pursuit of sailing; the archival study of history; and the mobilization of civic forces in the service of historic preservation. He also had a gift for friendship, and I was honored to be counted among his many friends.

In considering Judge Torruella's long and beneficent public career we recall that Torruella was, first and foremost, a proud Puerto Rican and a proud American patriot. Beyond the trappings of high judicial office, beyond his explorations of constitutional and international law, and beyond his extraordinary exploits as a sportsman, this is, I think, exactly how he would wish to be remembered – as one who loved his people and one who sought to redeem for them the promise of equality embedded in the Constitution of the United States.

Juan Torruella never tired of reminding us that Puerto Rico remains outside the constitutional perimeters of the United States, its people second-class citizens of the United States who lack meaningful participation in the formal law-making processes that shape their everyday lives.

He and I met for the first time thirty-five years ago, at the 1985 Judicial Conference of the First Circuit held in San Juan, the first of many invitations that he

would extend to me to lecture on aspects of the history of Puerto Rico and its federal court.

1985 was also the year in which Torruella published his first book, *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal*.¹

In 1985 I was able to report to the First Circuit Judicial Conference, on excellent authority, that, contrary to the assumption of Puerto Rican commentators and political leaders, the *Insular Cases* had been long forgotten by mainland students of constitutional law.

I reported that two years earlier no less a figure than Justice William Rehnquist, in a 1983 lecture at Louisiana State University, had observed that “[e]ven the most astute law student of today would probably be completely unfamiliar with these cases; indeed,” Justice Rehnquist continued, “when I went to law school more than 30 years [earlier], they rated only a footnote in a constitutional law case book.”² In my remarks of 1985 I was able to report, in the presence of Judge Torruella, that when I went to law school, a generation after Justice Rehnquist, I had difficulty even finding that one footnote.³

So it is that the first Puerto Rican to sit on a federal appeals court of any kind, and most notably the First Circuit, made it his business to describe and dismantle the doctrines that had made colonialism possible under the Constitution. He did so in a respectful academic form that aligned his argument with that of the American civil-rights movement, reinforced by connecting the treatment of Puerto Ricans to that of Black Americans in the era of Jim Crow.

Torruella’s argument is a hallmark of the uniquely American, and pro-American, decolonization movement which he personified, one that works within the American system to integrate Puerto Rico as a state of the Union and thus achieve equality for its people under the Constitution.

The starting point for Torruella’s writings, including some of his notable dissenting opinions, is the simple historical fact that the American colonial experiment in Puerto Rico was made possible by the very Supreme Court decisions that are the subject of this compendium of articles – the *Insular Cases*.

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1. JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985).
 2. José A. Cabranes, *Puerto Rico and the Constitution*, 110 F.R.D. 449, 477 (1986) (addressing the 1985 Judicial Conference of the First Circuit); see William Rehnquist, *Edward Douglass White Lecture: Lions Under the Throne at Louisiana State University* (Mar. 11, 1983) (on file with author).
 3. Cabranes, *supra* note 2, at 477.

These cases came in the aftermath of the Spanish-American War of 1898 and the election of 1900, in which the Democrats under William Jennings Bryan declared the “paramount issue” to be imperialism, and proceeded to lose the argument and the election.⁴

For Torruella and others whom he awakened to the status of Puerto Rico, the constitutional norm upon which colonial rule has rested for more than a century is the doctrine of territorial incorporation – a theory first elaborated in the pages of the *Harvard Law Review* by Professor Abbott Lawrence Lowell⁵ and adopted by the Supreme Court in the *Insular Cases* over a period of years.⁶

All sentient Puerto Ricans, even those who (like the author) grew up on the mainland, learn at an early age that Puerto Rico is a territory “appurtenant and belonging to the United States, but not a part of the United States”⁷

And they learn something else from their parents and other elders – that this doctrine of territorial incorporation means that the decision to extend the Constitution to a territory such as Puerto Rico can only be made by the political branches of the national government. And, most important of all, they learn that over the “unincorporated” territories, like Puerto Rico, congressional power is “plenary,” not necessarily constrained by the constitutional limitations applicable in the states of the Union and in an “incorporated” territory such as the District of Columbia.

The Supreme Court would eventually hold that “incorporation has always been a step, and an important one, leading to statehood,”⁸ which would require an “express declaration [by Congress], or an implication so strong as to exclude any other view.”⁹

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4. 1900 Democratic Party Platform, AM. PRESIDENCY PROJECT (July 5, 1900), <https://www.presidency.ucsb.edu/documents/1900-democratic-party-platform> [<https://perma.cc/PZL3-MBXV>]; see also JOHN M. BLUM, EDMUND S. MORGAN, WILLIE LEE ROSE, ARTHUR M. SCHLESINGER, JR., KENNETH M. STAMPP & C. VANN WOODWARD, THE NATIONAL EXPERIENCE PART TWO: A HISTORY OF THE UNITED STATES SINCE 1865, at 539 (5th ed. 1981); Thomas A. Bailey, *Was the Presidential Election of 1900 a Mandate on Imperialism?*, 24 MISS. VALLEY HIST. REV. 43, 43 (1937); José A. Cabranes, *Some Common Ground*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 42 (Christina Duffy Burnett [Ponsa-Kraus] & Burke Marshall eds., 2001) (citing JULIUS W. PRATT ET AL., A HISTORY OF UNITED STATES FOREIGN POLICY 187-88 (4th ed. 1980)).
 5. See Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155 (1899).
 6. *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901).
 7. *Downes*, 182 U.S. at 287.
 8. *Balzac v. Porto Rico*, 258 U.S. 298, 311 (1922).
 9. *Id.* at 306.

So it is that Judge Torruella concluded that it was the jurisprudence of the *Insular Cases* that had made possible and perpetuated a relationship under which Puerto Rico and its people would remain “separate and unequal.”¹⁰

And because the jurisprudence of the *Insular Cases* is by its terms a jurisprudence of judicial deference to the political branches of the national government, the dismantlement of this jurisprudence of subordination, in Torruella’s view, could be accomplished only by the exercise of the judicial power that had created it in the first place.

In other words, Torruella argued that the courts should not defer to the political branches any longer with respect to the place of Puerto Rico in our constitutional order.

In Torruella’s view, the Supreme Court could and should declare that the people of Puerto Rico are constitutionally no different from (and not inferior to) their fellow citizens of the American Union.

The demise of the doctrine of territorial incorporation, in Judge Torruella’s view, would put Puerto Rico in a position within the American political system substantially identical to that of Alaska and Hawaii before their admission to the Union in the late 1950s.

Accordingly, for Judge Torruella and other commentators, incorporation is not a mere constitutional abstraction—for better or worse, depending on your preferred view of Puerto Rico’s future, incorporation is a waystation on the road to statehood.

Some of those who read and heard Torruella’s cry for equality correctly understood that he was urging a form of judicial activism—judicial activism in the absence of action by the political branches of government; judicial activism because of the indifference of the political branches of government; judicial activism analogous to that required in *Brown v. Board of Education*.¹¹

Inevitably, Torruella’s point would be met by a counterpoint, the counterpoint of judicial self-restraint. At the 1985 conference Judge Levin Campbell was moved to assert the inevitable counterpoint: that “Puerto Rico’s long-term political future will be shaped by forces over which the federal courts have little control. We work within the existing political framework, whatever it may be at the time.”¹²

So, for Puerto Rico and its people, what is Judge Torruella’s legacy in the law? First and foremost, he helped to disinter the *Insular Cases* from the graveyard of American historical memory.

10. TORRUELLA, *supra* note 1, at 5, 268.

11. 347 U.S. 483 (1954).

12. Cabranes, *supra* note 2, at 484 n.29.

He reminded us all of the unfinished business of decolonization under the Constitution. He reminded us all that we had to put an end to what another great Puerto Rican jurist aptly described as the island's "sad distinction" – the "distinction" that the Puerto Ricans "are among the modern people of the world with the longest history as a colony."¹³

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13. 4 JOSÉ TRÍAS MONGE, *HISTORIA CONSTITUCIONAL DE PUERTO RICO* 217 (1980); *see also* JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 4 (1997) (regarding the "urgent need for the United States to take a new look at its relationship with Puerto Rico" and noting "its present predicament – how it has become, to its embarrassment and that of the United States, the oldest colony in the modern world"); José A. Cabranes, *Puerto Rico: "Out of the Colonial Closet,"* *FOREIGN POL'Y*, Winter 1978-1979, at 66-91 ("The problem of Puerto Rico is colonialism and decolonization stands at the front and center of the island's politics and its relations with the United States, now and for the foreseeable future.").