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TO : Honorable Bennett Johnston
Attention: Laura Hudson

FROM : American Law Division

SUBJECT : Discretion of Congress Respecting Citizenship Status of Puerto Ricans

This memorandum responds to your request for a brief discussion of the question whether Congress may be constitutionally constrained in decision-making with regard to the citizenship status of Puerto Ricans. The matter arises in the context of present proposals to afford Puerto Rico a choice through referendum of continuing commonwealth status, statehood, or independence. If the decision should be in favor of independence, what alteration could Congress constitutionally make with respect to United States citizenship of the residents of Puerto Rico?

In §7 of the Foraker Act, 31 Stat. 77 (1900), passed in the wake of the acquisition by the United States of Puerto Rico, Congress provided that all inhabitants of "Porto Rico," as it was then known, and their children born thereafter "shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States." Subsequently, by §5 of the Organic Act (Jones Act), 39 Stat. 953 (1917), "all citizens of Porto Rico ... are hereby declared, and shall be deemed and held to be, citizens of the United States." See 8 U.S.C. §1402(present law).

Although the original Constitution of 1789 contained several requirements of and provisions respecting citizenship, it nowhere defined who was or could be a citizen of the United States. By Article I, §8, cl. 4, Congress was empowered to "establish an uniform Rule of Naturalization," and pursuant to this power from the beginning provided not only for a naturalization process but also enacted a series of provisions determining what persons born outside the United States were to be citizens and what conditions if any they had to meet. 1 Stat. 103 (1790). But the omission in the Constitution of a definition of citizenship or of criteria for citizenship created a situation under which it was strenuously argued that national citizenship was derivative of citizenship under one of the States, an argument that culminated in the *Dred Scott* case. *Scott v. Sandford*, 19 How. (60 U.S.) 393 (1857). *Dred Scott* was reversed, first by the Civil Rights Act of 1866, 14 Stat. 27, and then by the first sentence of §1 of the Fourteenth Amendment. The Amendment provided: "All persons born

or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside."

That the first sentence of §1 of the Fourteenth Amendment comprehended more than a declaration of who was a citizen was determined by the Supreme Court in *Afroyim v. Rusk*, 387 U.S. 253 (1967), a controversial and divided decision in which the Court ruled that the Amendment withdrew from Congress the power to expatriate United States citizens against their will for any reason. See *Vance v. Terrazas*, 444 U.S. 252 (1980)(process for determining whether one has voluntarily renounced citizenship). Afroyim was a Polish national by birth, but he had acquired United States citizenship by naturalization. He had voted in a political election in Israel, and the Government attempted to revoke his citizenship under a statute which prescribed that penalty for voting in a foreign election.

If the *Afroyim* case applied to those persons made United States citizens by force of statute because of their Puerto Rican citizenship, then Congress might well lack the power statutorily to alter the citizenship status. We say "might," inasmuch as the situation in which Puerto Rico was granted independence could elicit a compelling argument excepting the case from the *Afroyim* rule. But it appears that *Afroyim* is inapplicable in the instance of Puerto Rico.

In *Rogers v. Bellei*, 401 U.S. 815 (1971), the Court had before it a challenge to an immigration law provision that requires one who acquired United States citizenship by virtue of having been born abroad to parents, one of whom is an American citizen, to reside in this country continuously for five years between the ages of 14 and 28. Forfeiture of citizenship is the price of failing to meet the residency requirement. Upholding the constitutionality of the provision, the Court, still divided, ruled that *Afroyim* was inapplicable because the claimant was not a "Fourteenth Amendment citizen" within the meaning of the first sentence, which defined citizens as those "born or naturalized *in* the United States."(Italics supplied). Because Bellei had been born *outside* the United States and naturalized *outside* the United States by statute, he did not meet the Fourteenth Amendment definition. Thus, the denaturalization provision, in order to be sustained, had only to be reasonable and not arbitrary.

The case law establishes that Puerto Rico, whatever its exact status and relationship to the United States is not itself *in* the United States. The reason this conclusion is possible owes to the decision of the *Insular Cases* following the acquisition of Puerto Rico and the Philippines. Those cases grappled with the difficult question whether "the Constitution follows the flag." That is, when the United States acquires territories or possessions, is the United States within the particular territory or possession bound by the Constitution in all respects? The cases held in the negative, but the reason for the result was for a time difficult to discern. In *De Lima v. Bidwell*, 182 U.S. 1 (1901), the Court ruled that Puerto Rico was not a "foreign country" after acquisition within the meaning of the United States tariff law. See also *Dooley v. United*

States, 182 U.S. 222 (1901)(authority to tax imports from United States into Puerto Rico ended when territory was ceded to the United States). *Downes v. Bidwell*, 182 U.S. 244 (1901), was the difficult case, in which, over four dissents and with no opinion of the Court by a majority of the Justices, it was determined that a discriminatory tax could be imposed on Puerto Rico despite the direction of Article I, §8, cl. 1 that "all Duties, Imposts and Excises shall be uniform throughout the United States."

One of the Justices in the majority simply took the position that nothing in the Constitution applied to any of the territories. Id., 285-286 (Justice Brown announcing the judgment of the Court). The other eight Justices disagreed, although they did not agree with each other. In a concurring opinion, Justice White, for himself and two other Justices with a third agreeing in substance, propounded a theory under which he found that Puerto Rico was not a part of "the United States" within the meaning of the uniformity clause. Id., 287. According to the theory, a territory becomes part of the United States only after it has been "incorporated" by congressional action, action that manifests an intention on the part of the political branches to set a territory upon a course of ultimate integration into the union of States. Those territories that Congress does not intend to admit into the union at some point in the future are not parts of "the United States" in the context of provisions limited in their application to "the United States." Id., 292, 299, 341-342. The concurrence specifically alluded to the difficulties which would accompany the inability of the United States to restrict the inhabitants of acquired territories from access to automatic citizenship in the United States if all the Constitution was applicable to the territories upon acquisition, an acknowledgment that absent incorporation the first sentence of §1 of the Fourteenth Amendment would have no effect. Id., 306, 313. He accepted that some provisions of the Constitution would apply to the island. Id., 293.

In *Dorr v. United States*, 195 U.S. 138 (1904), the Court ruled that the Constitution's jury trial provisions, Article III, §2, cl. 3; Sixth Amendment, did not apply to the Philippines. With only one Justice dissenting, the Court accepted Justice White's *Downes* concurrence and pointed to the fact that Congress had not "incorporated" the Islands. See also *Hawaii v. Mankichi*, 190 U.S. 197 (1903). Again, what provisions of the Constitution did apply was left uncertain. Then, in *Balzac v. Porto Rico*, 258 U.S. 298 (1922), a unanimous Court in an elaborate opinion by Chief Justice Taft considered whether a Sixth Amendment right to jury applied in the courts of Puerto Rico. Resolution of the question turned on whether Puerto Rico had been "incorporated" into the United States, the Court held, and it ruled that Congress had not done so. The fact that the Jones Act had extended United States citizenship to Puerto Ricans did not establish a showing of incorporation, nor did a variety of other enactments in that and other laws evidence an intent to put Puerto Rico on a course to eventual statehood.

The rule which emerges from these cases, as stated in Justice White's *Downes* concurrence, subsequently adopted by the Court, is that "whilst in an international sense Porto Rico was not a foreign country, since it was subject

to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession." *Downes*, supra, 258 U.S., 341-342. See *Balzac*, supra, 258 U.S., 305 (*Downes* and *Dorr* settled that neither the Philippines nor Puerto Rico "was territory which had been incorporated in the Union or become a part of the United States, as distinguished from merely belonging to it"), 313 ("we find no features in the Organic Act ... from which we can infer the purpose of Congress to incorporate Porto Rico into the United States with the consequences which would follow").

It is true that some Justices have since questioned the vitality of the *Insular Cases*. See *Reid v. Covert*, 354 U.S. 1, 14 (1957)(plurality opinion of Justice Black). But in *Torres v. Puerto Rico*, 442 U.S. 465, 469-470 (1979), the history and the cases are recited with approval of the analysis, while four concurring Justices would have limited the "old cases" to their "particular historical context." Id., 474, 475. On the other hand, the concurrence was expressly concerned with the application of the Bill of Rights to Puerto Rico. In that regard, the recent cases do apply certain Bill of Rights guarantees to the Commonwealth. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)(due process clause applies, but Court does not decide whether the Fifth or Fourteenth Amendment is relevant provision); *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976)(equal protection guarantee of either the Fifth or Fourteenth Amendment); *Califano v. Torres*, 435 U.S. 1, 4 n. 6 (1978)(assuming constitutional right to travel applies). In *Balzac*, supra, 258 U.S., 314, the Court assumed that the First Amendment speech and press guarantees applied. On the other hand, in *Torres v. Puerto Rico*, supra, the majority of the Justices reached the conclusion that the Fourth Amendment's search and seizure guarantee applied on the basis that Congress in its governing legislation had always acted on the premise that the Amendment could be applied to Puerto Rico without danger to national interests or the risk of unfairness.

But care must be taken when considering the impact of the recent judicial debates on the *Insular Cases* to remember that those decisions did not question the application of any of the Constitution's provisions; rather, the Court assumed that certain "fundamental" guarantees did apply. The more recent debate reflects the division within the Court on the "fundamentality" of most of the provisions of the Bill of Rights. Nothing said in these cases need be taken as questioning the theory regarding "incorporation" of a territory or possession into "the United States." In that perspective, then, the limitation of the first sentence of §1 of the Fourteenth Amendment would not restrain Congress' discretion in legislating about the citizenship status of Puerto Rico.

Of course, some Puerto Ricans do have "Fourteenth Amendment citizenship." That is, those who were born *in* the United States are within the meaning of §1 and are therefore constitutional citizens from birth. Cf. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). As to them, either dual

citizenship or some treaty provision requiring some choice might be alternatives. In any event, the relative numbers of persons involved will be small.

You also inquired with regard to the citizenship status of residents of the Philippines. Under §4 of the Organic Act, 32 Stat. 691, 692 (1902), Congress provided that all residents of the Philippines and their subsequently born children should be deemed to be "citizens of the Philippine Islands" entitled to the protection of the United States. As noted above, *Dorr v. United States*, supra, held that the Philippines was an unincorporated territory. In §8 of the Philippine Independence Act, 48 Stat. 456, 462 (1934), the Philippines was treated as a foreign country for many purposes. Filipino citizens were treated as aliens for immigration purposes; United States foreign service officers assigned to the Philippines were treated as if stationed in a foreign country. See *Hooven v. Evatt*, 325 U.S. 652, 677-678, 692 (1944). There was, thus, no comparable citizenship issue upon independence.

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