Manuel Luis

(Devolver al Archivo)

Memo de Frankfurter

AG

OFICINA DEL SECRETARIO DE JUSTICIA

SAN JUAN

MEMORANDUM 18 julio 1956

Estimado don Luis

Apareció por fin el memorandum de Frankfurter donde habla de las diversas formas de relación posibles bajo la Constitución de EEUU. Tiene otras partes muy interesantes.

Trías

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WAR DEPARTMENT.

WASHINGTON.

March 11, 1914.

MEMORANDUM for the Secretary of War.

Subject. The Political Status of Porto Rico.

1. The status of acquired territory entirely a matter for Congressional determination.

A. The nature and scope of the power to acquire territory, the status of such territory, its relation to the union of States, its protection and rights under the Constitution were considered at length in the series of cases dealing with the acquisitions resulting from the Spanish war. Those cases may thus be briefly summarized:

The United States has undoubted power to acquire territory (a) as part of (a) its war power; (b) its treaty-making power; (c) its inherent international sovereignty.

B. Such territory does not become automatically incorporated into the United States, so as to render the Constitution operative ex proprio vigore, in its limitations and in its privileges, "throughout the United States" consisting of states and organized territories.

C. On the contrary, when, and under what circumstances and to what extent the provisions of the Constitution, which relate to the aggregate of States, shall become operative in such territory presents a political question for Congressional determination.

"We are also of the opinion that the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive the inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American Empire.'" (Downes v. Bidwell, 182 U.S. 244, 279).

Insular Cases, 182 U. S. 1; Downes v. Bidwell, Ibid 244.

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"Conceding that the conception upon which the Constitution proceeds is that no territory as a general rule should be acquired unless the territory may reasonably be expected to be worthy of statehood, the determination of when such blessing is to be bestowed is wholly a political question, and the aid of the judiciary cannot be invoked to usurp political discretion in order to save the Constitution from imaginary or even real dangers." (Concurring opinion of the present Chief Justice in Downes v. Bidwell case, 182 at p. 318).

4. Of course, limitations upon Congress which go to the root of its power, bind Congress as to all territories subject to its jurisdiction. Thus a prohibition to pass a bill of attainder "goes to the competency of Congress to pass a bill of that description" (Downes v. Bidwell, 182 U.S.244,277).

5. There are probably also certain fundamental limitations in favor of personal rights which should be respected as inherent in the spirit of our Government. These are not to be determined by any doctrinaire assumption as to "fundamental rights," and they certainly do not contain all the provisions of the Bill of Rights. (Door v. United States, 195 U.S.138,146,149).

B. Specifically, the status of the territory acquired by the United States from Spain is entirely within Congressional control.

1. Article IX of the Treaty of Paris provided that the "civil rights and political status of the native inhabitants of the territories hereby conceded to the United States shall be determined by the Congress."

2. By this provision there was thus specifically reserved for Congressional action, the nature of the inter-relations between the United States and the Insular Possessions which came to it.

"Where a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions, but expressly provides to the contrary, incorporation does not arise until in the wisdom of Congress it is deemed that the acquired

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Gonzales v. Williams 192 U.S. 1; Door v. U.S. 195 U.S.138; Kopel v. Bingham 211 U.S. 468; Gromer v. Standard Dredging Co. 224 U.S. 362 Railroad Company v. Rosaly 227 U.S. 270.

territory has reached that state where it is proper that it should enter into and form a part of the American family."(Chief Justice White in Downes v. Bidwell, 182 U.S.244,339).

C. The form of the relationship between the United States and incorporated territory is solely a problem of statesmanship.

1. History suggests a great diversity of relationships between a central government and dependent territory. The present day shows a great variety in actual operation. One of the great demands upon inventive statesmanship is to help evolve new kinds of relationship so as to combine the advantages of local self-government with those of a confederated union. Luckily, our Constitution has left this field of invention open. The decisions in the Insular cases mean this, if they mean anything, that there is nothing in the Constitution to impair the responsibility of Congress in working out, step by step, forms of government for our Insular possessions responsive to the [illegible] needs and capacities of their inhabitants, and ascertained by the best wisdom of Congress.

2. Since the Spanish War a number of problems have arisen which illustrate the complexity of situations which may arise, and the variety of relationships that this country may occupy to territory not incorporated - all sorts of stages from control over country which is internationally foreign, up to the point of complete, conventional political incorporation.

(a) As to Cuba - the United States held foreign territory [illegible] its inhabitants until the erection of state government (Neely v. Henkel, 180 U.S. 109). And after that was established, this Government, by the Platt amendment, reserved the right to regulate the conditions under which Cuba could incur foreign indebtedness as well as the right of intervention under defined circumstances ([illegible] Stat. 897).

(b) Hawaii was admitted by the Newlands Resolution (30 Stat. 750) in that was practically a territorial form of government and yet not incorporating systems of procedure

deemed fundamental by our Bill of Rights. (Hawaii v. Mankichi 190 U.S. 197).

(c) In Panamá, a unique form of executive government was deemed necessary and sustained. (see Wilson v. Shaw, 204 U.S. 24).

(d) As to the Philippines, Congress exercised its political authority in creating an executive government, and delegating such legislative functions to such agencies as it saw fit. (Dorr v. U.S. 191 U.S. 138, 148; United States v. Heinszen, 206 U.S. 370, 385).

(d) In Santo Domingo, the treaty making power created a unique but developing influence over neighboring countries through the establishment of a Customs Receivership (Convention of February 8, 1907-35 Stat. 1880).

III. Porto Rico has received a territorial form of government, but for political reasons is excluded from incorporation into the United States.

1. In Porto Rico Congress has established a government both in form and function similar to those existing in our completely organized territories. (Kopel v. Bingham, 211 U.S. 468, 476). In the Foraker Act, Congress has sought to give the Island "local self-government, conferring an autonomy similar to that of the States"(Gromer v. Standard Dredging Co. 224 U.S. 362,370), as well as extending immunities such as are enjoyed by the States. (Porto Rico v. Rosaly 227 U.S. 270).

2. The Island, however, is not "incorporated into the United States, "it is not an inchoate state."

> "It must, I think, be admitted that Porto Rico is not a "territory" of the United States, and that Congress has with entire consistency, and for obvious political reasons, refused to describe it by that technical term." (In Re Kopel, 148 Fed. 505,507, approvingly cited in Kopel v. Bingham, 211 U.S. 468,474).

3. "The crux of the matter is that the nature and extent of the relationship as we have seen, is solely a problem of legislative expediency, a political question entrusted by the Constitution to

unlimited Congressional control. What the nature of the relation should be, what its incidents, the privileges that should be conferred upon the inhabitants, and the privileges that for the time being at least, should be denied, are all matters solely for Congressional competence. The Congressional will is circumscribed solely by its own action; and the problem, therefore, is for Congress to give adequate expression to its own will. There can be incorporation only when Congress sees fit to incorporate. Practically, incorporation is not accomplished unless Congress, in so many words, says so, or grants powers so as to make the denial of incorporation incompatible with the necessary effect of such powers. Such powers, however, are nothing short of the specific extension of the Constitution and laws of the United States to an unincorporated territory. Such result is not accomplished when Congress, having its mind specifically directed to the question of incorporation, consciously desires not to incorporate, but merely extends certain specific privileges of the Constitution without thereby relinquishing its plenary power to deal with the local situation of such territory.

III. No incorporation effected by proposed Porto Rican legislation.

1. It is plainly the purpose of Congress that no such incorporation shall be effected. The welfare of Porto Rico forbids it, and the thought of this country (so far as public opinion can be gauged) is against it. As a matter of finance, the conditions operative at the time of the Foraker Act, which make it needed justice for Porto Rico not to include it within the general taxing legislation of this country, still prevail in the Island. Porto Rico still needs the receipts under the Federal tariff and internal revenues collected at Porto Rico; in other words, she must be treated differently than and outside of the provisions applicable to incorporated territories. Politically, the relation between Porto Rico and the United States is undoubtedly a permanent one and so regarded by responsible thought and responsible leadership

frankly pointed out, that certainly for the present at least, statehood is not the form which such relationship is intended to take. Therefore, the conventional step towards statehood, the creation of an "inchoate state", the technical incorporation into the United States, is sought to be avoided.

2. The question, therefore, is: Does the proposed legislation accomplish the purpose which Congress has in mind, to wit: to enlarge the sphere of local self-government without incorporating the Island into the United States:

(a) There is no specific provision creating Porto Rico an organized Territory of the United States.

(b) There is no extension of the Constitution and the laws of the United States to Porto Rico. On the contrary, instead of making such an extension as Section 1891 R.S. U.S. does for all "organized territories," the bills before Congress provide that the "laws of the United States hereinafter enacted shall not apply to Porto Rico except when they specifically so provide." (Sec. 10, H.R. 13818, and Sec. 13 S. 4604).

3. Does the proposal to confer upon citizens of Porto Rico citizenship of the United States defeat this conscious purpose against incorporation? In my opinion, clearly not.

(a) Such grant of citizenship merely gives legal expression and recognized dignity to an insistent living state of facts. It gives Porto Rico a secure technical international standing; it epitomizes and confirms the sentiment of loyalty which they share with us. Both political parties, which have been charged with the responsibility of government, have recognized that the relation of Porto Rico to this country is a permanent one. The formal grant of citizenship is but a recognition of this tie, and the means of cementing it. (See President Taft's message, December 6, 1912, President Wilson's message, December 2, 1913, and Annual Reports of Secretary Stimson for 1911 p.40; 1912, p. 38, and of Secretary Garrison for 1913, p. 41).

The grant of citizenship is a means of removing the great source of political unrest in the Island; is a means of satisfying a sentiment of deep significance to the welfare of the Island. Fortunately, the Constitution has endowed Congress with ample power to meet specific needs without, incidentally and against its wishes, creating other difficulties; it has not left Congress impotent to grant certain privileges to meet specific exigencies except by causing totally irrelevant and unintentional consequences. Congress is free to add to the privileges heretofore granted to the inhabitants of Porto Rico, what is only another privilege, namely, "national citizenship," (see In Re Kopel 148 Fed. 505,507) without radically changing the fiscal and political desiderata of the Island. Since the whole question of the Island's political status is a matter for Congressional control, what the nature of the political rights of the Island shall be, and how they shall be exercised and what form they shall take are all within the field of choice of Congressional authority. (See McCulloch v. Maryland, 4 Wheat 316,421). By making the Porto Ricans citizens of the United States, you make them citizens of the United States, and not, incidentally, Porto Rico, an eventual State of the Union.

(b) It, therefore, does not particularly matter what method of conferring citizenship is pursued--whether by individual naturalization, as is the proposal in the bill introduced by Senator Shafroth (Section 6), or by what is loosely spoken of as collective citizenship, creating naturalization unless there is a dissent, as is proposed in the bill introduced by Mr. Jones (Section 5). The difference in methods is, of course, largely influenced by administrative considerations. Neither intends, both specifically do not intend, any other consequences except to confer citizenship. As a matter of form, however, the proposal for the grant of individual citizenship seems preferable. That

makes it clear that there is no incorporation of the territory as such, but merely a means of facilitating the naturalization into citizenship of the inhabitants. For the so-called grant of citizenship upon the inhabitants could, of course, be now obtained if each one of them went through the process of naturalization in this country. Such a tedious process would not turn Porto Rico into an incorporated territory, neither does the effective and more gracious way of conferring citizenship.

(c) It is true that the Foraker Act, as originally reported in the Senate, contained a provision conferring citizenship of the United States upon Porto Ricans, and this provision was struck out before its enactment. It is also true that this fact was adverted upon by Justice White in his concurring opinion in Downes v. Bidwell (182 U.S. 244,341). The citizenship feature was omitted from the Foraker bill out of deference to the then opposition (33 Cong. Rec. 3690). At that time, the power of Congress over territory acquired by the Treaty of Paris was still a much debated issue, and it was natural that a feature, which was much challenged because of the consequences which it might entail, should be abandoned. Chief Justice White referred to the exclusion of the granting of citizenship merely as manifesting the intention of Congress not to incorporate the territory. He nowise intimated that the grant of citizenship if clearly accompanied by an unmistakable refusal to incorporate, would carry any such consequences. Congress in 1900 merely sought to avoid the basis of argument that Porto Rico was incorporated. Now the series of Insular decisions have put beyond argument the plenary power of Congress over Porto Rico. To assert that Congress by granting citizenship would also grant incorporation which it seeks to withhold, requires the conclusion, in the language of Chief

Justice White "that rights were conferred which, after consideration, it was determined should not be granted." (182 U.S. at p. 341). No such fear need be apprehended. If Congress chooses to grant citizenship without incorporation, the Supreme Court will respect such exercise by Congress of its political function.

Respectfully submitted,

(Sgnd.) Felix Frankfurter,
Law Officer.