Decision making and ideology (III)

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Ideology plays a major role in distorting legal realities in Puerto Rico. Legal arguments such as "The Congress cannot give away its powers," are constantly recurring by those who would deconstruct the Commonwealth compact. We have a good example of this with regard to the recent opinion of the U.S. Supreme Court in the case of Boumediene v. Bush. The court held in this case that the aliens detained as enemy combatants at the naval station in Guantanamo Bay were entitled to the privilege of habeas corpus to challenge the legality of their detention.

In arriving at their decision, the justices had to revisit the Insular Cases. These cases were decided by the U.S. Supreme Court at the dawn of the 20th century and arose out of the acquisition by the U.S. of Puerto Rico, the Philippines and Guam from Spain through the Treaty of Paris of 1898, which put an end to the Spanish-American War.

The cases answered the question regarding the application of the U.S. Constitution to the territories acquired from Spain. They established the doctrine—followed to this day—that the Constitution does not extend in all of its provisions to an acquired territory if this territory was not intended for statehood. Nevertheless, certain provisions of the Constitution protecting fundamental rights do apply to restrain the actions of the executive or legislative powers over the territory regardless of whether the territory was intended for statehood. The territories intended for statehood were deemed incorporated territories; those not destined for statehood were deemed unincorporated territories.

Puerto Rico was deemed an unincorporated territory, which meant all the provisions of the U.S. Constitution do not apply, but those that protect our fundamental rights do. In practical terms this means our rights, such as free speech or due process, etc., are protected by the U.S. Constitution, but the U.S. Constitution does not require that federal taxes apply in Puerto Rico as it requires that they do in the States and incorporated territories.

The flexibility of this doctrine allowed creative statesmen and women to structure the Commonwealth relationship, which Puerto Rico currently enjoys, and opened the door to provisions such as sections 931 and 936 of the U.S. Tax Code to provide for our economic development.

Upon reaching Puerto Rico, the Boumediene opinion was drowned in the quagmire of status politics and ideological analysis. The justices, of course, do not read or hear the commentaries that circulate in our tropical media. But if they did, they would be shocked by the conclusions reached by the learned commentators in our midst.

The highly politicized ideologues seized upon the fact that the court held that the Insular Cases are still good law to draw the conclusion that Congress has plenary powers over Puerto Rico and therefore Commonwealth is an irredeemable colonial form of government.

Lest we be drowned by this type of thinking, let us take a look at exactly what the court said in Boumediene, by citing earlier cases:

"These considerations resulted in the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated territories surely destined for statehood but only in part in unincorporated territories. See Dorr v. United States ('Until Congress shall see fit to incorporate territory ceded by treaty into the United States, the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation.') ...As [this] court later made clear [in Balzac], '[T]he real issue in the Insular Cases was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.' Balzac v. Porto Rico. It may well be that over time the ties between the United States and any of its unincorporated territories strengthen in ways that are of constitutional significance. Compare Torres v. Puerto Rico, ('Whatever the validity of the [Insular Cases] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970s.') But as early as Balzac in 1922, the court took for granted that, even in unincorporated territories, the government of the United States was bound to provide to noncitizen inhabitants 'guaranties of certain fundamental personal rights declared in the Constitution.' See also Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States, ('Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights that are formulated in the Constitution and its amendments.')"

Three things should be noted from the court's discourse in the above paragraph:

1. Congress has the power to govern territories.
2. The relationship established in the exercise of this power can change in ways that have constitutional significance. The court cites Torres, a case about the Commonwealth relationship, to sustain this proposition.
3. The exercise of power to govern territories by Congress is limited by the fundamental rights of the citizen inhabitants.

The constitutional legitimacy of the Commonwealth relationship, which excludes congressional power over Puerto Rico's internal affairs just as the U.S. Constitution provides with regard to the states of the union, is in no way diminished by the continued validity of the Insular Cases doctrine taken by the court.

The fact that federal power is exercised in Puerto Rico does not mean the power of Congress is plenary. The U.S. Supreme Court has recognized Congress relinquished part of its power over Puerto Rico to bring about the Commonwealth relationship. (Examining Board v. Flores de Otero, 426 U.S. 572). The very nature of the territorial power requires that it can be renounced if this is the will of Congress. It has been renounced 36 times—Texas came in as an independent country—when former territories became states of the union. It was totally renounced when Congress granted independence to the Philippines. It was partially renounced when Congress enabled the people of Puerto Rico to adopt their Constitution to enter by compact into the present relationship.

So, Boumediene poses no problem as to the legitimacy of Commonwealth. In fact, it does the opposite. It stands for the proposition that the court will protect our fundamental rights, one which is our right to vote, as the court held in Rodríguez v. PDP, 457 U.S. 1. Our right to vote means nothing if Congress has the plenary power to do away with our Constitution or to trade us off to another country as the politicized ideologues maintain.