Chapter 5

The Insular Cases

The hard fact facing the anti-imperialist movement by 1901 was that it had failed to alter the trajectory of American foreign policy, even if imperialism was a controversial front-page news item for over two years. Bringing the “great debate” to the courts for consideration seemed a doomed last-ditch effort. An outstanding reading of the sentiment at the time comes from a fictional character, Mr. Dooley, an Irish bartender on Chicago’s south side who was a humorous, but serious, critic of national esteem. Conceived by journalist Finley Peter Dunne, Mr. Dooley’s opinions, syndicated in America’s newspapers, were even read in cabinet meetings. On the anti-imperialist movement and its postelection fallout, Dooley quipped, “They’se wan thing about th’ supreme coort, if ye lave annything to thim, you lave it to thim . . . It niver gives a decision until th’ crowd has dispersed and th’ players have packed their bats in th’ bags an’ started f’r home . . . Some say it laves th’ flag up in th’ air an’ some say that’s where it laves th’ constitution. Anyhow, something’s in th’ air. But there’s wan thing I’m sure about . . . no matther whether th’ constitution follows th’ flag or not, th’ supreme coort follows th’ iliction returns.”1 Dooley’s wit identifies the national consensus about anti-imperialism and the movement’s prospects. Most people assumed it had none after 1900. This was not entirely true, though. The decision to contest the Treaty of Paris and McKinley’s plans for “benevolent assimilation” in the courts was a real and considerable challenge to imperialists and their foreign policy.2 In fact, the movement had been gearing up for a Supreme Court challenge since 1898. As early as the war’s outset, anti-imperialist jurists were writing opinions against empire and acquisition. Among these were the country’s leading professors of law.
Ivy League academics disagreed vehemently in 1898 as to whether the extension of American sovereignty obligated the extension of the Constitution’s rights and a republican form of government. The legal parameters of the great debate were set well before Leagues organized, and because of this the natural place for a legal crescendo was the Supreme Court. It would be the final adjudication on the legality of American imperialism.

The Supreme Court took up the matter in a series of cases throughout December 1900 and January 1901. The cases are commonly known collectively as the Insular Cases. Each one considered tariff and customs duties for trade conducted between the United States and her newly acquired territories or among these territories. Though the cases centered on commerce, they framed a more significant debate, which would legally define the relationship of the territories to the American nation. The underlying question they posed to the court was whether the territories were part of the United States. And its decision would have the effect of either extending or denying constitutional liberties to the people of the territories.

The first seven of these Insular Cases were decided simultaneously on May 27, 1901. It took five hours and thirty minutes for the justices to read their verdicts and the various opinions for each case. The court’s ruling was closely split at 5–4, and it was not immediately clear whether the decision was for or against the extension of rights to the territories. Reporters, eager to scoop competing journalists, sent telegrams to their newspapers attempting to interpret the events. The jostling for a scoop led to conflicting accounts in the headlines the following day. Some newspapers claimed victory for anti-imperialism; others opined the McKinley administration had successfully defended its policy.3 What soon became evident was that the ruling was neither a rebuke of the president’s policies nor a resounding death knell for the anti-imperialists. Instead, the Insular Cases had adopted a “novel, even revolutionary, constitutional doctrine: the Incorporation Doctrine.”4 Enunciated by Justice Edward Douglass White, the incorporation doctrine distinguished between two types of American sovereignty in territories. White believed territory could be either incorporated or unincorporated. The distinction is made during the treaty-making process, he claimed. If a territory be incorporated, the full rights of the Constitution would be extended along with a guarantee of statehood. This was full membership into the Union of the “United States.” Conversely, he believed a territory could be unincorporated and thereby not extended certain rights or statehood. This judgment became