

May 10, 2021

**Re: ACLU Urges Cosponsorship of H.Res. 279**

Dear Representative:

On behalf of the American Civil Liberties Union (ACLU),<sup>1</sup> we urge you to cosponsor H. Res. 279, a bipartisan resolution rejecting the use of a discredited line of Supreme Court decisions, known as the *Insular Cases*, in current and future court cases.

Decided between 1901 and 1922, the *Insular Cases* held that specific constitutional provisions did not apply in certain then-recently acquired U.S. island territories.<sup>2</sup> The cases devised an untenable and unprecedented distinction between “incorporated” and “unincorporated” U.S. territories. They decided—with no grounding in its text—that the Constitution applied in full in “incorporated” territories on the path to statehood, such as Alaska, while its protections and limitations applied only in part in “unincorporated” territories such as Guam and Puerto Rico.<sup>3</sup>

It is broadly accepted now that these cases entrenched racialized imperialist-era concerns over extending constitutional protections to people of color. At the time, prominent members of Congress from both parties did not want the Constitution to apply fully to these territories because they found the islands’ residents unfit to enjoy its full benefits.<sup>4</sup> In the principal decision, speaking of Puerto Rico, Justice Edward White warned against the dangers of admitting an “unknown island, peopled with an uncivilized race.”<sup>5</sup> Through these cases, the Supreme Court decided for the first time that the Constitution would not fully “follow the flag.” But the Court expressly relied on racist assumptions about the inferiority of the newly acquired territories’ inhabitants to reach that conclusion.<sup>6</sup>

Now, 120 years later, litigants and lower courts still cite the *Insular Cases* to say—wrongly—that the decisions resolved that only



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<sup>1</sup> The ACLU takes no position on the ideal political status of territories like the Commonwealth of Puerto Rico—be it statehood, independence, or continued association with the United States.

<sup>2</sup> *E.g.*, *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922) (Puerto Rico; right to jury trial inoperable); *Downes v. Bidwell*, 182 U.S. 244, 347 (1901) (Puerto Rico; Uniformity Clause inapplicable); *Dooley v. United States*, 183 U.S. 151, 156-57 (1901) (Puerto Rico; Export Clause inoperable).

<sup>3</sup> *Boumediene v. Bush*, 553 U.S. 723, 757 (2008).

<sup>4</sup> See Br. for the ACLU as *Amicus Curiae*, at p. 19-20, *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC, et al.*, 18-1334 (2019).

<sup>5</sup> *Downes v. Bidwell*, 182 U.S. 282, 306 (1901) (White, J., concurring).

<sup>6</sup> *Id.* at 18.

“fundamental” constitutional protections apply in the territories.<sup>7</sup> When they do, they ignore that the Supreme Court warned—as recently as last year—that the cases should not be expanded beyond their narrow facts and holdings.<sup>8</sup> And almost always, misplaced reliance on the *Insular Cases* deprives residents of the territories of rights and protections to which they are almost surely entitled.<sup>9</sup>

The Supreme Court has long held that the “powers vested in Congress” concerning “Territories are broad.”<sup>10</sup> That broad authority makes a statement from this body regarding the full application of constitutional rights to residents of U.S. territories critically important. This resolution justly repudiates the offensive and archaic racial views expressed in the *Insular Cases* about the residents of American Samoa, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, Guam, and the U.S. Virgin Islands. It rightly acknowledges that the “*Insular Cases* and the ‘territorial incorporation doctrine’ are contrary to the text and history of the United States Constitution.”

Congress should take a stand against the outdated racist and imperial rationale that underpins the *Insular Cases*.

Please contact Margarita Varela at [Margarita.Varela-Rosa@mail.house.gov](mailto:Margarita.Varela-Rosa@mail.house.gov) to cosponsor H.Res. 279. If you have any questions about the amicus brief the ACLU filed urging the Supreme Court to overrule the *Insular Cases*, please contact Kristen Lee at [klee@aclu.org](mailto:klee@aclu.org).

Sincerely,



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<sup>7</sup> *E.g.*, *Tuaua v. United States*, 951 F. Supp. 2d 88, 94-95 (D.D.C. 2013) (“In an unincorporated territory . . . only certain ‘fundamental’ constitutional rights are extended to its inhabitants.”), *aff’d*, 788 F.3d 300 (D.C. Cir. 2015).

<sup>8</sup> *See Fin. Oversight & Mgmt. Bd. for P.R.*, 140 S. Ct. at 1665 (*Insular Cases* “should not be further extended” (quoting *Reid v. Covert*, 354 U.S. 1, 14 (1957)); *id.* (declining to extend decisions).

<sup>9</sup> *E.g.*, *Conde Vidal v. García-Padilla*, 167 F. Supp. 3d 279, 282, 286-87 (D.P.R. 2016) (ruling right of same-sex couples to marry inapplicable in Puerto Rico because of *Insular Cases*), *overruled by In re Conde Vidal*, 818 F.3d 765, 767 (1st Cir. 2016).

<sup>10</sup> *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 586 n.16 (1976).