

December 1, 2022

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Steny Hoyer
Majority Leader
U.S. House of Representatives
Washington, D.C. 20515

The Honorable James E. Clyburn
Majority Whip
U.S. House of Representatives
Washington, D.C. 20515

Dear Speaker Pelosi, Majority Leader Hoyer, and Majority Whip Clyburn:

On behalf of the undersigned civil rights groups,¹ we urge you to pass H. Res. 279 during what remains of the 117th Congress. This bipartisan resolution presents an historic opportunity for the House to reject the racist *Insular Cases* and their doctrine of “territorial incorporation,” which established what has been criticized as a doctrine of “separate and unequal” status for the 3.6 million residents of U.S. territories - 98% of whom are people of color. While both liberal and conservative Supreme Court Justices have recently criticized the *Insular Cases* as “odious and wrong” and “rest[ing] on a rotten foundation,” the Supreme Court has repeatedly passed on opportunities to reconsider these controversial cases.² A strong statement from the U.S. House of Representatives that it opposes these discredited cases will help signal to the Supreme Court it is time to finally act.

Congress has unique authority in this realm. The Supreme Court has long held that the “powers vested in Congress” concerning “Territories are broad.”³ That broad authority makes a statement from this body regarding the full application of constitutional rights to residents of U.S. territories critically important. H. Res. 279 repudiates the offensive and archaic racial views expressed in the *Insular Cases* about the residents of U.S. territories. And it acknowledges that the “*Insular Cases* and the ‘territorial incorporation doctrine’ are contrary to the text and history of the United States Constitution.”

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.⁴ The cases devised an untenable and unprecedented distinction between “incorporated” and “unincorporated” U.S. territories. They decided that the Constitution applied in full in “incorporated” territories on the path to statehood, as deemed by the Court, while its protections and limitations applied only in

¹ The undersigned organizations take no position on the ultimate question of political status - that should be answered by the people of each territory through a process of self-determination and decolonization.

² *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020); *United States v. Vaello Madero*, 142 S.Ct. 1539, 1557 (2022) (Gorsuch, J., concurring); Robert Barnes, [Supreme Court won't take case raising past rulings denounced as racist](#), Washington Post, October 17, 2022.

³ *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 586 n.16 (1976).

⁴ 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).

part in “unincorporated” territories such as Guam and Puerto Rico.⁵ This made-up distinction between “incorporated” and “unincorporated” had never before been applied to territories and has no support in the text or structure of the Constitution. The distinguishing feature between existing or former territories and the newly-acquired island territories was the race of the latter’s inhabitants.

Indeed, it is broadly accepted now that these cases entrenched racialized imperialist-era concerns over extending constitutional protections to people of color.⁶ 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.⁷ The Supreme Court itself described these persons as “alien races”⁸ and “savage tribes”⁹ who were less deserving of full Constitutional protection. In the principal decision, Justice Edward White warned against the dangers of admitting an “unknown island, peopled with an uncivilized race.”¹⁰ Through these cases, the Supreme Court decided for the first time that the Constitution would not fully “follow the flag.” The Court, however, expressly relied on racist assumptions about the inferiority of the newly acquired territories’ inhabitants to reach that conclusion.¹¹

With next year marking the 125th anniversary of the United States holding formal overseas colonies, the time for the House to act is now. For these reasons, Congress should roundly condemn the outdated racist and imperial rationale underpinning the *Insular Cases* and adopt H. Res. 279 before this session expires.

For follow up, please contact Alejandro A. Ortiz, Senior Staff Attorney at ACLU (OrtizA@aclu.org), Lía Fiol-Matta, Senior Counsel at LatinoJustice PRLDEF (lfiol-matta@latinojustice.org), Laura Esquivel, Vice President, Federal Policy and Advocacy at Hispanic Federation (lesquivel@hispanicfederation.org), or Neil Weare, President of Equally American (nweare@equallyamerican.org).

Sincerely,

American Civil Liberties Union
Ayuda Legal Puerto Rico
Brennan Center for Justice
Demos
Equally American
Hispanic Federation

⁵ *Boumediene v. Bush*, 553 U.S. 723, 757 (2008).

⁶ See, e.g. Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 Yale L. J. 2449, (2022); Adriel I. Cepeda Derieux & Rafael Cox Alomar, *Saying What Everyone Knows to Be True: Why Stare Decisis Is Not an Obstacle to Overruling the Insular Cases*, 53 Colum. Hum. Rts. L. Rev. 721 (2022).

⁷ 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).

⁸ *Downes v. Bidwell*, 182 U.S. 244, 286–87 (1901) (Brown, J.).

⁹ *DeLima v. Bidwell*, 182 U.S. 1, 219 (McKenna, J., dissenting).

¹⁰ *Downes v. Bidwell*, 182 U.S. 282, 306 (1901) (White, J., concurring).

¹¹ *Id.* at 18.

Lambda Legal
LatinoJustice PRLDEF
Lawyers' Committee for Civil Rights Under Law
Washington Lawyers' Committee for Civil Rights and Urban Affairs

CC: The Honorable Raúl M. Grijalva, Chair, House Natural Resources Committee
The Honorable Jerrold Nadler, Chair, House Judiciary Committee