

November 25, 2019

Re: ACLU urges Members of Congress to Cosponsor H.Res. 641

Dear Representative:

On behalf of the American Civil Liberties Union (ACLU),¹ we urge you to cosponsor H. Res. 641, 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.² Decided between 1901 and 1922, the *Insular Cases* held that certain constitutional provisions do not apply to the then-recently acquired U.S. island territories. The cases devised an untenable distinction between “incorporated” and “unincorporated” U.S. territories, and decided—without constitutional grounding—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 Puerto Rico and Guam.³

It is broadly accepted now that these cases entrenched 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 their residents were not Anglo-Saxon, and believed they were therefore unfit to enjoy its full benefits.⁴ In the principal decision, speaking of Puerto Rico, Justice White warned against admitting an “unknown island, peopled with an uncivilized race” that is “absolutely unfit to receive citizenship.”⁵ His reasoning: “If the conquered are a fierce, savage and restless people,” the United States could “govern them with a tight[] rein so as to curb their impetuosity, and to keep them under subjection.”⁶ Through these cases, the Supreme Court decided that the Constitution would not fully “follow the flag” into annexed lands. To reach this conclusion, the Supreme Court expressly relied on racist assumptions about the inferiority of the newly acquired territories’ inhabitants.⁷



National Political
Advocacy Department
915 15th St. NW, 6th FL
Washington, D.C. 20005
aclu.org

Susan Herman
President

Anthony Romero
Executive Director

Ronald Newman
National Political
Director

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

² See, e.g., *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC, et al.*, 18-1334 (2019).

³ *Boumediene v. Bush*, 553 U.S. 723, 757 (2008).

⁴ See Brief 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).

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

⁶ *Id.* at 302 (quotation marks omitted).

⁷ *Id.* at 18.

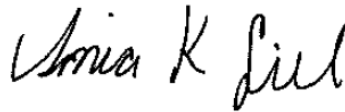
Almost 120 years later, the Constitution still applies only in part in U.S. island territories despite that most of their native-born residents are U.S. citizens.⁸ Some core rights—such as the constitutional right to a jury trial—do not apply there at all.⁹ While the Supreme Court has limited the *Insular Cases*' reach and stressed that they should not be expanded,¹⁰ courts continue to consider and cite them in cases for the overstated proposition that only “fundamental” rights apply in the territories.¹¹

Congress's broad authority to administer U.S. territories 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 those cases about the residents of American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands. 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 to cosponsor H.Res. 641. If you have any questions about the amicus brief the ACLU filed urging the Supreme Court to overrule the *Insular Cases*, please contact Sonia Gill at sgill@aclu.org.

Sincerely,



Ronald Newman
National Political Director
National Political Advocacy Department



Sonia Gill
Senior Legislative Counsel
National Political Advocacy Department



Adriel I. Cepeda Derieux
Staff Attorney
Voting Rights Project



Alejandro A. Ortiz
Senior Staff Attorney
Racial Justice Program

⁸ “Unlike those born in the United States’ other current territorial possessions . . . section 308(1) of the Immigration Nationality Act of 1952 designates persons born in American Samoa as non-citizen nationals.” *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015).

⁹ *See, e.g., Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922).

¹⁰ *See, e.g., Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality op.) (“[N]either the [*Insular Cases*] nor their reasoning should be given any further expansion.”); *see also id.* (“The concept that the Bill of Rights and other constitutional protections . . . are inoperative when they become inconvenient . . . would destroy the benefit of a written Constitution . . .”).

¹¹ *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).