



NEW YORK  
CITY BAR

December 21, 2022

Hon. Nancy Pelosi  
Speaker  
U.S. House of Representatives  
1236 Longworth House Office Building  
Washington, DC 20515

Hon. Raul Grijalva  
Chair, Natural Resources Committee  
U.S. House of Representatives  
1511 Longworth House Office Building  
Washington, DC 20515

**Re: Urging a Vote in Favor of H. Res 279 to Reverse the Insular Cases**

Dear Speaker Pelosi and Representative Grijalva:

We write on behalf of the New York City Bar Association (City Bar)'s Puerto Rico Task Force, Rule of Law Task Force, Senior Lawyers Committee, and Civil Rights Committee to urge members of Congress to vote in favor of H. Res. 279, which calls for rejection of the "territorial incorporation doctrine" found in the U.S. Supreme Court's decisions in the so-called "Insular Cases" from the turn of the last century.

First, we share with you a recent op-ed published in the New York Law Journal by the undersigned City Bar committees. The op-ed describes how the reasoning of the Insular cases continues to deprive the residents of U.S. territories – which include Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa – of basic rights of American citizenship and are anathema to democratic principles.<sup>1</sup>

As set forth in the op-ed:

Following the end of the Spanish American War, in 1898, the U.S. Supreme Court issued a series of opinions relating to the rights of residents of the territories annexed by the United States after the war. To what extent the U.S. Constitution applied to residents of these territories was debated in Congress, within the executive branch, and decided by the Court in cases

---

<sup>1</sup> Wanda Sanchez Day, Carlos Morales, Marcy Kahn, Kevin Jason and Kathleen Rubenstein, "Residents of U.S. Territories Deserve the Basic Rights of American Citizenship," New York Law Journal, Oct. 24, 2022, <https://www.law.com/newyorklawjournal/2022/10/24/residents-of-u-s-territories-deserve-the-basic-rights-of-american-citizenship/> (all websites last visited Dec. 21, 2022). A copy of the op-ed is appended to this letter.

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

referred to as the “Insular Cases.” The Insular Cases stand for the proposition that not all parts of the federal Constitution apply to the U.S. territories, and perpetuate undemocratic and unjust treatment. These cases sanction the imposition of different categories of U.S. citizenship on residents of the territories where the United States exercises sovereignty. They further permit discrimination on the basis of race and ethnicity. The decisions are outdated, abhorrent, and should be reversed. [...]

For more than 100 years, the Northwest Ordinance of 1789 provided the path for U.S. territories in the northwestern part of the mainland to acquire entry into the U.S. as a State.<sup>2</sup> However, this path was denied to territories the United States annexed after the Spanish American War. These annexed territories include Puerto Rico and the U.S. Virgin Islands in the Caribbean Sea, Guam and the Northern Mariana Islands in the North Pacific Ocean, and American Samoa in the South Pacific Ocean.

Although in 1904 the Supreme Court held that the U.S. Constitution had independent force in the territories not contingent upon acts of legislative grace,<sup>3</sup> it also reasoned that “transforming the former Spanish colonies’ civil law system into an Anglo-American system would be practically impossible.” With this and other vague justifications, the Supreme Court developed the Territorial Incorporation Doctrine.<sup>4</sup> It states that the U.S. Constitution applies only in part in unincorporated territories.<sup>5</sup> Many

---

<sup>2</sup> Under the Northwestern Ordinance, Congress had the power to initially appoint a governor and judges and establish civil rights. But, when the territorial population exceeded 5,000 adult males, voters would elect a legislature and send a non-voting delegate to Congress. When the territory or division thereof reached a population of 60,000, the territory could petition for statehood and eventually be admitted to the Union. In each act of admission since that of Tennessee in 1796, Congress has included in each state’s act of admission a clause providing that the state enters the Union “on an equal footing with the original States in all respects whatever.” *Pollard v. Hagan*, 44 U.S. 212, 221 (1845). The Northwest Ordinance provided the territories with a clear path towards statehood, and national citizenship was assumed to apply to the people in the territories.

<sup>3</sup> See e.g., *Dorr v. United States*, 195 U. S. 138 (1904).

<sup>4</sup> See *Downes v. Bidwell*, 184 U.S. 244 (1901); and *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

<sup>5</sup> See e.g., *Dorr*, at 143; see also Juan R. Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal* (1985) (describing the racial animus underpinning the Insular Cases and the development of the incorporation doctrine following the Spanish American War); José A. Cabranes, *Citizenship and the American Empire*, 127 U. Pa. L. Rev. 391 (1978) (describing the debate within Congress regarding the conferral of citizenship to Puerto Rico without attaching all commensurate rights); Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int’l L. 283 (2007) (describing the role of academic debates in producing the Insular Cases and that incorporation doctrine’s expansion in the early 20th century); Gustavo A. Gelpi, *The Insular Cases: A Comparative Historical Study of Puerto Rico, Hawai’i, and the Philippines*, *The Federal Lawyer* (March/April 2011), <https://www.fedbar.org/wp-content/uploads/2011/03/feature3-marapr2011-pdf-1.pdf> (describing imperialist and racist sentiment expressed by members of U.S. Congress toward inhabitants of the newly acquired territories).

For example, in 1900, House Representative Thomas Spight of Mississippi commented that “the Filipinos, who “[are] Asiatics, Malays, negroes and of mixed blood, have nothing in common with us and centuries cannot assimilate them. ... They can never be clothed with the rights of American citizenship nor their territory be admitted as a State of the American Union.” 233 Cong. Rec. 2105 (1900); see also Cong. Rec. 6019 (June 14, 1898).

provisions of the Bill of Rights also do not apply. It is not enough that the residents of these territories pledge allegiance to the American flag; people in the unincorporated territories would not be considered full U.S. citizens. Even after the conferral of citizenship to residents of most of these territories, they would not be entitled to equal protection or other rights generally understood to be the principal benefits of citizenship.<sup>6</sup>

The Insular cases perpetuate an injustice against Americans residing in the U.S. territories, including Puerto Rico. However, U.S. courts, including the Supreme Court, continue to rely upon the reasoning of the Insular cases<sup>7</sup> despite the fact that, in 1957, the Supreme Court stated that neither the Insular Cases nor their reasoning should be given any further expansion.<sup>8</sup>

These cases withhold the full protections of citizenship and constitutional rights from residents of Puerto Rico and the territories based on fictitious distinctions and racial animosity. These attitudes can be traced back to statements made by Congressmembers in the 1900s and, more recently, in statements made by Congressman Jody Hice (R-GA) in response to Governor Pedro R. Pierluisi's testimony before the Congressional Natural Resources Committee.<sup>9</sup>

In a hearing before the Natural Resources Committee on November 17, 2022, Governor Pierluisi testified regarding post-disaster reconstruction efforts and the state of the electric system in Puerto Rico. He described how Puerto Rico is recovering from the financial crisis, and the many natural disasters that have contributed to the decimation of the Island's electrical infrastructure and economy. Most recently, in 2022, Hurricane Fiona brought over thirty inches of rain to some municipalities which, combined with historic rainfall during the months of September and October, caused major power outages and additional damage to the electric system, and required further emergency assistance from FEMA to stabilize the power grid. The governor asked that Congress provide financial assistance along the lines of what has been granted to mainland states in similar situations.<sup>10</sup>

---

<sup>6</sup> See *U.S. v. Vaello Madero*, 596 U.S. \_\_\_, 2022. In *Vaello-Madero*, the U.S. Government sued Mr. Vaello-Madero to recover \$28,081 it claimed he had illegally received in federal Supplemental Security Income because Congress had excluded Puerto Rico from this program. The plaintiff framed the question as a Constitutional Equal Protection issue.

<sup>7</sup> See *id.* Although the majority opinion did not cite the Insular cases directly, this is the most recent case in which the U.S. Supreme Court, citing the Territorial Doctrine, held that Congress has constitutional authority to treat U.S. territories differently from states. The Court rejected the argument that residents of Puerto Rico have a constitutional right under the equal protection doctrine to receive the same federal benefits – specifically, Supplemental Security Income (SSI) benefits – provided to Americans living in the 50 states. In so doing, the Court upheld the reasoning of the Insular cases, which established differential treatment vis-à-vis constitutional rights for Americans in the U.S. territories versus those in the states.

<sup>8</sup> See *Reid v. Covert*, 354 U.S. 1, 14 (1957).

<sup>9</sup> See Full Committee Hearing: Puerto Rico's Post-Disaster Reconstruction & Power Grid Development, 117 Congress Cong., Nov. 17, 2022, Hon. Pedro Pierluisi, Governor of Puerto Rico, <https://naturalresources.house.gov/hearings/puerto-ricos-post-disaster-reconstruction-and-power-grid-development1>.

<sup>10</sup> *Id.* Specifically, Governor Pierluisi requested the following Congressional intervention: 1) 100% federal matching funds for energy-related FEMA-funded projects, which he states was done in other states where catastrophic damage occurred; 2) FEMA authorization to adjust fixed costs estimates of approved permanent projects given the recent

In addition, Governor Pierluisi opined that unequal treatment of American citizens living in Puerto Rico over the course of 125 years has taken a toll. He stated that the people of Puerto Rico voted and chose permanent union with the United States through statehood as their path forward and that the continued lack of voting representation in Congress and voting rights is unacceptable. He stated that Congress should call for a vote on the political future of Puerto Rico and commit to implementing the will of the majority.<sup>11</sup>

In response, Congressman Hice stated: “every time we have a hearing here over Puerto Rico, one of two things happens and it just happened here again. And it is that they come here with their hands open asking for more money or asking for statehood. That’s all we cater to here.”<sup>12</sup>

Congressman Hice’s statements make plain that he regards the U.S. territories as standing on different – and lesser – footing than the states. He appears to fault the governor of Puerto Rico, whose residents are U.S. citizens, for seeking federal appropriations in the way that governors of the 50 states do and demonstrates his distaste and disregard for the residents of Puerto Rico by depicting them as outsiders looking for handouts rather than American citizens exercising their right to rely on the federal government.

In fact, there should be no distinction between citizens of the United States, and no difference in how a witness like Governor Pierluisi is treated versus a governor of one of the 50 states. To the extent that Congressman Hice is implying that there is something improper or unseemly about a political leader of Puerto Rico requesting federal assistance, it is worth noting that leaders of many of the territories that later became U.S. states advocated before Congress and the public regarding legal, political, human and civil rights prior to admission into the United States union. And with regard to Governor Pierluisi’s request that Congress act on Puerto Rico’s bid for statehood, this kind of advocacy is no different from what leaders of other territories that became U.S. states undoubtedly engaged in.

Congressman Hice’s statements demonstrate, and reinforce, stereotypes and biases based on an illusory superior/inferior framework that began with the Insular cases and continues to undergird a divided America that treats citizens of U.S. territories differently from citizens of U.S. states. His statement was also dismissive of the natural and man-made travesties Americans in Puerto Rico have been facing.

---

increase in the cost of construction materials and supply chain disruptions, to ensure that projects have enough funding to be completed; and 3) an amendment to the Robert T. Stafford Disaster Relief and Emergency Assistance Act to authorize FEMA to consolidate the requested disaster relief into a single award under DR-4339-PR for the administration of federal assistance which would help lessen the administrative burden for both the Government of Puerto Rico and FEMA.

<sup>11</sup> *Id.*

<sup>12</sup> “Outgoing GOP congressman accuses governor of pestering,” San Juan Daily Star, Nov. 18, 2022, <https://www.sanjuandaily.com/post/outgoing-gop-congressman-accuses-governor-of-pestering>.

Over one hundred years ago, the Supreme Court adopted the racist ideology expressed by, among others, members of Congress, in deciding the Insular cases.<sup>13</sup> And, unfortunately, we continue to see the effects of these opinions to this day.

We call on Congress to correct the injustices perpetrated by the Insular cases against Americans who reside in Puerto Rico and the territories, and to address and reject the racial inequities they perpetuate. Congress should begin by passing H. Res. 279, which calls for reversal of the Insular cases and repudiation of the territorial incorporation doctrine that has supported a “separate but equal” framework justifying unequal treatment of American citizens in the U.S. territories.

Respectfully,

Susan J. Kohlmann  
President, New York City Bar Association

Wanda S. Day and Carlos Morales  
Co-Chairs, Puerto Rico Task Force

Marcy Kahn  
Chair, Rule of Law Task Force

Kevin Jason and Kathleen Rubenstein  
Co-Chairs, Civil Rights Committee

Diane Fener and Gertrude Pfaffenbach  
Co-Chairs, Senior Lawyers Committee

Cc:

Hon. Jim Clyburn, House Majority Whip  
Hon. Steve Cohen, Chair, House Judiciary Committee Constitution, Civil Rights, and Civil Liberties Subcommittee  
Hon. Steny Hoyer, House Majority Leader  
Hon. Mike Johnson, Ranking Member, House Judiciary Committee Constitution, Civil Rights, and Civil Liberties Subcommittee  
Hon. Jim Jordan, Ranking Member, House Judiciary Committee  
Hon. Kevin McCarthy, House Minority Leader  
Hon. Jerry Nadler, Chair, House Judiciary Committee  
Cosponsors of H. Res. 279  
Members of the House Congressional Hispanic Caucus

**Contact**

Elizabeth Kocienda, Director of Advocacy | 212.382.4788 | ekocienda@nycbar.org  
Mary Margulis-Ohnuma, Policy Counsel | 212.382.6767 | mmargulis-ohnuma@nycbar.org

---

<sup>13</sup> See note 5, *supra*.

Page Printed From:

<https://www.law.com/newyorklawjournal/2022/10/24/residents-of-u-s-territories-deserve-the-basic-rights-of-american-citizenship/>

NOT FOR REPRINT

## Residents of U.S. Territories Deserve the Basic Rights of American Citizenship

The Insular Cases sanction the imposition of different categories of U.S. citizenship on residents of the territories where the United States exercises sovereignty. They further permit discrimination on the basis of race and ethnicity. The decisions are outdated, abhorrent, and should be reversed.

October 24, 2022 at 10:00 AM

Constitutional Law

By Wanda Sanchez Day, Carlos Morales, Marcy Kahn, Kevin Jason and Kathleen Rubenstein | October 24, 2022 at 10:00 AM

The New York City Bar Association joins with the American Bar Association and the New York State Bar Association in calling on the Biden Administration, Congress and the U.S. Supreme Court to reverse the harmful effects of the so-called “Insular Cases,” which deprive the residents of U.S. territories of the most basic rights of American citizenship and are anathema to democratic principles.

Following the end of the Spanish American War, in 1898, the U.S. Supreme Court issued a series of opinions relating to the rights of residents of the territories annexed by the United States after the war. To what extent the U.S. Constitution applied to residents of these territories was debated in Congress, within the executive branch, and decided by the Court in cases referred to as the “Insular Cases.” The Insular Cases stand for the proposition that not all parts of the federal Constitution apply to the U.S. territories, and perpetuate undemocratic and unjust treatment. These cases sanction the imposition of different categories of U.S. citizenship on residents of the territories where the United States exercises sovereignty. They further permit discrimination on the basis of race and ethnicity. The decisions are outdated, abhorrent, and should be reversed.

### The Insular Cases

For more than 100 years, the Northwest Ordinance of 1789 provided the path for U.S. territories in the northwestern part of the mainland to acquire entry into the U.S. as a State.<sup>[1]</sup> However, this path was denied to territories the United States annexed after the Spanish American War. These annexed territories include Puerto Rico and the U.S. Virgin Islands in the Caribbean Sea, Guam and the Northern Mariana Islands in the North Pacific Ocean, and American Samoa in the South Pacific Ocean.

Although in 1904 the Supreme Court held that the U.S. Constitution had independent force in the territories not contingent upon acts of legislative grace,<sup>[2]</sup> it also reasoned that “transforming the former Spanish colonies’ civil law system into an Anglo-American system would be practically impossible.” With this and other vague justifications, the Supreme Court developed the Territorial Incorporation Doctrine.<sup>[3]</sup> It states that the U.S. Constitution applies only in part in unincorporated territories.<sup>[4]</sup> Many provisions of the Bill of Rights also do not apply. It is not enough that the residents of these territories pledge allegiance to the American flag; people in the unincorporated territories would not be considered full U.S. citizens. Even after the conferral of citizenship to residents of most of these territories, they would not be entitled to equal protection or other rights generally understood to be the principal benefits of citizenship.<sup>[5]</sup>

### The Insular Cases Must Be Overturned

The Insular Cases were decided not based on need or merit but on the belief in the inferiority of the residents of these territories. Words like “savage tribes” and “alien races” were used to describe the residents of these regions and to justify unequal treatment. However, these cases remain good law<sup>[6]</sup> despite the fact that, in 1957, the Supreme Court stated that neither the Insular Cases nor their reasoning should be given any further expansion.<sup>[7]</sup> The Insular Cases continue to deny the residents of the territories the full protection of the U.S. Constitution, despite the fact that the residents of these regions have continually helped shape the United States’ image as a globally competitive democracy through their many contributions.

Current justices of the U.S. Supreme Court have already begun expressing concern about the themes of racism underlying these cases, with Justice Neil Gorsuch stating that they “rest on a rotten foundation,” and Justice Sonia Sotomayor describing them as “both odious and wrong.”<sup>[8]</sup> The Insular Cases cannot be squared with the core values the United States has embraced through its jurisprudence and legislative acts in other areas and through its treaties with other countries and trade partners in a global environment. They run contrary to basic notions of fairness, democracy, citizenship, and equal protection under law, and should not represent the law of the United States.<sup>[9]</sup>

## Endnotes:

[1] Under the Northwestern Ordinance, Congress had the power to initially appoint a governor and judges and establish civil rights. But, when the territorial population exceeded 5,000 adult males, voters would elect a legislature and send a non-voting delegate to Congress. When the territory or division thereof reached a population of 60,000, the territory could petition for statehood and eventually be admitted to the Union. In each act of admission since that of Tennessee in 1796, Congress has included in each state's act of admission a clause providing that the state enters the Union "on an equal footing with the original States in all respects whatever." *Pollard v. Hagan*, 44 U.S. 212, 221 (1845). The Northwest Ordinance provided the territories with a clear path towards statehood, and national citizenship was assumed to apply to the people in the territories.

[2] See, e.g., *Dorr v. United States*, 195 U. S. 138 (1904).

[3] See *Downes v. Bidwell*, 184 U.S. 244 (1901); and *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

[4] See, e.g., *Dorr*, at 143; see also Juan R. Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal* (1985) (describing the racial animus underpinning the Insular Cases and the development of the incorporation doctrine following the Spanish American War); José A. Cabranes, *Citizenship and the American Empire*, 127 U. Pa. L. Rev. 391 (1978) (describing the debate within Congress regarding the conferral of citizenship to Puerto Rico without attaching all commensurate rights); Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283 (2007) (describing the role of academic debates in producing the Insular Cases and that incorporation doctrine's expansion in the early 20th century); Gustavo A. Gelpi, *The Insular Cases: A Comparative Historical Study of Puerto Rico, Hawai'i, and the Philippines*, *The Federal Lawyer* (March/April 2011) (describing imperialist and racist sentiment expressed by members of U.S. Congress toward inhabitants of the newly acquired territories).

For example, in 1900, House Representative Thomas Spight of Mississippi commented that "the Filipinos, who "[are] Asiatics, Malays, negroes and of mixed blood, have nothing in common with us and centuries cannot assimilate them. ... They can never be clothed with the rights of American citizenship nor their territory be admitted as a State of the American Union." 233 Cong. Rec. 2105 (1900); see also Cong. Rec. 6019 (June 14, 1898).

[5] See *U.S. v. Vaello Madero*, 596 U.S. \_\_\_, 2022. In *Vaello-Madero*, the U.S. Government sued Mr. Vaello-Madero to recover \$28,081 it claimed he had illegally received in federal Supplemental Security Income because Congress had excluded Puerto Rico from this program. The plaintiff framed the question as a Constitutional Equal Protection issue.

[6] *Id.* Although the Court does not cite the Insular Cases directly, this is the most recent case in which the Court, citing the Territorial Doctrine, holds that Congress has constitutional authority to legislate for the territory. By treating residents in Puerto Rico differently from the residents of other States, the Court continued to expand the reasoning in the Insular Cases.

[7] See *Reid v. Covert*, 354 U.S. 1, 14 (1957).

[8] *U.S. v. Vaello Madero*, 596 U.S. \_\_\_, 2022 (Gorsuch, J., concurring; Sotomayor, J., dissenting).

[9] The Supreme Court was presented with an opportunity to revisit the Insular Cases in *Fitisemanu v. U.S.*, a case brought by three people who argued for birthright citizenship for the people of American Samoa. On Oct. 17, 2022, the Court issued an order denying certiorari. See Amy Howe, [Court declines to take up petition seeking to overturn Insular Cases](#), SCOTUSblog (Oct 17, 2022).

**Wanda Sanchez Day** and **Carlos Morales** are co-chairs of the Puerto Rico Task Force, **Marcy Kahn** is chair of the Rule of Law Task Force, and **Kevin Jason** and **Kathleen Rubenstein** are co-chairs of the Civil Rights Committee, all at the New York City Bar Association

NOT FOR REPRINT

---