



To: House Committee on Natural Resources Republican Members
From: Republican Committee Staff; Ken Degenfelder
(Ken.Degenfelder@mail.house.gov)
Date: May 10, 2021
Subject: Full Committee Legislative Hearing on H.Res. 279, Acknowledging that the United States Supreme Court's decisions in the Insular Cases and the "territorial incorporation doctrine" are contrary to the text and history of the United States Constitution, rest on racial views and stereotypes from the era of Plessy v. Ferguson that have long been rejected, are contrary to our Nation's most basic constitutional and democratic principles, and should be rejected as having no place in United States constitutional law.

The Committee on Natural Resources will hold a Full Committee Legislative Hearing on H.Res. 279 (Rep. Grijalva) **on Wednesday, April 12, 2021, at 1:00 p.m.** online via Cisco WebEx.

Member offices are requested to notify Rob MacGregor (Robert.MacGregor@mail.house.gov) by 4:30 p.m. on Monday, May 10, 2021, if their Member intends to participate. Member offices are also requested to indicate whether their Member plans to attend in person in the hearing room or remotely from his/her laptop from another location. Submissions for the hearing record must be submitted through the Committee's electronic repository at HNRCDocs@mail.house.gov. Please contact David DeMarco (David.DeMarco@mail.house.gov) or Everett Winnick (EverettWinnick@mail.house.gov) should any technical difficulties arise.

I. KEY MESSAGES

- Article IV, Section 3, Clause 2 of the U.S. Constitution (Territorial Clause) states that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."
- The Supreme Court, beginning with the *Insular Cases*, *Downes v. Bidwell*,¹ has long upheld Congress' plenary authority over the territories, and that outside of fundamental individual protections, the Constitution applies to the territories only when Congress specifically provided to that effect.

¹ 182 U.S. 244 (1901).

- The *Insular Cases* recognize the authority of Congress to decide political questions of federal territorial law and policy within the reserved power of Congress for territories not within a state, including the power of Congress to embrace or reject the unincorporated territory status doctrine and otherwise define the status of the territories concerned.
- H. Res. 279 would have no legal effect in repealing, altering, or modifying territorial law and applicability of the *Insular Cases*.

II. WITNESSES

- **Dr. Peter S. Watson**, Former White House Director of Asian Affairs, National Security Council, Washington, D.C. [*Republican Witness*]
- **The Honorable Talauega Eleasalo Vaalele Ale**, Lieutenant Governor, American Samoa, Pago Pago, AS [*Republican Witness*]
- **The Honorable Stacy Plaskett**, Delegate, U.S. Virgin Islands
- **The Honorable Tina Muna Barnes**, Vice Speaker, Guam Legislature, Hagatna, GU
- **Ms. Rose Cuison-Villazor**, Professor of Law, Rutgers Law School, New York, NY
- **Mr. Neil Weare**, President, Equally American, Washington, D.C.
- **Dr. Daniel Immerwahr**, Professor, Northwestern University, Evanston, IL

III. BACKGROUND

Prior to the Spanish-American War, all U.S. territories were located in North America and were populated by U.S. citizens. U.S. territories that later became states, like Ohio and Louisiana, were incorporated into the U.S. under the Constitution, with temporary territorial government until admitted by Congress as states. Following the U.S. victory in the Spanish-American War, the United States acquired Puerto Rico, Guam, and the Philippines from Spain in the Treaty of Paris of 1898.² A year after the end of the second Samoan Civil War in 1899, the U.S. acquired a portion of the Samoan archipelago through the Tripartite Convention.³ The U.S. Virgin Islands were purchased in 1917 through the Treaty of the Danish West Indies⁴ and the Commonwealth of the Northern Marianas became a U.S. territory in 1986.⁵

² <https://www.loc.gov/rr/hispanic/1898/treaty.html>

³ <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0273.pdf>

⁴ <https://www.loc.gov/law/help/us-treaties/bevans/b-dk-ust000007-0056.pdf>

⁵ <https://www.govinfo.gov/content/pkg/STATUTE-90/pdf/STATUTE-90-Pg263.pdf#page=1>

In 1901, the U.S. Supreme Court (SCOTUS) decided a series of cases which have collectively become known as the *Insular Cases*,⁶ which attempted to answer the question of whether the Constitution “follows the flag” – whether newly acquired U.S. territories would be afforded the same status under the Constitution upon admission. While the details of the original six cases dealt with economic, diplomatic, and procedural issues between the United States and the territories, the cases also unintentionally established a different cultural and social relationship between the territories and the United States.⁷

In the leading case, *Downes v. Bidwell*, the court contemplated whether shipments from Puerto Rico to New York were considered to be interstate or international, and thus subject to import duties.⁸ The plaintiff, Samuel Downes, was a merchant who sued George Bidwell, the customs inspector for the port of New York, after being forced to pay a tariff.⁹

The SCOTUS decided 5-4 that the new territories were not properly part of the United States for the purposes of the Constitution in the matter of revenues under the Constitution. However, the court noted that the constitutional guarantees of a citizen's rights to liberty and property were applicable to all. In a concurring opinion, Justice Edward White adopted the “doctrine of territorial incorporation,” which differentiates between incorporated and unincorporated territories.¹⁰ An incorporated territory is a territory that is treated “as to be in all respects part of the United States,” while an unincorporated territory is one that is not recognized “as an integral part of the United States, at least, temporarily, and until Congress had so determined.”¹¹ Decades later, the SCOTUS ruled that Puerto Rico was an unincorporated territory, stating “On the whole, therefore, we find no features in the Organic Act of Puerto Rico of 1917 from which we can infer the purpose of Congress to incorporate Porto Rico into the United States...”¹²

By virtue of having plenary power over the territories, Congress can extend individual provisions of the U.S. Constitution to unincorporated territories if it decides to do so. Congress has extended citizenship, the right to organize a government and the power to adopt territorial constitutions through the Jones Act for Puerto Rico;¹³ the Guam Organic Act;¹⁴ and the revised Organic Act of the Virgin Islands.¹⁵ The Privileges and Immunities Clause of the Constitution can also be expressly extended by Congressional action as was done for Puerto Rico.¹⁶ However, Congress has chosen not to extend the right to vote in

⁶ *Insular Cases*, *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *DeLima v. Bidwell*, 182 U.S. 1 (1901), *Goetze v. United States*, 182 U.S. 221 (1901), *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901).

⁷ *Downes v. Bidwell*, 182 U.S. 244 (1901). 248.

⁸ *Id.*

⁹ *Id.* at 249-250.

¹⁰ *Id.* at 287-344.

¹¹ *Id.* at 311-12

¹² *Balzac v. People of Porto Rico*, 258 U.S. 298, 313 (1922).

¹³ 39 Stat. 951 & 958.

¹⁴ Pub.L. 81-630.

¹⁵ 68 Stat. 497

¹⁶ 48 USC 737.

presidential general elections to the people of the U.S. territories (except American Samoa), for example.

H. Res. 279 (Rep. Grijalva, D-AZ)

H. Res. 279 primarily contains findings to describe the history of the *Insular Cases*. The resolution ties Supreme Court Justice Brown’s opinion in *Downes v. Bidwell* to the doctrine of “separate but equal” in an opinion also written by Justice Brown in *Plessy v. Ferguson*.¹⁷ The resolution also states that the concurring opinion of Justice White in *Downes* created the territorial incorporation doctrine because there was a belief that inhabitants of the islands were unfit for citizenship.

H. Res. 279 continues to state that territorial incorporation doctrine has received harsh criticism from the SCOTUS, that in 2020, the Court questioned the continued validity of the *Insular Cases*.

Finally, H. Res. 279 calls on Congress to recognize that the Constitution applies to both states and territories, acknowledge that the *Insular Cases* are contrary to the Constitution, acknowledge that the *Insular Cases* are relics of racial views of an earlier era, and reject the *Insular Cases* and controversies.

Issues and concerns

While the language used by several Justices in the *Insular Cases* is contrary to the correct social and racial norms of today, H. Res. 279 fails to consider or recognize that the SCOTUS or Congress could override or supersede what is contained in the *Insular Cases*. When the *Insular Case* decisions were made, the majority opinion held that their decisions would be in place until Congress decided to act and extend the benefits of the Constitution to those in the territories. Congress has done so in circumstances over the last one hundred and twenty years through passage of several territorial Organic Acts extending citizenships and other benefits. H. Res. 279 also fails to recognize self-determination of each of the territories. In the case of American Samoa, citizenship is not sought because of the *matai land tenure system* (chief system). If the true intent is to ensure the full benefits of the constitution are extended to the territories, statehood would provide just that.

IV. COST

A Congressional Budget Office score for the legislation in the 117th Congress has not been completed.

V. ADMINISTRATION POSITIONS

Unknown.

¹⁷ 163 U.S. 537 (1896).