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H. RES. 279, "INSULAR CASES RESOLUTION"

LEGISLATIVE HEARING

BEFORE THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

FIRST SESSION

Wednesday, May 12, 2021

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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, "INSULAR CASES RESOLUTION"

Wednesday, May 12, 2021

U.S. House of Representatives

Committee on Natural Resources

Washington, DC

The Committee met, pursuant to notice, at 1 p.m., via Webex, Hon. Gregorio Kilili Camacho Sablan [Vice Chair for Insular Affairs of the Committee] presiding.

Present: Representatives Sablan, Napolitano, Costa, Lowenthal, Porter, Leger Fernández, Dingell, Tlaib; Gohmert, McClintock, Radewagen, González-Colón, Tiffany, Moore, Obernolte, and Bentz.

Also present: Representative Plaskett.

Mr. SABLAN. The Committee will come to order. The Committee is meeting today to receive testimony on a resolution to acknowledge that U.S. Supreme Court decisions in the Insular Cases and the Territorial Incorporation Doctrine are contrary to the text and history of the United States Constitution, and should be rejected as having no place in United States constitutional law.

Under Committee Rule 4(f), any oral opening statements at hearings are limited to the Chair and the Ranking Minority Member or their designees. This will allow us to hear from our witnesses sooner and help Members keep to their schedules. Therefore, I ask unanimous consent that all other Members' opening statements be made part of the hearing record if they are submitted to the Clerk by 5 p.m. today or the close of the hearing, whichever comes first. Hearing no objection, so ordered.

Without objection, the Chairman may also declare a recess subject to the call of the Chair. Without objection, so ordered.

And without objection, the Member from the U.S. Virgin Islands, Delegate Plaskett, is authorized to question witnesses in today's hearing. Hearing no objection, so ordered.

As described in the notice, statements, documents, or motions must be submitted to the electronic repository at HNRCdocs@mail.house.gov.

Additionally, please note that, as with in-person meetings, Members are responsible for their own microphones. As with our in-person meetings, Members can be muted by staff only to avoid inadvertent background noise.

And finally, Members or witnesses experiencing technical problems should inform Committee staff immediately.

I will now begin with my opening statement.

STATEMENT OF THE HON. GREGORIO KILILI CAMACHO SABLAN, A DELEGATE IN CONGRESS FROM THE TERRITORY OF THE NORTHERN MARIANA ISLANDS

Mr. SABLAN. I want to begin by thanking our impressive list of witnesses for being here today, including the Delegate from the U.S. Virgin Islands, Congresswoman Stacey Plaskett, and Lieutenant Governor Ale from American Samoa. I would also like to welcome the Vice Speaker of the Guam Legislature, the Honorable Tina Muña Barnes and distinguished academics Dr. Daniel Immerwahr, Dr. Peter Watson and former Marianas resident, Professor Rose Cuison-Villazor. Lastly, welcome to Mr. Neil Weare, former staff of the U.S. House of Representatives and now president of Equally American.

Today's witnesses will be discussing H. Res. 279, which would place the U.S. House of Representatives on record as rejecting the racist reasoning of the Insular Cases. These cases are a series of Supreme Court decisions concerning the constitutional rights of residents of the overseas territories the United States acquired in the Treaty of Paris in 1898; namely, Puerto Rico, Guam, and the Philippines.

The Insular Cases have also been used to determine rights in the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands right up to the present day. The explicit reasoning behind the most famous of the cases, *Downes v. Bidwell* in 1901 was that the new territories are inhabited by alien races that could not be governed by Anglo-Saxon principles. Ever since, the Insular Cases have been used to block territorial efforts for equal treatment in essential Federal programs from Medicaid and food stamps to SSI, the Supplemental Security Income.

It is true that the Territorial Clause—Article IV, Section 3 of the U.S. Constitution, which gives Congress the power to make all needful rules respecting the territory or other property of the United States—provided a judicial basis for the Insular Cases. But the theory that some territories are incorporated into the United States and, therefore, the Constitution applies there in full, while other territories are unincorporated, without the full protection of the Constitution, was an invention of the U.S. Supreme Court.

The Territorial Incorporation Doctrine was based on the same racial views and stereotypes that led to the notorious *Plessy v. Ferguson* decision in 1896 that gave us the separate but equal doctrine and segregation. I will say, *Plessy v. Ferguson* has, of course, been overturned in the modern era. The Insular Cases, however, relics of the racist views of the 19th century, which have no place in our Nation today, are still in active use by the courts. H. Res. 279 puts the House on record in favor of overturning the Insular Cases. We recognize, however, that this must be done in a manner that respects the uniqueness of each territory.

In American Samoa, for instance, we must take care to craft a solution that allows the U.S. nationals to be treated as U.S. citizens under some Federal laws, while preserving the local Matai culture.

In the Marianas, my home district, the courts used the Insular Cases to justify the seeming incompatibility of the equal protection guarantee of the 14th Amendment with the restrictions on land ownership only to persons of Northern Marianas descent as set forth in Article XII of the NMI Constitution.

This is a 33-year-old decision which may sit on shaky ground, given more recent rulings on racial classifications and the conservative bent of today's judiciary. I look forward to what our witnesses have to say about the wisdom of relying on the Insular Cases to protect Article XII, but let us not think that the Territorial Clause prohibits Congress from extending the applicability of programs such as SNAP, TANF, Medicaid or SSI to the territories because they in one way or another are already applicable to some of the territories. Congressional will or lack thereof is what unites these programs through the territories.

Again, thank you all for being with us today. I look forward to receiving your testimony.

[The prepared statement of Mr. Sablan follows:]

PREPARED STATEMENT OF THE HON. GREGORIO KILILI CAMACHO SABLAN, A REPRESENTATIVE IN CONGRESS FROM THE NORTHERN MARIANA ISLANDS

I want to begin by thanking our impressive list of witnesses for being here today, including my colleague from the Virgin Islands, Congresswoman Stacey Plaskett, and Lieutenant Governor Ale from American Samoa.

I would also like to welcome the Vice Speaker of the Guam Legislature, Tina Muña Barnes, and distinguished academics, Dr. Daniel Immerwahr, Dr. Peter Watson, and the Marianas' own Professor Rose Cuison-Villazor.

Lastly, welcome to Mr. Neil Weare, former staff of the U.S. House of Representatives and now President of Equally American.

Today's witnesses will be discussing H. Res. 279, which would place the U.S. House of Representatives on record as rejecting the racist reasoning of the Insular Cases.

These cases are a series of Supreme Court decisions concerning the constitutional rights of residents of the overseas territories the U.S. acquired in the Treaty of Paris in 1898, namely Puerto Rico, Guam, and the Philippines. But the Insular Cases have, also, been used to determine rights in the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands, right up to the present day.

The explicit reasoning behind the most famous of the cases, *Downs v. Bidwell*, in 1901, was that the new territories are "inhabited by alien races" that could not be governed by Anglo-Saxon principles.

Ever since, the Insular Cases have been used to block Territorial efforts for equal treatment in essential federal programs from Medicaid and Food Stamps to SSI—Supplemental Security Income.

It is true that the Territorial Clause—Article 4, Section 3 of the U.S. Constitution—which gives Congress the power to make all needful rules respecting

the territory or other property of the United States provided a judicial basis for the Insular Cases.

But the theory that some territories are "incorporated" into the United States and, therefore, the Constitution applies there in full, while other territories are "unincorporated," without the full protection of the Constitution, was invented by the Supreme Court.

That "territorial incorporation doctrine" was based on the same racial views and stereotypes that led to the notorious *Plessy v. Ferguson* decision in 1896 that gave us the "separate but equal doctrine" and segregation.

Plessy v. Ferguson has, of course, been overturned in the modern era. The Insular Cases, however, relics of the racist views of the 19th century, which have no place in our Nation today, are still in active use by the courts.

H. Res. 279 puts the House on record in favor of overturning the Insular Cases.

We recognize, however, this must be done in a manner that respects the uniqueness of each territory.

In American Samoa, for instance, we must take care to craft a solution that allows the U.S. Nationals to be treated as U.S. citizens under some federal laws, while preserving the local Matai culture.

In the Marianas, my home district, the courts used the Insular Cases to justify the seeming incompatibility of the equal protection guarantee of the 14th Amendment with the restriction on land ownership only to persons of Northern Marianas descent in Article XII of the Marianas Constitution.

This is a 30-year-old decision, which may sit on shaky ground, given more recent rulings on racial classifications and the conservative bent of today's judiciary. I look forward to what our witnesses have to say about the wisdom of relying on the Insular Cases to protect Article XII.

Again, thank you all for being with us today. I look forward to receiving your testimony.

Mr. SABLAN. The Chair now recognizes the Vice Ranking Minority Member for Insular Affairs for her opening statement, the Resident Commissioner González-Colón. Welcome, you have 5 minutes.

STATEMENT OF THE HON. JENNIFFER GONZÁLEZ-COLÓN, A RESIDENT COMMISSIONER IN CONGRESS FROM THE TERRITORY OF PUERTO RICO

Miss GONZÁLEZ-COLÓN. Thank you, Mr. Chair. The Constitution's Territorial Clause gives Congress full power over the governing and fate of the territories and their residents.

After the Spanish-American war, a major debate arose regarding the fate of the newly acquired territories and the status and constitutional rights of the residents of those territories. The debates reached the Supreme Court in a series of cases later called the Insular Cases, where it held that full constitutional protection of rights does not automatically extend to all places under American control. This meant that inhabitants of unincorporated territories such as Puerto Rico, even if they are U.S. citizens, may lack some constitutional rights.

As Judge Juan Torruella explained, the Insular Cases authorized the colonial regime created by Congress, which allowed the United States to continue its administration and exploitation of the territories acquired from Spain after the Spanish-American war and allowed for the U.S. Government to extend unilateral power over these newly acquired territories.

Former Puerto Rico Supreme Court Chief Justice José Trías Monge contended that the Insular Cases were based on premises that would be legally and politically unacceptable in the 21st

century, premises such as: that democracy and colonialism are fully compatible; that there is nothing wrong when a democracy such as the United States engages in the business of governing other subjects that have not participated in their democratic election process; that the people are not created equal, some races being superior to others; and that it is the burden of the superior people, the white man's burden, to bring up others in their image, except to the extent that the nation which possesses them shall in due time determine.

These decisions were odious, reflecting cultural and racial biases that are now rightfully rejected by most Americans.

I co-sponsor this resolution being discussed today because the Insular Cases as written denies democracy and equality and reflects abhorrent bias and have provided a justification for Congress to discriminate against American citizens unfairly and irrationally—citizens to whom full representation in their national government has been denied.

Some of the language of the resolution, however, may confuse the fundamental issue of the territories' status, and I just want to make clear and make the record clear as to where I stand.

It is not the Insular Cases that deny the residents of the territories voting representation; Articles I and II of the Constitution do. It is not the Insular Cases that have denied equality in Federal programs; it has been Congress who has done that.

As to the Puerto Rico political status, the policy of the Federal Government's political branches has been that it is the sole responsibility of the majority of the voters of Puerto Rico to determine its ultimate political status from among the possible constitutional status—statehood or independence, with or without a subsequent sovereign relationship with the United States, and Public Law 114–187, for example, recognized Puerto Rico's right to determine its future political status.

The island has had three free and fair votes on possible status options in 8 years. The first in 2012 specifically rejected the current territorial status, while in the last plebiscite in November of last year, the majority of voters chose statehood. The solution chosen by voters in Puerto Rico to determine its ultimate political status is clear. They chose by clear majority the equality within the Nation that they are citizens of. The voters of Puerto Rico understand that equality can't be taken away, and equal voting representation can only come through statehood.

In 1957, the Supreme Court stated that neither the Insular Cases nor their reasoning should be given any further expansion. However, the Court has not over-ruled these decisions and continue to cite them as precedent.

In 1944, the Supreme Court validated the practice of forcibly relocating U.S. citizens to concentration camps on the sole basis of race within the scope of presidential authority, and it took 75 years for the Supreme Court to correct that, and that is the reason today we can have an opportunity to overcome that. However, this resolution will send an unequivocal message to the executive and judiciary branches of our government that we repudiate the cultural biases that these cases are based on and, as such, should not be the basis for those decisions.

Having said that, I want to put on the record the book by Chief Judge Gustavo Gelpi, who has been nominated today by the President of the United States to be a judge in the Boston Circuit. It is titled, "The constitutional evolution of Puerto Rico and other U.S. territories." I think this is an obligated lecture for the Committee.

Thank you, and I yield back.

[The prepared statement of Miss González-Colón follows:]

PREPARED STATEMENT OF THE HON. JENNIFFER GONZÁLEZ-COLÓN, A REPRESENTATIVE IN CONGRESS FROM PUERTO RICO

Thank you, Mr. Chairman.

The Constitution's Territorial Clause gives Congress full power over the governing and fate of the territories and their residents.

After the Spanish-American War, a major debate arose regarding the fate of the newly acquired territories and the status and constitutional rights of the residents of those territories. The debates reached the Supreme Court in a series of cases later called the "Insular Cases", where it held that full constitutional protection of rights does not automatically extend to all places under American control. This meant that inhabitants of unincorporated territories such as Puerto Rico—even if they are U.S. citizens—may lack some constitutional rights.

As Judge Juan Torruella explained, the Insular Cases "authorized the colonial regime created by Congress, which allowed the United States to continue its administration—and exploitation—of the territories acquired from Spain after the Spanish-American War" and allowed for the U.S. Government to extend unilateral power over these newly acquired territories.[1]

Former Puerto Rico Supreme Court Chief Justice José Trías Monge contended that the Insular Cases were based on premises that would be legally and politically unacceptable in the 21st century, premises such as: that democracy and colonialism are "fully compatible"; that there is "nothing wrong when a democracy such as the United States engages in the business of governing other" subjects that have not participated in their democratic election process; that people are not created equal, some races being superior to others; and that it is the "burden of the superior peoples, the white man's burden, to bring up others in their image, except to the extent that the nation which possesses them should in due time determine".[2] **These decisions were odious, reflecting cultural and racial biases that are now rightfully rejected by most Americans.**

I co-sponsored the Resolution being discussed today because the Insular Cases doctrine denies democracy and equality and reflects abhorrent bias and have provided a justification for Congress to discriminate against American citizens unfairly and irrationally, citizens to whom full representation in their national Government has been denied.

Some of the language of the resolution, however, may confuse the fundamental issue of the territories' status and I want to make the record clear as to where I stand. It is **not** the Insular Cases that deny the residents of the territories voting representation; Articles I and II of the Constitution do. It is not the Insular Cases that have denied equality in Federal programs; it has been Congress who has done that.

As to Puerto Rico's political status, the policy of the federal government's political branches has been that it is the sole responsibility of the majority of the voters of Puerto Rico to determine its ultimate political status from among the possible, constitutional status: statehood or independence (with or without a subsequent sovereign relationship with the United States). Public Law 114-187, for example, recognized "Puerto Rico's right to determine its future political status."

The Island has had three free and fair votes on possible status options in 8 years. The first in 2012 specifically rejected the current territory status, while in the last plebiscite, held November 3, 2020, the majority of voters chose statehood.

The solution chosen by the voters of Puerto Rico to determine its ultimate political status is clear: they chose by clear majority the equality within the Nation that they

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[1] Juan A. Torruella. (Fall 2013). *Ruling America's Colonies: The "Insular Cases"*. Yale Law & Policy Review 32(1): 57–95.

[2] José Trías Monge. (2001). *Injustice According to Law: The Insular Cases and Other Oddities*. In Christina Duffy Burnett & Burke Marshall (eds.). Foreign in a Domestic Sense: Puerto Rico, the American Expansion, and the Constitution. Durham, NC: Duke University Press. p. 243.

are citizens of. The voters in Puerto Rico understand that equality that can't be taken away and equal voting representation can only come through statehood.

In 1957, the Supreme Court stated that, "neither the [Insular] cases nor their reasoning should be given any further expansion."[3] However, the Court has not overruled these decisions and continues to cite them as precedent.

In 1944, the Supreme Court validated the practice of forcibly relocating U.S. citizens to concentration camps, on the sole basis of race, as within the scope of Presidential authority.[4] It took the Supreme Court 75 years to correct what, for years now, everyone else has recognized to have been a despicable and shameful act by our Government.[5] If passed by the House, this Resolution would not overturn the Insular Cases; the Justices of the Supreme Court will continue to bear the shame of their predecessors' racism until they, themselves act to overturn them. However, this Resolution will send an unequivocal message to the Executive and the Judiciary Branches of our Government that we repudiate the cultural biases that these cases are based on and, as such, should not be the basis of their decisions.

If we are serious about reversing the doctrines of the Insular Cases, we should do the job that the Constitution has placed upon Congress, enact legislation addressing unequal treatment, and grant statehood or nationhood if that is the People's choice. Abraham Lincoln stated that "Most governments have been based, practically on the denial of the equal rights of men. . . Ours began by affirming those rights."[6] Let us work so that we can truthfully say that our Country not just began by affirming those rights, but that it survives and thrives for that very reason.

I look forward to the testimony and yield back.

Mr. SABLAN. Thank you, Resident Commissioner González-Colón. I will now turn to our witnesses, but before introducing them I will remind the non-Administration witnesses that they are encouraged to participate in the witness diversity survey created by the Congressional Office of Diversity and Inclusion. Witnesses may refer to their hearing invitation materials for further information.

Now I will introduce our witnesses. On Panel 1, we would have the Hon. Stacey E. Plaskett, the Delegate from the U.S. Virgin Islands. Panel 2 will have our invited witnesses: Dr. Daniel Immerwahr, Professor, Department of History, Northwestern University; Mr. Neil Weare, President, Equally American; the Honorable Tina Muña Barnes, Vice Speaker of the Guam Legislature; Professor Rose Cuison-Villazor, Professor of Law and Chancellor Social Justice scholar, Rutgers University; Dr. Peter S. Watson, President and CEO of The Dwight Group and former White House Director of Asian Affairs, National Security Council. And I want to try this, I apologize, but the Honorable Talauega Eleasalo Va'alele Ale, Lieutenant Governor of American Samoa. I hope I got that right.

Lieutenant Governor ALE. Great job.

Mr. SABLAN. Let me remind the witnesses that under our Committee Rules, they must limit their oral statements to 5

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[3] *Reid v. Covert*, 354 U.S. 1, 14 (1957); cf. Downes v. Bidwell, 182 U.S. 244, 380 (1901) (Harlan, J., dissenting) ("In my opinion, Congress has no existence and can exercise no authority outside of the Constitution. Still less is it true that Congress can deal with new territories just as other nations have done or may do with their new territories. The nation is under the control of a written constitution, the supreme law of the land and the only source of the powers which our Government, or any branch or officer of it, may exert at any time or any place.").

[4] *See Korematsu v. United States*, 323 U.S. 214 (1944).

[5] *Trump v. Hawaii*, U.S. __, 138 S.Ct. 2392, 2422 (2018) (". . . Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'") (internal citations omitted).

[6] Abraham Lincoln, Speech on slavery and the American Dream (April 1, 1854) in *Fragments on Slavery*, teachingamericanhistory.org, http://teachingamericanhistory.org/library/document/fragments-on-slavery/.

minutes, but that their entire statement will appear in the hearing record. When you begin, the timer will begin, and it will turn orange when you have 1 minute remaining. I recommend that Members and witnesses use "stage view" so they can pin the timer on their screen. And as we were told, we have two timers today that will alternate by 2 or 2:30.

After your testimony is complete, just remember to mute yourself to avoid any inadvertent background noise. I will also allow the entire panel to testify before the questioning of the witnesses.

The Chair now introduces the Hon. Stacey Plaskett, the Member from the U.S. Virgin Islands. Ms. Plaskett, you have 5 minutes.

STATEMENT OF THE HON. STACEY E. PLASKETT, A DELEGATE IN CONGRESS FROM THE TERRITORY OF THE U.S. VIRGIN ISLANDS

Ms. PLASKETT. Thank you so much, Mr. Chairman, and thank you Ranking Member Westerman and members of the Committee, as well as the distinguished guests. My name is Stacey Plaskett. I represent the Virgin Islands of the United States in the U.S. House of Representatives. I want to really thank you for holding this hearing on House Resolution 279, which would condemn the Insular Cases. This is a historic hearing indeed.

More than 3.5 million U.S. citizens are denied constitutional rights simply because they reside in one of the five U.S. territories: American Samoa, Guam, the Northern Mariana Islands, Puerto Rico and the Virgin Islands of the United States. The combined populations of the territories is greater than that of 22 states and that of the 5 smallest states combined. It is the central principle of our American democracy that Americans through their votes can have a say in their government, and yet millions of Americans have almost no say in Federal decision making, even when it directly affects the islands they live on.

At the core of the disenfranchisement of territorial residents are the racially charged series of Supreme Court decisions in the early 1900s, the Insular Cases. Prior to the Insular Cases, territories were viewed as inchoate states, areas on the path to full statehood. However, with the Insular Cases, the Supreme Court invented an unprecedented category of unincorporated territories not on the path to statehood and whose residents could be denied the most basic constitutional rights. Those decisions were explicitly informed by racial assumptions, with residents of the territories, as you have heard, described as fierce, savage, restless people who were "absolutely unfit" to be citizens as they could not comprehend American, Anglo-Saxon principles.

What irony that the Supreme Court in the 1900s stated that Virgin Islanders such as D. Hamilton Jackson, journalist; Edward Wilmot Blyden, the founder of Pan Africanism; Hubert Harrison, one of the founders of the negro renaissance in Harlem; Camille Pissarro, the founder of impressionism; and Alexander Hamilton cannot understand Anglo-Saxon principles or indeed the Constitution. The irony is profound.

It comes as no surprise that one of the most influential of these cases, *Downes v. Bidwell*, was decided by the same Justices who invented the separate but equal doctrine of racial segregation in

Plessy v. Ferguson just 3 years earlier. But the legal basis established by *Plessy* was reversed in *Brown v. Board of Education* in 1954 as the Court recognized that the nation could not operate in a supposed separate but equal category, which in reality was separate and unequal. While the discriminatory precedent set by the Insular Cases continues to affect 3.5 million Americans, the Supreme Court has yet to revisit this precedent.

Furthermore, the past three administrations—Trump, before that the Obama administration, before that the Bush administration—have reaffirmed this position. I call upon the Biden administration to chart a new course, reject the Supreme Court decisions in the Insular Cases and recognize the importance of supporting equal rights of Americans living in the territories.

The ramifications of the Insular Cases extend to all aspects of life of U.S. citizens in the territories. Residents are denied access to crucial Federal support despite paying more in Federal taxes collectively than several states. While in the recent case of *United States v. Vaello-Madero*, the U.S. Department of Justice has disclaimed that the Insular Cases limit the application of equal protection in the territories, it nonetheless still continues to embrace the flawed logic that the Constitution applies only in part in so-called unincorporated territories.

Ultimately, the ongoing discrimination against Americans in the territories in Federal benefit programs cannot be separated from the harmful legacy of the Insular Cases. This is seen in major disasters, in the COVID pandemic—the territories are extremely vulnerable.

The Insular Cases set the precedent and created a near permanent colonial status. Prior to the Insular Cases, under the Northwest Ordinance and other doctrines, territories were given support, economic, population growth incentives to eventually become states. For us living in territories, that does not happen.

The Supreme Court has left the question of the Insular Cases unanswered. Amicus briefs have been filed by elected leaders. Bipartisan requests for dismantling the cases was even argued in the Supreme Court by Republican-appointed Solicitors General Paul Clement and Ted Olson.

This is why the House must take up and pass House Resolution 279 and send an official message that the Supreme Court's decisions in the Insular Cases are contrary to the text and history of the Constitution——

Mr. SABLAN. Thank you, Ms. Plaskett.

Ms. PLASKETT [continuing]. And rest on racial views.

Thank you to the Committee, and I thank you for allowing me to be a co-sponsor of this resolution. As a resident of the Virgin Islands, it is of the utmost importance that we, as Members of Congress, confront our disenfranchisement.

Thank you so much, sir, for the opportunity to speak.

[The prepared statement of Ms. Plaskett follows:]

PREPARED STATEMENT OF THE HON. STACEY PLASKETT, A REPRESENTATIVE IN CONGRESS FROM THE VIRGIN ISLANDS

Good afternoon, Chairman Grijalva, Ranking Member Westerman, members of the Committee, distinguished guests. My name is Stacey Plaskett. I represent the Virgin Islands of the United States in the House of Representatives. Thank you for holding this hearing on House Resolution 279, the Insular Cases Resolution.

More than 3.5 million United States citizens are denied constitutional rights because they reside in one of the five U.S. territories: American Samoa, Guam, the Northern Mariana Islands, Puerto Rico and the U.S. Virgin Islands. The combined population of the territories is greater than that of 22 states and that of the five smallest states combined. It is a central principle of our American democracy that Americans, through their votes, can have a say in their own governments, and yet these millions of Americans have almost no say in federal decision-making, even when it directly affects the islands they live on.

At the core of the disenfranchisement of territory residents are the racially charged series of Supreme Court decisions in the early 1900s—the *Insular Cases*. Prior to the *Insular Cases*, territories were viewed as inchoate states, areas on the path to full statehood. However, with the *Insular Cases*, the Supreme Court invented an unprecedented category of "unincorporated" territories not on the path to statehood and whose residents could be denied the most basic constitutional rights. Those decisions were explicitly informed by racial assumptions—with residents of the territories described as "fierce, savage and restless people" who were "absolutely unfit" to be citizens as they could not comprehend American, Anglo-Saxon principles.

It comes as no surprise that one of the most influential of these cases, *Downes v. Bidwell*, was decided by the same Justices who invented the separate but equal doctrine of racial segregation in *Plessy v. Ferguson* just 3 years earlier. But the legal basis established by *Plessy* was reversed in *Brown v. Board of Education* in 1954 as the Court recognized the nation could not operate in the supposed "separate but equal" category, which in reality was separate and unequal. While the discriminatory precedent set by the *Insular Cases* continues to affect more than 3.5 million Americans residing in U.S. territory, the Supreme Court has yet to revisit this precedent. Furthermore, the past three administrations—Trump, Obama and Bush—have reaffirmed this position. I call upon this administration to chart a new course, reject the Supreme Court's decisions in the *Insular Cases*, and recognize the importance of supporting equal rights of Americans living in the U.S. territories.

The ramifications of the *Insular Cases* extend to all aspects of life for U.S. citizens in the territories. Residents are denied access to crucial federal support despite paying more in federal taxes collectively than several of the states. While in the recent case of *United States v. Vaello Madero*, the U.S. Department of Justice has disclaimed that the *Insular Cases* limit the application of equal protection in the territories, it nonetheless still continues to embrace their flawed logic that the Constitution applies "only in part" in so-called "unincorporated" territories. Ultimately, the ongoing discrimination against Americans in the territories in federal benefits programs cannot be separated from the harmful legacy of the *Insular Cases*. As we have seen with the COVID-19 pandemic and recent major natural disasters, the territories are extremely vulnerable. This already precarious situation is exacerbated by delayed federal assistance and arbitrary formulas for infrastructure enhancement.

The *Insular Cases* set this precedent—and created a near permanent colonial status. It was never the intent of Congress for areas of the United States to be a territory for 100 years except for the fact that these are now people of color. These are communities of people of color. So, based on the *Insular Cases* 100 years ago which said that the people living in the territories were people of alien races who couldn't understand Anglo-Saxon principles of law, that is why we were not able to have the full-fledged rights of American citizens.

In the cases adjudicated following the *Insular Cases*, the Supreme Court has reaffirmed time after time that the current relationship between the United States and its territories—rooted in a racist, paternalistic basis that denies American citizens full constitutional rights—is acceptable. In a modern context, lower courts feel bound to apply the precedent established in the *Insular Cases*. In *Tuaua v. United States*, the Federal Government had the opportunity to address the substandard treatment of residents of territories. The premise of the argument presented in *Tuaua v. United States* was straight-forward: individuals born in American Samoa are labeled as a "non-citizen national" despite the Citizenship Clause of the Constitution, which states, "All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States." The

Federal Government argued that Congress has the power to exclude Americans born in U.S. territory from the Citizenship Clause based upon the doctrine established by the Insular Cases. However, the plaintiffs pointed to the Supreme Court's findings of *Boumediene v. Bush*: the Constitution grants Congress and the President "the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."

The petition for Supreme Court review was denied, leaving these pressing questions unanswered. Amici briefs were filed by elected leaders and former officials of the territories, well-informed government officials and scholars. Instead of using this opportunity to address the treatment of Americans residing in U.S. Territories, the Supreme Court left this matter for another day.

That is why the House must take up and pass House Resolution 279, and send an official message that the Supreme Court's decisions in the *Insular Cases* are contrary to the text and history of the Constitution, rest on racial views and stereotypes from the era of *Plessy v. Ferguson*, 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. This hearing is an important step toward that goal. I thank Chairman Grijalva for introducing this legislation to address the pressing matter of the treatment of the U.S. territories. As a co-sponsor of this resolution and a resident of the U.S. Virgin Islands, it is of the utmost importance that we, as Members of Congress, confront the disenfranchisement of millions of Americans residing in the territories—most of whom are people of color. We deserve nothing less than the full rights of citizenship, with the full application of the constitutional and democratic principles of the United States.

Mr. SABLAN. Thank you very much.

I would now like to recognize Dr. Daniel Immerwahr for 5 minutes.

STATEMENT OF DR. DANIEL IMMERWAHR, PROFESSOR OF HISTORY, NORTHWESTERN UNIVERSITY, EVANSTON, ILLINOIS

Dr. IMMERWAHR. Distinguished Committee members, it is a pleasure to be here. I come to you as a historian of the United States and of U.S. foreign relations. I teach at Northwestern University, and I've written a book about the history of the United States' relations with its overseas territories. As I gather, you've heard already, the territories that we're talking about, the unincorporated territories, came to the United States as a result of a dramatic moment in U.S. history, a war with Spain in which the United States annexed the Philippines, Puerto Rico, and Guam from Spain and took the non-Spanish lands of Hawaii and American Samoa at the same time.

Suddenly, the people in these territories accounted for 10 percent of the U.S. population, and this prompted a set of political debates—Should they be citizens? Should these new lands be states? I think what is really important to recognize is that that political debate was rooted in racism. Just for a sort of representative sense of this, a Senator from North Dakota objected that if Hawaii were considered as a state, it would ultimately be represented by a government of "dusky ex-cannibals."

There were two dominant positions, one an anti-imperialist position, which is to say that the United States in order to hang onto its tradition of representative government would have to jettison the territories. The assumption underlying that was that it was unthinkable that the people from the territories could actually be in Congress making laws.

The other position, the imperialist position, was that the United States should retain the territories and jettison representative government in the territories, and that is exactly what happened. The imperialists won. The territories were taken and held, but they were taken and held not in the way that former territories had been, but forthrightly and explicitly as colonies where colonial rule was imposed and statehood blocked.

The Insular Cases are an important artifact from that political moment. What they did, in essence, was to carve out room within the U.S. political fabric for colonies. As you've heard, they divided the territories into incorporated and unincorporated territories. This was a novel legal doctrine, and the bulk of the population was in the unincorporated category. And then the Court ruled that the Constitution didn't fully apply to the unincorporated territories. As one Justice explained it, the Constitution, yes, is the supreme law of the land, but the unincorporated territories are not part of the land.

These legal decisions, not just the political culture around them, were suffused with racial ideals that strike us as abhorrent now. There are references in the Insular Cases to territorial inhabitants as savages and as "alien races." One Justice objected that to include them within the constitutional fold would "wreck our institutions perhaps leaving the whole structure of government to be overthrown."

Others have already mentioned, and I think it is really important to grasp, that the Justices who decided this case were by and large the Justices who also decided *Plessy v. Ferguson*, and that is not entirely an accident. Those two decisions, the Insular Cases and *Plessy*, have a lot in common. What *Plessy* did was to divide the country into distinct administrative spaces for whites and for nonwhites, and what the Insular Cases did was to divide the country into a constitutional zone and into an extra constitutional zone, or at least a zone where the Constitution didn't fully apply.

The difference, of course, is that in 1954 the Supreme Court overturned *Plessy v. Ferguson*, and now we look back on it as one of the Court's great mistakes, something that warps the Constitution and deprived millions of their rights. The difference, of course, is that we have not yet refuted the Insular Cases. They are still cited, and I think it is beyond time that we do that.

Thank you very much.

[The prepared statement of Dr. Immerwahr follows:]

PREPARED STATEMENT OF DR. DANIEL IMMERWAHR, PROFESSOR OF HISTORY, NORTHWESTERN UNIVERSITY

Chair Grijalva and distinguished committee members:

Thank you for the chance to testify in support of this important measure. I am a professor of U.S. history at Northwestern University, and I've written a book about the United States' overseas territory. I would like to fill in the history of the Insular Cases and the "territorial incorporation doctrine" they established. Plainly put, that doctrine was the result of open racism.

The Insular Cases followed a war the United States fought with Spain in 1898. In that war, the United States took three of Spain's colonies—Puerto Rico, the Philippines, and Guam—and it claimed, at the same moment, Hawai'i and American Samoa. The United States had expanded before, but it had never taken in anywhere near this number of people—almost 9 million in all. The inhabitants of these new acquisitions comprised about 10 percent of the U.S. population.

This massive, unprecedented influx raised immediate questions. Would the new residents be citizens? Would they be able to vote? Would their territories become states? Such questions prompted a loud political debate.

That debate was rooted in racism. The new territories were full of nonwhite people (even Spanish-descended Puerto Ricans were classified as nonwhite in the United States). Were the new territories treated as the older ones had been, the result would be Filipinos, Puerto Ricans, Native Hawaiians, Chamorus, and Samoans in the Senate and House, voting on laws. Leading politicians shared an understanding that this was wholly unacceptable. One senator warned that Hawai'i, if made a state, "would be represented by the country of dusky ex-cannibals." [1]

With that possibility ruled out, there were two main positions left. Anti-imperialists argued that for the United States to protect its tradition of representative government, it would have to relinquish the territories. Imperialists, on the other hand, argued that for the United States to retain its territories, it would have to relinquish representative government. The new territories should be ruled as colonies, the United States should be an empire.

That is what happened. The United States annexed the territories but didn't grant them statehood, despite their large populations. (Hawai'i, the only 1898 acquisition to become a state, had to wait more than six decades.) In place of representative government, the United States imposed colonial rule.

The Insular Cases are an enduring artifact from that political moment. In them, the Supreme Court introduced a novel distinction between "incorporated" and "unincorporated" territories and ruled that the Constitution did not fully extend to the latter. As one justice summarized the logic, the Constitution was "the supreme law of the land" but the unincorporated territories were "not part of 'the land.'" [2] The reasoning was straightforwardly racist; justices referred to the inhabitants of the overseas territories as "savages" and "alien races." [3] Including them within the constitutional fold, one warned, would "wreck our institutions," perhaps leading the "whole structure of the government" to be "overthrown." [4] As a result, inhabitants of the unincorporated territories have lacked rights, including a constitutional right to citizenship.

The justices who decided the first Insular Cases were largely the same justices who decided *Plessy v. Ferguson*, the infamous ruling that sanctified Jim Crow by allowing "separate but equal" facilities for whites and nonwhites. *Plessy* divided the country into distinct administrative spaces, consigning some citizens—literally and metaphorically—to the back of the bus. The Insular Cases did something similar, dividing the country into two zones, one covered fully by the Constitution, the other not. The Insular Cases relegated millions to the back of the constitutional bus.

The difference is that, in 1954, with *Brown v. Board of Education*, the Supreme Court overturned *Plessy*. We now regard *Plessy* as one of the Court's greatest mistakes—an infamously racist ruling that deprived millions of their rights. By contrast, the country has not yet repudiated the Insular Cases. It's time we do.

Thank you.

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[1] William Roach of North Dakota, quoted in Eric T.L. Love, *Race over Empire: Racism and U.S. Imperialism, 1865–1900* (Chapel Hill: University of North Carolina Press, 2004), 150.

[2] *Dorr v. United States*, 195 U.S. 138, 155 (1904) (Harlan, J., dissenting).

[3] *Downes v. Bidwell*, 182 U.S. 244, 251 and 287 (1901).

[4] *Downes*, 182 U.S. at 313 (White, J., concurring).

QUESTIONS SUBMITTED FOR THE RECORD TO DR. DANIEL IMMERWAHR, PROFESSOR OF HISTORY, NORTHWESTERN UNIVERSITY

Questions Submitted by Representative Sablan

Question 1. How may a change in the territorial incorporation doctrine affect various territories differently?

Answer. As I read it, this is a question about law. I am a historian, not a legal expert, so I am not qualified to fully answer Rep. Sablan's question. But I can say that, in the past, Congress has claimed enormous discretion in governing the territories, independent of the territorial incorporation doctrine, under the territorial clause of the Constitution. It has advanced some incorporated territories to statehood quickly and held others as territories indefinitely. Compare the fates of California, which became a state two years after annexation, to that of present-day Oklahoma, whose land was held as non-state territory for more than a century before statehood (and which was known for most of that time as "Indian Territory"). Neither California nor present-day Oklahoma was unincorporated, so the territorial incorporation doctrine as established by the Supreme Court in the Insular Cases did not apply. If we are to take historical precedent as a guide, then changing or rejecting the territorial incorporation doctrine would not prevent Congress from treating different territories differently.

Mr. SABLAN. Thank you very much, Professor.

At this time, I'd like to recognize Lieutenant Governor Ale from American Samoa for 5 minutes.

STATEMENT OF THE HON. TALAUEGA ELEASALO VA'ALELE ALE, LIEUTENANT GOVERNOR, AMERICAN SAMOA, PAGO PAGO, AMERICAN SAMOA

Lieutenant Governor ALE. Good afternoon, Chairman, Ranking Member, Members of Congress, the Committee. On behalf of Governor Lemanu Mauga and myself, I bring greetings from the people and government of American Samoa. Talofa, Talofa Lava. And thank you for the opportunity to appear before you today to share our strong opposition to the proposed Insular Cases Resolution, House Resolution 279.

This measure, while well-intended and perhaps justified in certain circumstances, is in our view a blunt instrument that will only hasten the destruction of unique cultures within the U.S. territories and insular areas, and it will destroy the right of the people of American Samoa to democratic self-determination.

Currently, the people of American Samoa have a degree of self-determination and a voice and a way of protecting our culture and way of life. This arrangement preserves our traditional Samoan way of life, or fa'a Samoa, including communal land ownership, cultural traditions like prayer curfews, and that most of our islands' lands should stay in the hands of persons with Samoan ancestry.

American Samoa has been a U.S. territory since 1900. However, we are not U.S. citizens but, rather, non-citizen U.S. nationals. We cannot vote or run for office in the incorporated United States or hold certain government positions. There is a unique difference between American Samoa and the other U.S. territories of Guam, the Commonwealth of Northern Marianas, Puerto Rico, and the Virgin Islands. We are not, as I said, citizens, and we would like the decision on whether we become citizens to be decided not by a court but by the people of American Samoa and its elected leaders.

In December 2019, District Court Judge Clark Waddoups in the Utah District made that decision for American Samoa. He decided that American Samoans should be birthright citizens of the United States done with no involvement whatsoever by the local people of American Samoa or its elected leaders.

Now, ending the application of the Insular Cases as proposed in this resolution, as I said earlier, may well be the right thing to do with other territories. All of these other territories have taken this step to democratic self-determination and have decided their future. American Samoa has not. American Samoa still has to make that decision, and eliminating, wiping out the infrastructure or the structure prepared in the Insular Cases on how the Constitution should be applied to U.S. territories will destroy the right of American Samoan people to take that important step and decide for itself democratically whether it wants to be U.S. citizens or not.

Our voice and our message has always been clear. We want our political status and our rights under territorial law to be decided by our people, our elected leaders, local, federal. We do not want to have court decide the fate of our people as it was done resulting in the Insular Cases. Congress has the right to do so, and we ask that Congress address the ailments that are affecting other territories making them want to destroy and wipe out the Insular Cases.

Now, let me be clear. We support the intent of the resolution to repudiate the racist and shameful attitudes depicted in the Insular Cases. However, we believe that to completely wipe it out is incorrect. These cases have been condemned by courts and been condemned by Congress, but to completely eliminate, as I said earlier, is a blunt instrument.

The people of American Samoa are proud to be part of the U.S. Government and are proud of our heritage of supporting the U.S. military and being part of the U.S. family. However, we believe a core principle of our unity, of our relationship, is the protection of the rights of people to decide democratically how they want to live.

Mr. Chairman and members of the Committee, thank you for the opportunity to be here and to testify on this important resolution, and I would submit for the record letters from Governor Lemanu Mauga and myself to our counterparts regarding these issues. Thank you very much.

Mr. SABLAN. Without objection so ordered.

[The prepared statement of Lieutenant Governor Ale follows:]

PREPARED STATEMENT OF THE HON. TALAUEGA ELEASALO VA'ALELE ALE, LIEUTENANT GOVERNOR, AMERICAN SAMOA

Good afternoon Chairman Grijalva, Ranking Member Westerman and Members of the Committee. On behalf of Governor Lemanu Mauga and myself, I bring greetings from the people and government of American Samoa. Talofa, Talofa Lava. Thank you for the opportunity to appear before you today to share our strong opposition to the proposed "Insular Cases Resolution—House Resolution 279." This measure, while well-intended and perhaps, in some circumstances justified, is a blunt instrument that will not only hasten the destruction of unique cultures within U.S. Territories and Insular Areas, it will destroy the right of the people of American Samoa to democratic self-determination.

Currently the people of American Samoa have a degree of self-determination and have a voice and a way of protecting our culture and way of life. This arrangement preserves our traditional Samoan way of life, or fa'a Samoa, including communal land ownership, cultural traditions like prayer curfews, and that most of our islands' lands should stay in the hands of persons with Samoan ancestry.

American Samoa has been a U.S. territory since 1900. However, we are not U.S. citizens, but rather non-citizen U.S. nationals. We cannot vote or run for office in the incorporated U.S. or hold certain U.S. government positions. There is a unique difference between American Samoa and the other U.S. territories in that those persons native to Guam, the Commonwealth of the Northern Mariana Islands, Puerto Rico, and the Virgin Islands become U.S. citizens at birth pursuant to Congressional action.

In December 2019, U.S. District Court Judge Clark Waddoups in the Utah District tried to change our non-citizen U.S. national status, ruling that American Samoans should also have birthright citizenship. This decision was made without our people in American Samoa voting on the issue or exercising our right to self-determination. Persons born in American Samoa currently have a path to U.S. citizenship, an expedited path if they leave American Samoa and reside in the United States.

Ending application of the Insular Cases, as proposed in H.R. 279, may well be the correct course for some territories. That could include territories that have democratically self-determined that the status of the people under the law of the Insular Cases is intolerable, and must end immediately by legal mandate without agreed terms or conditions that define a new status other than unincorporated territory.

That is not the case for American Samoa. Each territory has a voice through the local territorial government and a voice in Congress to inform and assist Congress in the exercise of its powers to provide for local self-government in the territories under Article IV, Section 3, Clause 2 of the U.S. Constitution.

Our voice and our message are extremely clear: We want any change in our political status and rights under federal territorial law to be decided by elected leaders in the local government, our people and our elected representative in Congress and fellow Members of Congress, not by unelected federal judges who we have no voice in nominating or confirming, who handed down the Insular Cases the last time Congress deferred to the courts on the question of political status of territories in 1901.

Accordingly, we support the intent of the resolution to repudiate the expression of racist attitudes by justices of the U.S. in the Insular Cases. However, we believe all lawsuits and cases in the Federal courts in which the actual law of the Insular Cases is being challenged should be decided on the merits consistent with the U.S. Constitution, law, evidence, and facts presented in court.

This is imperative and critical for American Samoa because of pending litigation in which the courts are being asked to change the political status of the people of American Samoa under Federal law, without local democratic self-determination supporting outcomes of litigation that are unpredictable and/or unwanted.

I understand why lawyers representing plaintiffs in the lawsuit involving U.S. birthright citizenship for persons born in American Samoa, would like Congress and the Department of Justice to be unable to consider the history and meaning of the Insular Cases in adjudicating currently pending cases. That could mean the lawyers for clients who want court-ordered political status changes would prevail, because there would be less U.S. Supreme Court case law to oppose plaintiffs' legal positions.

That is why lawyers are aligned with other special interest groups in current pending cases. These special interest groups have lost past lawsuits, and now are asking Congress to change existing U.S. territorial law, based on racist attitudes expressed by judges 120 years ago, when the vast majority of Americans and the U.S. as a nation were openly engaged in systemic racism.

We have no objection to repudiating the racist and immoral views adopted in the Insular Cases. Indeed, we join our fellow Territories in doing so today. What we oppose is the wholesale rejection of these cases because we believe such an action will have a lasting impact on the underlying structure of our political relationship with the U.S.—the right of self-determination and consent of the governed.

Each U.S. Territory is unique, and any new legislation should recognize the history of the individual territories and their relationship with the U.S. and Congress. A "one size fits all" approach will not work.

American Samoa as an example:

- We are the only one of the five insular territories that did not come under U.S. sovereignty as a result of conquest of or sale by a European or Asian power;
- We are the only territory that controls its own immigration and customs systems;
- We are the only territory that selects part of its legislature through customary means;
- We are the only territory that prohibits the alienation of most of its lands;
- We are the only territory whose residents are not automatically U.S. citizens at birth and prefer to keep it that way.
- We believe being patriotic non-citizen U.S. nationals is not a second-class status but a unique first-class status. Despite not being U.S. citizens, American Samoa has the highest enlistment rate in the U.S. military of any of the U.S. states or territories.

I would like to submit for the record letters from Governor Lemanu Mauga and myself to our counterparts in other insular territories asking them not to support or endorse efforts to deny self-determination and force reclassification of U.S. nationals in American Samoa as U.S. "citizens" without consent of our people. I understand our legislature will take up a resolution to the same effect when it meets in its next regular session.

Thank you again, Mr. Chairman, and Members of the Committee for allowing me to speak for my people on this important matter.

Submissions for the Record by Lt. Governor Ale

OFFICE OF THE GOVERNOR
AMERICAN SAMOA GOVERNMENT

March 19, 2021

The Honorable Ralph DLG Torres, Governor
Commonwealth of the Northern Mariana Islands
Caller Box 10007
Saipan, MP 96950

Dear Governor Torres:

As I am certain you are aware, several organizations and media outlets have been advocating national voting rights for territories. There is a case pending before the 10th Circuit Court of Appeals, Fitisemanu v. United States, which, as a precursor to national voting rights, would impose U.S. citizenship on America Samoa, where most of our people are U.S. Nationals. I am writing you today to advise you that the majority of our people prefer to maintain our status as Nationals and ask that you not support any efforts to impose citizenship on us by court fiat.

When approached by one group to support the plaintiffs in this court case, Guam Governor Leon Guerrero declined to insert herself in an issue that has nothing to do with Guam. I sincerely appeal to you to follow her example, because as she recognized, this is a fundamental issue of self-determination. My administration as well as that of my predecessor and our Congresswoman as well as her predecessor have joined the federal government in opposing the Fitisemanu case being considered by the Denver court.

To be clear, that court case seeks to usurp the power of Congress and asks the court to unilaterally declare all U.S. Nationals to be U.S. Citizens regardless of where they reside or whether or not they have sought citizenship. In an almost identical case, the D.C. Circuit Court of Appeals already ruled favorably for us on this same issue, and the Supreme Court declined to consider it further. Regrettably, the District Court that heard the Fitisemanu case ignored this precedent.

If the 10th Circuit were to uphold the Utah District Court, it would set a precedent that would be dangerous to all the territories by diminishing the power of Congress—where we all are represented—to determine the status of territories as provided by the U.S. Constitution. Congress in the past has statutorily considered and passed legislation to grant citizenship to the other territories with input from those territories and has sought the views and consent of the people residing there, but that would not be the case here.

American Samoa asks only for that same consideration. We have indicated to the Court that it is American Samoa's preference to determine for ourselves the question of citizenship and leave it to Congress in consultation with us to determine such basic rights.

Our forebears negotiated an agreement with the United States that protects our lands and customs that we have found satisfactory to date and which we wish to continue until such time as the people who live here feel differently.

Therefore, I once again ask you to rebuff any entreaties for you to support "equality" for territorial voters if it violates our passionate devotion to self-determination. I believe that the issues confronting Nationals in Utah can best be resolved by passage of H.R. 1941, which would expedite reclassification of national to citizen to anyone who chooses it, and I am pleased that many of the territorial Members of the U.S. House of Representatives have already co-sponsored our Congresswoman's bill. Thank you for your consideration.

Sincerely,

LEMANU P.S. MAUGA,
Governor

OFFICE OF THE GOVERNOR
AMERICAN SAMOA GOVERNMENT

March 19, 2021

The Honorable Pedro Pierluisi, Governor
Government of Puerto Rico
P.O. Box 9020082
San Juan, PR 00902–0082

Dear Governor Pierluisi:

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American Samoa asks only for that same consideration. We have indicated to the Court that it is American Samoa's preference to determine for ourselves the question of citizenship and leave it to Congress in consultation with us to determine such basic rights.

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Sincerely,

LEMANU P.S. MAUGA,
Governor

OFFICE OF THE GOVERNOR
AMERICAN SAMOA GOVERNMENT

March 19, 2021

The Honorable Albert Bryan Jr., Governor
U.S. Virgin Islands
5047 (21–22) Kongens Gade
St. Thomas, VI 00802–6487

Dear Governor Bryan:

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When approached by one group to support the plaintiffs in this court case, Guam Governor Leon Guerrero declined to insert herself in an issue that has nothing to do with Guam. I sincerely appeal to you to follow her example, because as she recognized, this is a fundamental issue of self-determination. My administration as well as that of my predecessor and our Congresswoman as well as her predecessor have joined the federal government in opposing the Fitisemanu case being considered by the Denver court.

To be clear, that court case seeks to usurp the power of Congress and asks the court to unilaterally declare all U.S. Nationals to be U.S. Citizens regardless of where they reside or whether or not they have sought citizenship. In an almost identical case, the D.C. Circuit Court of Appeals already ruled favorably for us on this same issue, and the Supreme Court declined to consider it further. Regrettably, the District Court that heard the Fitisemanu case ignored this precedent.

If the 10th Circuit were to uphold the Utah District Court, it would set a precedent that would be dangerous to all the territories by diminishing the power of Congress—where we all are represented—to determine the status of territories as provided by the U.S. Constitution. Congress in the past has statutorily considered and passed legislation to grant citizenship to the other territories with input from those territories and has sought the views and consent of the people residing there, but that would not be the case here.

American Samoa asks only for that same consideration. We have indicated to the Court that it is American Samoa's preference to determine for ourselves the question of citizenship and leave it to Congress in consultation with us to determine such basic rights.

Our forebears negotiated an agreement with the United States that protects our lands and customs that we have found satisfactory to date and which we wish to continue until such time as the people who live here feel differently.

Therefore, I once again ask you to rebuff any entreaties for you to support "equality" for territorial voters if it violates our passionate devotion to self-determination. I believe that the issues confronting Nationals in Utah can best be resolved by passage of H.R. 1941, which would expedite reclassification of national to citizen to anyone who chooses it, and I am pleased that many of the territorial Members of the U.S. House of Representatives have already co-sponsored our Congresswoman's bill. Thank you for your consideration.

Sincerely,

LEMANU P.S. MAUGA,
Governor

Mr. SABLAN. I would now like to recognize the Honorable Tina Muña Barnes, Vice Speaker of the Guam Legislature. Ms. Barnes, you have 5 minutes.

STATEMENT OF THE HON. TINA MUÑA BARNES, VICE SPEAKER, GUAM LEGISLATURE, HAGÅTÑA, GUAM

Ms. BARNES. Hafa Adai. My name is Tina Rose Muña Barnes. I am the Vice Speaker of the 36th Guam Legislature. My committee recently held a public hearing on Resolution 56-36, a measure I introduced in support of House Resolution 279. My testimony today is in part based on the testimony presented before my committee.

I would like to begin by expressing thank you and Un Dangkolo Na Si Yu'os Ma'ase to Chairman Grijalva and Vice Chairman Gregorio Kilili Sablan for authoring House Resolution 279. Today, I will be discussing the injustices of the Insular Cases on the people of Guam and our sister territories. I ask that my full written testimony, as well as the Guam Legislature's Committee Report on Resolution 56-36, be entered into the record.

Mr. SABLAN. So ordered.

Ms. BARNES. Thank you. My grandfather is the late Colonel Juan Muna, for whom the Guam National Guard's Headquarters bears his name to honor his contributions to the U.S. Armed Forces during World War II. I am also the proud wife of an Air Force veteran, the mother of an Air Guardsman, mother-in-law of an Air Guard veteran and a grandmother-in-law of a deployed Army soldier, a level of patriotism and service shared by many on Guam.

As a daughter of Guam, I am grateful that this conversation is moving forward, but frustrated that this has taken so long. While this resolution sends a strong message, Congress can do more. It always could. Its plenary powers allow Congress to tailor make a binding political status process unique to each territory. You all have made notable strides by temporarily raising our Medicaid allotments and increasing the Federal Medicaid rate through the Fiscal Year 2020 Appropriations and the Families First Coronavirus Response Act, but they are temporary measures set to expire.

While I am also grateful for the numerous relief packages passed by this body and the continued advocacy of Guam's Delegate, Congressman Mike San Nicolas, I echo Governor Lourdes Leon Guerrero's sentiment that "this high match requirement has prevented us from availing of much-needed federal funds."

The unequal treatment of the territories has also prevented American citizens from availing of Federal programs they otherwise would have access to if they lived in a state. To challenge this unfair policy, Ms. Katrina Schaller of Guam filed a lawsuit in the District Court of Guam in December 2018. Katrina and her twin sister Leslie both live with myotonic dystrophy, which severely inhibits muscle function and other critical aspects of daily life. Leslie is able to live independently in Pennsylvania due to the aid she receives from SSI. Katrina, however, is ineligible for the same benefits by virtue of her geographic location.

Attorney Rodney Jacob, who serves as Katrina's counsel, testified, "It is contrary to common sense, human decency, and sound public policy to deny public benefits to all other American citizens with disabilities living on Guam." As a result of this injustice and at the request of my good colleague, Senator Mary Camacho Torres, I amended my resolution to seek parity on this matter. Senator Torres and I may hail from different political parties, but

for the benefit of our people, we can work together. I hope you all share the same desire.

To be clear, I echo the testimony submitted by Attorney Julian Aguon that the rejection of the Insular Cases must be carefully approached and cannot be America's justification for its relationship with the territories. We must also acknowledge our right to self-determination.

In closing, I come before you today as an island leader, a proud American, and a daughter of Guam, on behalf of Guam's people and their contributions to this Nation. What I ask for is simple, and yet it has been the long struggle of this great nation. I ask that every American be equally American wherever we might live and that each of us be given the chance to manifest our own destiny.

On behalf of the people of Guam, thank you, Mr. Chairman. Si Yu'us ma'ae'.

[The prepared statement of Ms. Barnes follows:]

PREPARED STATEMENT OF TINA ROSE MUÑA BARNES, VICE SPEAKER, 36TH GUAM LEGISLATURE

Hafa Adai! My name is Tina Rose Muña Barnes, and I am the Vice Speaker of the 36th Guam Legislature. My Committee held a public hearing last week on Resolution 56-36, a measure I introduced in support of House Resolution 279. My testimony today is, in part, based on the testimony presented before my Committee.

First and foremost, I would like to express my heartfelt thank you and *Un Dangkolo Na Si Yu'os Ma'ase* (thank you) to Chairman Grijalva and Vice Chairman Gregorio Kilili Sablan for their leadership in authoring House Resolution 279 along with its many co-sponsors and for convening this hearing.

My grandfather is the late Colonel Juan Muna, for whom the Guam National Guard's Headquarters, Fort Juan Muna, bears his name to honor his contributions to the U.S. Armed Forces during World War II. I am also the proud wife of an Air Force Veteran, the mother of an Active-Duty Air Guardsman, mother-in-law of an Air Guard Veteran, and lastly a grand-mother-in-law of a deployed Army Soldier.

As you may recall, when COVID-19 swept our nation, and made its way onto the USS Theodore Roosevelt, the people of Guam responded to protect the lives of thousands of sailors who took an oath to protect both you and me.[1] Yes, there was fear and anxiety within our community as we took extraordinary action to help the TR and eliminate any further spread into our community. We did so because our ancestors taught us the Ancient *CHamoru* spirit of *Inafa'maolek*, where we must step up, when our community is in need—it's literal definition means "to make good."[2] At that time, it was not the people of Guam vs. the U.S. Navy, it was the people of Guam *alongside* our fellow Americans, *for* our fellow Americans.

What makes me proud to call myself an American, is the fact that the country is capable of recognizing its past mistakes, and it can take action to *make amends* to those who were harmed or negatively impacted. Today, House Resolution 279, which calls the *Insular Cases* racist, undemocratic, unconstitutional, unAmerican, and having no place in the America we know and love, is the first and important step to make amends and heal the millions of our fellow Americans who have been impacted by the decisions and harmful language used by the U.S. Supreme Court. As my good friend, Senator Paul Strauss, who is DC's Shadow Senator to the U.S. Senate testified last week,[3] House Res. 279 "express(es) the overdue opinion that the racist ideology expressed in the Insular Cases is an idea that belongs on the dustbin of history, along with so many other terrible, racist ideas—be it slavery, racial segregation, Jim Crow laws, fascism, and the types of discrimination on the basis of religion and other ideologies that no longer deserve a place in 21st century, civilized society."

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[1] Baldor, Lolita C. "Carrier Theodore Roosevelt, Sidelined in Guam by Coronavirus, Heads Back to Sea This Week." *The Assosciated Press*, 19 May 2020.

[2] Perez-Iyechad, Lilli. "Inafa'Maolek: Striving for Harmony." *Guampedia*.

[3] Strauss, Paul. "Testimony on Resolution 56-36 (COR)." 36th Guam Legislature. Hagåtña, Guam. 5 May 2021. Testimony.

But we can't stop there. This resolution, as the panel of leading legal experts testified at my hearing stated, it sends a strong message, but is non-binding on the courts. We cannot call ourselves the land of the free, but allow the *Insular Cases* to set the precedence of jurisprudence. I would like to reflect on the testimony of your former colleague, my former Congressman and former President of the University of Guam, Dr. Robert Underwood.[4] We are taking the first step by calling the *Insular Cases* for what it is, but this is where I need your help. As a local lawmaker, I cannot single-handedly change the relationship between the United States and its Unincorporated Territory. Members of this Committee, I humbly urge you to exercise the Plenary Powers granted to you, to make right by the people of Guam.

You *all* have made strides, by temporarily granting Guam parity with our fellow Americans by raising our Medicaid allotments[5] and increasing the federal Medicaid rates, through the FY 2020 appropriations and the Families First Coronavirus Relief Act. But these are temporary and set to expire. While I am also grateful for the numerous relief packages passed by this body, and the continued advocacy of Guam's Delegate, Mr. San Nicolas, the requirement for a local match, in a time where our main economic driver, *tourism*, is at a standstill, I echo our Governor Lourdes Leon Guerrero's sentiments that "this high match requirement has prevented us from availing of much-needed federal funds."[6]

I also had the honor of hearing from Attorney Rodney Jacob, who hails from Chairman Grijalva's District in Arizona and represented Katrina Schaller in the District Court of Guam. Ms. Katrina Schaller of Barrigada, Guam, filed a lawsuit in the District Court of Guam in December 2018. Katrina and her twin sister Leslie Schaller both live with myotonic dystrophy, which severely inhibits muscle function and other critical aspects of daily life. Leslie is able to live independently in Pennsylvania due to the aid she receives from SSI. Katrina however is ineligible for the same SSI benefits received by her twin simply by virtue of her geographic location.

As Attorney Rodney Jacob, who serves as Katrina Schaller's counsel, eloquently stated: "It is contrary to common sense, human decency, and sound public policy to deny public benefits to all other American citizens with disabilities living on Guam."[7] While Katrina won her case in the U.S. District Court of Guam last June, the U.S. Federal Government has appealed to the Ninth Circuit, which has paused the case pending the outcome of a similar case from Puerto Rico, which will be heard by the U.S. Supreme Court. As a result of this shocking injustice, and at the request of my good colleague, Senator Mary Camacho Torres,[8] who is the daughter of Guam's first elected Republican Governor, and founder of the Republican Party of Guam, I was honored to amend my resolution to seek parity on this matter. Senator Torres and I may hail from different political parties, but for our People, we can work together. I hope you all share this same desire.

Going back to the testimony of Dr. Underwood, and echoed by our Governor, the Legal Scholars, and Community Advocates, I would like to humbly further request this committee, that Congress further exercise its Plenary Powers to begin the process to correct this wrong. Congress could begin the process of creating a binding political status reconciliation process tailored for each Territory. I am a proud daughter of Guam, but I while I prefer a closer relationship with the United States, I believe that we must begin this conversation, will all of you here today, and all those who live on Guam, so that we can figure out our future, and not push this issue under the rug.

I also received testimony from human rights lawyer and law scholar Julian Aguon,[9] whose support for H. Res. 279 was far more qualified than the other legal experts. While he denounces the racist and imperialist origins of the Insular Cases, Attorney Aguon argues that they nevertheless provide the basic analytical framework that later federal courts have used to protect the indigenous peoples of the territories, in particular the peoples of the CNMI and American Samoa. He argues that in certain cases, like Wabol v. Villacrusis and Tuaua v. United States, the

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[4] Underwood, Robert. "Testimony on Resolution 56-36 (COR)." 36th Guam Legislature. Hagåtña, Guam. 5 May 2021. Testimony.

[5] Medicaid and CHIP Payment and Access Commission. *Medicaid and CHIP in Guam*. Washington, DC, 2021. Print.

[6] Leon Guerrero, Lourdes. Letter to Gretchen Sierra-Zorita. 5 May 2021. Brief on Significant Federal Policies Affecting Guam. Hagåtña, Guam.

[7] Jacob, Rodney. "Testimony on Resolution 56-36 (COR)." 36th Guam Legislature. Hagåtña, Guam. 5 May 2021. Testimony.

[8] Torres, Mary Camacho. Letter to Vice Speaker Muña Barnes. 7 May 2021. Suggested Language Relative to SSI Inclusion in Resolution No. 56-36 (COR) Hagåtña, Guam.

[9] Aguon, Julian. "Testimony on Resolution 56-36 (COR)." 36th Guam Legislature. Hagåtña, Guam. 10 May 2021. Written Testimony.

Insular Cases were not used as a sword (against the peoples of the territories) but instead as a shield (to protect their lands, cultures, and self-determination). For instance, for all its flaws, the impracticable and anomalous test, which developed out of the doctrinal flexibility created by the Insular Cases, has been used to ward off challenges to things like ancestry-based land alienation restrictions. Without the doctrinal space created by these cases, programs like these would have almost certainly been struck down. In sum, Attorney Aguon argues that in our zeal to condemn these cases, we can't ignore the fact that in more recent times they have been repurposed to benefit the indigenous peoples in the territories. Finally, Attorney Aguon argues that until we are willing to do the much harder work of reconstruction (that is, establishing an alternative doctrinal path to protect the indigenous peoples of the territories), just denouncing the Insular Cases is not nearly enough.

In closing, I would like to reflect on the U.S. Navy Report on Guam. It outlines that the Navy was tasked with being the Administrator of Guam, simply because of our Geographical location, and its importance to the Navy. The Navy outlined its mission in a tone similar to the *Insular Cases*, by stating that "In a little less than 49 years the Naval administration of Guam had guided a people from illiteracy, peonage, and apathy to where in conservative estimate and appraisal, it had been educated to accept and intelligently to discharge the responsibilities (as well as the privileges) of citizenship.[10]

I come before you today, as a leader, a proud American and a daughter of Guam. My family's contribution to this nation, and my decades of service to my People, taking an oath every 2 years to uphold this same constitution, asking you to give me the right to Manifest my own destiny.

I look at my entire career, as an athlete, an Investigator, a Director, and a Senator for 15+ years—I have lived a full life, blessed with a great family, great friends, and a great career. For me—my goal now is to make sure that my children and our future generations are no longer subjected by these injustices. We have fought alongside you in wars, we are proud to be home to the highest enlistment rates into the U.S. Armed Forces. I ask you today, why can't we be equals during peacetime? With the partnership and support of all of you whom I have the honor of testifying before, I will keep fighting to meet my goal.

On behalf of the People of Guam, Thank you, Mr. Chairman.

QUESTIONS SUBMITTED FOR THE RECORD TO THE HON. TINA MUÑA BARNES, VICE SPEAKER, 36TH GUAM LEGISLATURE

Questions Submitted by Representative Sablan

Question 1. The Guam legislature recently had its own hearing to discuss the Insular Cases resolution. Could you share some of the key takeaways and recommendations from that discussion?

Answer. *Håfa Adai!* Thank you for the opportunity to submit testimony on H. Res. 279, the Insular Cases Resolution. I was honored to present testimony to the Committee in support of your efforts to restore parity in our territories. We concluded discussions on my Resolution 56-36 (COR) today, relative to supporting your efforts with H. Res. 279. The Guam Legislature will be voting on my Resolution this week, and I am optimistic that I will be able to deliver the support of the Guam Legislature.

Based on the testimony we received for the public hearing, Resolution 56-36 received overwhelming support from the Governor Lourdes A. Leon Guerrero, legal scholars, governmental and community stakeholders, and global partners.

The sentiment during the hearing was that House Resolution 279 is the first step to correcting an injustice. The U.S. Congress can exercise its Plenary Powers to correct this injustice. As such, I amended the resolution to reflect these requests by legal scholars and community stakeholders to include this language.

We also incorporated the request of my colleague Senator Mary Camacho Torres, and echoed by the Governor of Guam, to add language relative to the application of the Supplemental Security Income program to be inclusive of Guam. This was based on the testimony of Attorney Rodney Jacob, who serves as Katrina Schaller's counsel. Attorney Jacob stated that "It is contrary to common sense, human decency, and sound public policy to deny public benefits to all other American

[10] United States. Dept. of the Navy. Office of the Chief of Naval Operations. *U.S. Navy Report on Guam 1899-1950*. U.S. Government Printing Office. Washington, DC. 1951. Print.

citizens with disabilities living on Guam." While Katrina won her case in the U.S. District Court of Guam last June, the U.S. Federal Government has appealed to the Ninth Circuit, which has paused the case pending the outcome of a similar case from Puerto Rico, which will be heard by the U.S. Supreme Court.

This same report also outlines that there must be further action to provide the People of Guam parity with their fellow Americans. The United States, through Davis v. Guam, systematically denied the People of Guam their right to Self-Determination. Concurrently, the United States has grown their footprint on Guam as a result of the ongoing Military Build-Up. While the I recognizes the importance of Guam as United States Military Installation, amidst growing regional threats perpetuated by rogue actors, and the importance of a free and safe Indo-Pacific, I concur that the People of Guam should have a voice in potential long-term ramifications to their home.

During the public hearing, I entered into the record a report by the Unrepresented Nations and People's Organization (UNPO). The UNPO report points out that Guam's status as an Unincorporated Territory, and how the Insular Cases present a framework wherein only certain parts of the United States Constitution applies to Guam. This determination, as echoed by Legal Scholars present, proved to be an injustice to the People of Guam and deprived them of fundamental rights afforded to Americans.

The floor debate on Resolution 56-36 was definitely contentious. But as in any functional democracy, it only works if we can have an open dialogue that encompasses the different perspectives of those governed. It was apparent to me that Guam's relationship with the United States is something that *everyone* in our Island is passionate about, and something that we must continue to discuss. I am grateful that you allowed me to voice my opinion and my concerns. I am thankful for your leadership, continued advocacy for parity within the United States Territories, and I am confident I can count on you to always allow the voice of the People of Guam to be heard.

Stronger, TOGETHER!

Mr. SABLAN. Thank you very much, Vice Speaker.

I now recognize Mr. Neil Weare for 5 minutes.

STATEMENT OF NEIL WEARE, PRESIDENT, EQUALLY AMERICAN, WASHINGTON, DC

Mr. WEARE. Thank you for the opportunity to testify today in this historic, first ever congressional hearing to focus on the Insular Cases, and I appreciate those who have joined from the territories despite the challenging time zones.

I am Neil Weare, President and Founder of Equally American, the only non-profit whose mission is to advance equality and the right to vote in the U.S. territories. I've also recently taught legal seminars on the law of U.S. territories at Yale Law School and Columbia Law School and have published scholarship on the Insular Cases in the *Yale Law Journal* and *Harvard Law Review*.

Equally American approaches our work through a civil rights lens and does not take a position on political status in the territories other than to support self-determination and decolonization. Through our impact litigation, we work to build the kind of broad awareness and consensus at both a national and local level needed to end the second-class treatment of U.S. citizens in the territories. I speak today on behalf of Equally American, not on behalf of any clients we represent.

Simply put, America has a colonies problem, and the reason is clear: a series of racist early 1900 Supreme Court decisions known as the Insular Cases. As a consequence of the Insular Cases, 3.5 million residents of U.S. territories are treated as second-class citizens and sometimes even denied citizenship itself. From a civil

rights perspective, the United States continues to deny residents of the territories the right to vote for President and voting representation in Congress even as Congress maintains the power to govern the territories unilaterally. From a human rights perspective, the United States has fallen far short of its commitment to self-determination, decolonization, and indigenous rights.

At the same time, citizens in the territories have higher military service rates than any state and contribute billions of dollars in Federal taxes every year, all while being denied equal participation in a broad range of Federal programs that other citizens simply take for granted. In short, the Insular Cases have laid the groundwork for what José Cabranes has called "colonialism as constitutional doctrine" or as former Congressman Dr. Robert Underwood recently said, the Insular Cases "encoded into the political DNA of the United States of America that colonies are OK." The Insular Cases have been criticized by both liberal and conservative legal scholars alike with prominent originalist scholar Michael Ramsey recently explaining that, "the Insular Cases are an abomination," something originalists and non-originalists should be able to agree on.

While the Supreme Court has acted to over-rule many of its appalling decisions like *Plessy v. Ferguson*, the Insular Cases remain not just on the books but continue to cause real harm. As Guam Attorney General Leevin Camacho recently said about the Insular Cases, "the harm is not hypothetical." Indeed, their legacy has meant a denial of SSI benefits, a lack of parity in Medicaid, veterans discrimination, all without a vote or say in Federal law. Nor would over-ruling the Insular Cases serve to impede self-determination or decolonization or result in the parade of horribles some of the witnesses today warn of.

If anything, turning the page on the Insular Cases is necessary if we are to have serious conversations about these issues. Last year, the Supreme Court questioned the continued validity of the Insular Cases, indicating the Insular Cases should not be further extended, yet this has not stopped the Insular Cases from continuing to be relied on by the United States in court filings.

In *Fitisemanu v. United States*, DOJ has relied on the Insular Cases to argue that unlike everywhere else on U.S. soil, there is no constitutional right to U.S. citizenship for people born in so-called unincorporated territories. In another recent case, *United States v. Baxter*, DOJ relied on the Insular Cases to limit the Fourth Amendment's protections against unreasonable search and seizure in certain territories. And of course, in *United States v. Vaello Madero*, recently taken up by the Supreme Court, the denial of SSI benefits is a clear legacy of the colonial framework established by the Insular Cases.

If history teaches us anything, simply waiting for the Supreme Court to reverse an injustice is not enough. That is why I commend the bipartisan co-sponsors of H. Res. 279 who call on the Insular Cases to be rejected in their entirety. I also applaud the work of this Committee to address many of the inequalities residents of the territories face through statutory means. The U.S. DOJ should also take a moment to reflect on its continued reliance on the Insular

Cases in cases involving the Constitution's application to residents of U.S. territories.

I will take it as a good sign that the Biden-Harris administration announced today it is nominating Chief Judge Gustavo Gelpi, a strong critic of the Insular Cases, to fill the vacancy left by the passing of Judge Juan Torruella, whose legacy fighting against the Insular Cases is an inspiration to all of us.

The people of the United States must ask ourselves: Who are we, and who do we want to be? Do we as a Nation accept or reject the colonial framework established by the Insular Cases, and what does that call upon us to do? Condemning the Insular Cases is an important start, if only a start. A century of colonialism as constitutional doctrine is enough. I ask that you support this resolution and look forward to your questions.

[The prepared statement of Mr. Weare follows:]

PREPARED STATEMENT OF NEIL WEARE, PRESIDENT AND FOUNDER, EQUALLY AMERICAN LEGAL DEFENSE & EDUCATION FUND

Chair Raúl M. Grijalva, Ranking Member Bruce Westerman, and distinguished committee members:

Thank you for the opportunity to testify in support of House Resolution 279 at this historic, first-ever congressional hearing focused on the *Insular Cases*.

I am Neil Weare, President and Founder of Equally American Legal Defense & Education Fund. Equally American is the only nonprofit focused on advancing equality and civil rights for the 3.5 million citizens living in U.S. territories. Building on the progress of earlier civil rights movements, we approach our work through a civil rights lens. We do not take a position on political status in the Territories, other than to reject the colonial status quo. Through our impact litigation, we work to build the kind of broad awareness and consensus at both a national and local level needed to end the second-class treatment of U.S. citizens in the Territories. I speak today on behalf of Equally American, not on behalf of any clients we represent.

America Has a Colonies Problem and it is Because of the *Insular Cases*

Simply put, America has a colonies problem. And the reason is clear: a series of racist early 1900s Supreme Court decisions known as the *Insular Cases* that invented a new legal doctrine designed to transform the United States from a Nation founded on the rejection of colonialism to one that embraced colonial expansion and perpetual colonial rule.

As a consequence, 3.5 million residents of U.S. territories—who not coincidentally are 98% ethnic or racial minorities—are treated as second-class citizens, and sometimes even denied citizenship itself. From a civil rights perspective, the United States continues to deny residents of the territories the right to vote for President and voting representation in Congress, even as Congress maintains the power to govern the territories unilaterally.[1] From a human rights perspective, the United States has fallen far short of its commitments to self-determination, decolonization, and indigenous rights.[2]

At the same time, the territories have higher military service rates than any state,[3] and contribute billions of dollars in federal taxes every year[4] while being denied equal participation in federal programs like Medicaid, Supplemental Security

[1] Stacey Plaskett, *The Second-Class Treatment of U.S. Territories is Un-American*, The Atlantic (March 11, 2021).

[2] Unrepresented Nations and Peoples Organization (UNPO), *CHamoru Self-Determination: Development, Democracy and Decolonization in Guam Amid a Military Build-Up*, UNPO.org (April 2021).

[3] See, e.g., Josh Hicks, *Guam: A High Concentration of Veterans, But Rock-Bottom VA Funding*, Washington Post (October 29, 2014).

[4] Alexia Ferńndez Campbell, *Puerto Rico Pays Taxes. The US Is Obligation To Help It Just As Much As Texas And Florida*, Vox.com (October 4, 2017).

Income (SSI), and Supplemental Nutrition Assistance Program (SNAP) that every other American takes for granted.[5]

However you look at it, U.S. territories can only be described as colonies of the United States.

If there is a but-for or proximate cause for the colonial relationship between the United States and its overseas territories—which has now existed for 123 years and counting—it is the *Insular Cases*. Following the acquisition of overseas territories in 1898, the Supreme Court's decisions in the *Insular Cases* broke from its prior precedent to establish a doctrine of territorial incorporation, creating for the first time a distinction between so-called "incorporated" territories "surely destined for statehood" and so-called "unincorporated" ones, where there was no such promise of eventual political equality.[6] Some commonly understand the *Insular Cases* to hold that the Constitution applies "in full" in incorporated territories, but only "in part" in unincorporated territories.[7]

The reason for the Supreme Court's doctrinal shift from a Constitution that only allowed temporary territories to one that embraced permanent colonies was clear: racial animus toward the people living in the overseas territories acquired following the Spanish-American War. Notably, the same justices who ruled in *Plessy v. Ferguson* to justify Jim Crow and racial segregation also decided the *Insular Cases*.[8] The *Insular Cases* and the doctrine of territorial incorporation not only ratified but constitutionalized the era's racism and racial hierarchies. In this way, the *Insular Cases* provided a constitutional license for the United States to have permanent colonies. Or as your former colleague, Dr. Robert Underwood, recently testified at a hearing in support of this resolution in Guam, the *Insular Cases* "encoded into the political DNA of the United States of America that colonies are OK."[9]

The most prominent of these cases, *Downes v. Bidwell*—a highly fractured 5-4 decision—laid the groundwork for what Judge José Cabranes has called "colonialism as constitutional doctrine."[10] In dissent, Chief Justice Melville Fuller rejected the idea that "Congress has the power to keep [an unincorporated territory], like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period" with such a territory being "absolutely subject to the will of Congress, irrespective of constitutional provisions."[11]

Modern critics of the *Insular Cases* include conservative legal luminaries like Professor Gary Lawson, co-founder of the Federalist Society,[12] and prominent liberal scholars like Sanford Levinson.[13] As originalist scholar Michael Ramsey has outlined, "the *Insular Cases* were an outrageous bit of non-originalism. The distinction between 'incorporated' and 'unincorporated' territories . . . has no basis in the Constitution's text or founding-era commentary."[14] In short, as Professor Ramsey recently explained, "[t]he *Insular Cases* are an abomination . . . something originalists and non-originalists should be able to agree on."[15]

While the Supreme Court has acted to overrule many of its most appalling decisions, the *Insular Cases* remain not just on the books, but continue to cause real harm.

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[5] Neil Weare, Rosa Hayes, and Mary Charlotte Carroll, *The Constitution, COVID-19, and Growing Health Disparities in U.S. Territories*, ACS Expert Forum (April 28, 2020); Hammond, Andrew, *Territorial Exceptionalism and the American Welfare State* (July 13, 2020). Michigan Law Review, Forthcoming.

[6] Neil C. Weare and Adriel I. Cepeda Derieux, *After Aurelius: What Future for the Insular Cases*?, 130 Yale L.J. (Nov. 2, 2020).

[7] *Boumediene v. Bush*, 553 U.S. 723, 757 (2008).

[8] Neil Weare, *Why the Insular Cases Must Become the Next Plessy*, Harv. L. Rev.: Blog (Mar. 28, 2018).

[9] Joe Taitano II, *Resolution Rejecting U.S. Supreme Court Insular Cases Heard*, Pacific Daily News (May 5, 2021).

[10] *Downes v. Bidwell*, 182 U.S. 244, 282–83 (1901).

[11] *Id*. at 372 (Fuller, J., dissenting).

[12] Gary Lawson and Guy Seidman, The Constitution of Empire: Territorial Expansion & American Legal History (2004).

[13] Sanford Levinson, *Why the Canon Should Be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 Const. Comment. 241 (2000).

[14] Michael Ramsey, *The Supreme Court, FOMB v. Aurelius Investment, and the Insular Cases*, The Originalism Blog (October 16, 2017).

[15] Michael Ramsey, *The Supreme Court, FOMB v. Aurelius Investment, and the Insular Cases*, The Originalism Blog (June 4, 2020).

Harm of *Insular Cases* "Not Hypothetical"

As Guam Attorney General Leevin Camacho recently said about the *Insular Cases*, "the harm is not hypothetical."[16] Indeed, the *Insular Cases* and the colonial framework they established should be viewed as kitchen table issues, not simply abstract matters of principle.

Deprived of any voting power in the federal government, it is perhaps not surprising residents of the Territories are short-changed in a range of federal benefits programs that most Americans take for granted. Disparities in federal Medicaid policy leave citizens in the Territories without the funding that ensures a basic level of healthcare sustainability to most American communities.[17] Throughout the country, Medicaid enables providers to care for low-income Americans and to invest in equipment, infrastructure, and health-worker salaries. Congress allocates Medicaid funds to Territories at the lower rates comparable to the wealthiest states, like California, rather than the higher rates associated with states with similarly low per capita incomes. Congress also caps Territories' funds at an arbitrary dollar amount that falls well below actual need.[18] Although Congress increased Medicaid funding to all Territories in response to Hurricanes Irma and Maria, without further action by Congress this funding bump will expire later this year—setting the stage for a Medicaid cliff that has life or death consequences for residents of the Territories.[19]

Another example of how political inequality in the Territories leads to benefits discrimination is the SSI program. Under federal law, otherwise eligible low-income aged, blind, or disabled Americans living in most U.S. territories are entirely precluded from receiving SSI benefits solely based on where they happen to live. So, for example, if someone receiving SSI benefits moves from Arizona or Arkansas to Guam or Puerto Rico, their benefits will end even as their very real needs continue. This discriminatory treatment unjustly disqualifies some of America's most vulnerable citizens from accessing the basic benefits they need and deserve. The constitutionality of denying SSI benefits to residents of the Territories will soon be tested by the Supreme Court in *United States v. Vaello Madero*.[20]

Military service members from the Territories are not insulated from this discrimination. Over 100,000 veterans living in the Territories have served to defend our Nation's democratic and constitutional principles. Yet they remain disenfranchised simply because of where they live. More than 20,000 veterans from the Territories served in Iraq and Afghanistan, with nearly 100 making the ultimate sacrifice. Equality should not be denied these patriotic citizens, or the communities in which they live.

At bottom, the colonial framework established by the *Insular Cases* means vital decisions are being made for the people of the Territories in the absence of the usual democratic checks and balances. The grim reality is that until this democratic deficit is resolved, literal life and death decisions will continue to be made for citizens in the territories without their input, something that cannot be squared with the American principle of the consent of the governed.

Now is the Time to Turn the Page on the *Insular Cases*

Last year in *Aurelius v. FOMB*, the Supreme Court questioned the "continued validity" of the *Insular Cases*, indicating that "the *Insular Cases* should not be further extended".[21] In this way, the Supreme Court continued the trend of narrowing and cabining the *Insular Cases*, although it stopped short of overruling them, noting the issue wasn't squarely presented.[22] This has not stopped the *Insular Cases* from continuing to be relied upon to cause harm to residents of U.S. territories.

In *Fitisemanu v. United States*, currently pending before the Tenth Circuit Court of Appeals, the United States has relied on the *Insular Cases* to argue that—unlike everywhere else on U.S. soil—there is no constitutional right to U.S. citizenship for people born in so-called "unincorporated" territories. Leaders from Puerto Rico,

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[16] Office of the Attorney General of Guam, Twitter (May 5, 2021).

[17] Selena Simmons-Duffin, *America's 'Shame': Medicaid Funding Slashed In U.S. Territories*, NPR.org (November 20, 2019).

[18] Lena O'Rourke, *Congress is Holding Health, Wellbeing of U.S. Territory Residents in the Balance*, CLASP.org (December 19, 2019).

[19] Javier Balmaceda, *Territories' Looming Medicaid "Cliff" Highlights Need for Full, Permanent Funding*, CBPP.org (March 16, 2021).

[20] 956 F.3d 12 (1st Cir. 2020).

[21] *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv.*, 140 S.Ct. 1649, 1665 (2020).

[22] Neil Weare, Kyla Eastling, and Danny Li, *The Supreme Court Just Passed Up a Chance to Overrule Appallingly Racist Precedents*, Slate.com (June 1, 2020).

Guam, the U.S. Virgin Islands, and the Northern Mariana Islands have challenged[23] the United States view that under the *Insular Cases* Congress has the power to unilaterally recognize—*or revoke*—citizenship for people born in *all* overseas territories. Meanwhile, American Samoan officials have embraced the U.S. view that citizenship in the territories is a congressional privilege, not a constitutional right.[24] A district court in Utah rejected this view, holding that people born in overseas territories have a constitutional right to U.S. citizenship that Congress has no power to deny.[25] The Supreme Court may soon be called on to resolve these questions.

In another recent case, *United States v. Baxter*, the U.S. relied on the *Insular Cases* to successfully argue before the U.S. Court of Appeals for the Third Circuit that the *Insular Cases* allow for a territories-only exception to the Fourth Amendment that permits incoming mail from other parts of the United States to be searched without a warrant or even probable cause—something that would be patently unconstitutional anywhere else in the United States.[26] The Supreme Court denied review of the case, leaving the Fourth Amendment right against unreasonable search and seizure uncertain in the territories.

Even where the *Insular Cases* are not directly invoked by the United States, their legacy continues to create uncertainty and cause harm. In *United States v. Vaello Madero*—recently taken up by the Supreme Court—the United States has disclaimed any express reliance on the *Insular Cases* while nonetheless still arguing that Congress can deny SSI benefits to otherwise eligible low-income aged, blind, or disabled citizens living in the Virgin Islands, Puerto Rico, Guam, and American Samoa based solely on the fact that they live in a territory. Lower courts unanimously struck down this statutory discrimination as an unconstitutional denial of equal protection.[27] Whatever doctrinal impact the *Insular Cases* may have before the Supreme Court in this case, the fact that this kind of discrimination continues to exist at all is a clear legacy of the colonial framework established by the *Insular Cases*.

If history teaches us anything, simply waiting for the Supreme Court to reverse an injustice is not enough. I commend House Resources Chair Raúl Grijalva and the bipartisan co-sponsors of H. Res. 279 who call on the *Insular Cases* to be "rejected in their entirety" as decisions that have "no place in United States Constitutional law."[28] Members of Congress of all political and ideological stripes should reject the *Insular Cases* attempt to steamroll the Constitution's limitations on congressional power over people in the Territories. As the Supreme Court ruled in *Boumediene v. Bush*, "The Constitution grants Congress . . . the power to acquire, dispose of, and govern territory, not the power to decide when and where [the Constitution's] terms apply."[29]

The U.S. Department of Justice should also take a moment to reflect on its continued reliance on the *Insular Cases* in cases involving the Constitution's application to residents of U.S. territories. President Joe Biden and Vice President Kamala Harris have made a commitment to equality, racial justice, and the rule of law a centerpiece of their Administration. Each of these principles stands in stark contrast to the *Insular Cases*, which is why the Biden-Harris DOJ should immediately stop relying on the *Insular Cases* in any pending or future cases.

A century of colonialism as constitutional doctrine is enough.

Conclusion

The people of the United States must ask ourselves: who are we and who do we want to be? Do we as a Nation accept or reject the colonial framework established by the *Insular Cases*? And what does that call upon us to do regarding our relationship with citizens in U.S. territories? Condemning the *Insular Cases* is an important start, if only a start.

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[23] Brief Of Amici Curiae Members Of Congress, Former Members Of Congress, And Former Governors Of Guam, The Northern Mariana Islands, Puerto Rico, And The U.S. Virgin Islands, *Fitisemanu v. United States* (Tenth Circuit, filed May 12, 2020).

[24] Intervenor Defendants-Appellants' Opening Brief, *Fitisemanu v. United States* (Tenth Circuit, filed April 14, 2020).

[25] *Fitisemanu v. United States*, 426 F. Supp 3d. 1155 (D. Utah 2019).

[26] *United States v. Baxter*, 951 F.3d 128 (3d Cir. 2020).

[27] *United States v. Vaello Madero*, 956 F.3d 12 (1st Cir. 2020), affirming 356 F.Supp. 3d 208 (D.PR 2019).

[28] U.S. House of Representatives Committee on Natural Resources, *Chair Grijalva, Territorial Delegates Introduce Bipartisan Resolution Rejecting Insular Cases as Racist and Contrary to the Constitution,* Naturalresources.house.gov (March 29, 2021).

[29] *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (emphasis added).

The continuing colonial framework established by the *Insular Cases* is particularly concerning because of the undeniable connection it has to racial discrimination. When America's overseas Territories were initially acquired, Members of Congress and others were explicit that they viewed the race of the inhabitants of these areas to disqualify them from ever being able to participate in the U.S. Government as equals. While such sentiments are no longer openly stated, it cannot be a mere coincidence that more than 98 percent of territorial residents are racial or ethnic minorities.[30]

We cannot erase this tragic history—nor should we permit ourselves to forget it. But it need not be our future.

We urge the House to adopt H. Res 279 to condemn the *Insular Cases* and reject both their infidelity to the Constitution and the racial discrimination they are grounded in.

It is the right thing to do, the moral thing to do, and it is long overdue.

QUESTIONS SUBMITTED FOR THE RECORD TO MR. NEIL WEARE, PRESIDENT, EQUALLY AMERICAN

Questions Submitted by Representative Sablan

Question 1. Although the authority to overturn the Insular Cases lies with the Supreme Court, how may Congress and the Administration intervene to help resolve the issues discussed in this hearing?

Answer. The Supreme Court has to date hesitated to act on calls for it to overrule the *Insular Cases*. So while the responsibility and authority to overrule the *Insular Cases* rests with the Supreme Court, Congress and the executive branch can play an important role in signaling that the Court should take clear and decisive action to turn the page once and for all on the *Insular Cases* and the colonial framework they established. At the same time, the political branches should act immediately to address ongoing discrimination against residents of U.S. territories that are a legacy of the *Insular Cases*. In this way, all three branches have an important role to play in ensuring that every U.S. citizen enjoys equal rights, wherever they live.

In 2019, Equally American led efforts in *Financial Oversight and Management Board v. Aurelius Investment, LLC*, to call on the Supreme Court to finally overrule the *Insular Cases*.[1] At oral argument in *Aurelius*, Attorney Jessica Méndez-Colberg expressly called on the Supreme Court to overrule the *Insular Cases*, an historic first.[2] Unfortunately, the Supreme Court did not take up this call to action.[3] But the Supreme Court was not silent either. Building on prior precedent, it made clear that the "much-criticized" *Insular Cases* "should not be further extended."[4] The Court spoke in undeniably questioning terms on the *Insular Cases*' perdurance, noting that "whatever their continued validity" it would not expand on their framework, despite such an invitation from at least one party in the case.[5] The Supreme Court's skepticism toward the *Insular Cases* suggests it is open to reconsidering them when a case more squarely presents the opportunity to do so.[6]

The Supreme Court will have another opportunity soon to weigh in on the *Insular Cases* in *United States v. Vaello Madero*, a case that considers whether discrimination against residents of U.S. territories in the Supplemental Security Income

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[30] Stacey Plaskett, *The Left and Right's Blind Spot in Systemic Racism: The US Colonies*, The Grio (June 24, 2020).

[1] *See, e.g.*, Brief For Amicus Curiae Equally American Legal Defense And Education Fund In Support Of Neither Party; Brief Amici Curiae Of The American Civil Liberties Union And The ACLU Of Puerto Rico, Supporting The First Circuit's Ruling On The Appointments Clause Issue; Brief Of Amicus Curiae Virgin Islands Bar Association Supporting The Ruling On The Appointments Clause; Brief For Amici Curiae Scholars Of Constitutional Law And Legal History Supporting The First Circuit's Ruling On The Appointments Clause Issue; Brief Of Former Federal And Local Judges As Amici Curiae Supporting The First Circuit's Ruling On The Appointments Clause.

[2] Transcript of Oral Argument, October 15, 2019.

[3] Kyla Eastling, Danny Li, and Neil Weare, *The Supreme Court Just Passed Up a Chance to Overrule Appallingly Racist Precedents*, Slate.com, June 1, 2020.

[4] 140 S.Ct. 1649, 1665 (2020) (quoting Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion)).

[5] *Id*.

[6] Adriel Cepeda-Derieux and Neil Weare, *After Aurelius: What Future for the Insular Cases*? 130 Yale L.J.F. 284 (2020).

program violates the Constitution's guarantee of Equal Protection.[7] It may also have the opportunity soon in *Fitisemanu v. United States*, a case brought by Equally American which challenges the Federal Government's position that citizenship in U.S. territories is a mere privilege to be determined unilaterally by Congress, rather than a right guaranteed by the Constitution.[8]

All this attention before the Supreme Court makes it critical that Congress and the executive branch weigh in on whether the racist *Insular Cases* should continue to be the governing legal framework for the 3.5 million residents of U.S. territories—more than 95% of whom are racial or ethnic minorities. H. Res. 279 is important because it puts the other branches on notice that the House of Representatives rejects any continued reliance on the *Insular Cases* and their doctrine of territorial incorporation. This is significant, in part, because the *Insular Cases* stand as a kind of super-deference toward Congress when it acts to govern the territories. But the Constitution already provides Congress extremely broad powers over the territories through the Territories Clause,[9] so it does not need any of the extra-constitutional powers the *Insular Cases* purport to provide. As the U.S. Department of Justice continues to develop its approach to litigation involving U.S. territories, H. Res. 279 may also shape whether and how it will rely on the *Insular Cases* moving forward. The U.S. Department of Justice has taken steps before to reject continued adherence to constitutional frameworks that rest on racist or bigoted foundations, such as the Japanese-American internment case *Korematsu v. United States*,[10] so reversing course on the *Insular Cases* would not be unprecedented and is in fact long overdue.

But even as the *Insular Cases* come up for reconsideration before the Supreme Court, Congress and the executive branch should prioritize statutory solutions to fix what the late Judge Juan Torruella called the *Insular Cases*' legacy of "separate and unequal" treatment. For example, H.R. 1, the For the People Act, includes provisions to increase voting rights, justice and democracy in the U.S. territories. S. 1228, the Territorial Equity Act of 2021, provides equitable treatment for the territories in a range of federal programs. H.R. 265, the Insular Area Medicaid Parity Act, eliminates Medicaid funding limitations for U.S. territories beginning in FY2021. H.R. 1722, the Puerto Rico Health Care Fairness, Accountability, and Beneficiary Access Act of 2021, amends titles XI and XIX of the Social Security Act to stabilize the Medicaid program in Puerto Rico. H.R. 537, the Supplemental Security Income Equality Act, seeks to extend the SSI program to Puerto Rico, the U.S. Virgin Islands, Guam, and American Samoa. H.R. 1773, the Northern Marianas Family Assistance Act, seeks to make the Commonwealth of the Northern Mariana Islands eligible to operate TANF programs. H.R. 3434 amends Title XVIII and XIX of the Social Security Act to make improvements to the treatment of U.S. territories under the Medicare and Medicaid programs. The Biden-Harris Administration has committed to supporting a number of these critical legislative solutions,[11] which could have an immediate impact on residents of U.S. territories regardless what action is taken by the Supreme Court.

The time for all three branches of the Federal Government to act to dismantle the legacy of the *Insular Cases* is now. In 2021, no one should be discriminated against based solely on what Zip Code they happen to live in.

Mr. SABLAN. Thank you very much, Mr. Weare. Right on time.

I now recognize Professor Rose Cuison-Villazor. You have 5 minutes, Professor.

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[7] Neil Weare, Rosa Hayes, and Mary Charlotte Carroll, *The Constitution, COVID-19, and Growing Healthcare Disparities in U.S. Territories*, Expert Forum, ACSlaw.org, April 28, 2020.

[8] Mark Joseph Stern, *Federal Judge Rules American Samoans are U.S. Citizens by Birth. Finally*. Slate.com, December 12, 2019.

[9] U.S. Const. art. IV, § 3., Cl. 2.

[10] *See, e.g.*, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, February 23, 2011; Confession Of Error: The Solicitor General's Mistakes During The Japanese-American Internment Cases, May 20, 2011.

[11] *See, e.g.*, The Biden-Harris Plan For Recovery, Renewal And Respect For Puerto Rico.

STATEMENT OF PROFESSOR ROSE CUISON-VILLAZOR, VICE DEAN AND PROFESSOR OF LAW, RUTGERS UNIVERSITY, NEW YORK, NEW YORK

Dr. CUISON-VILLAZOR. Good afternoon, Distinguished Chair, Congressman Sablan, and distinguished Members and witnesses. My name is Rose Cruz Cuison-Villazor. I am Vice Dean and Professor of Law at Rutgers Law School in New Jersey. Thank you for the opportunity to provide oral testimony on the Insular Cases. I request that my written testimony be entered into the record.

As you may know, I am a legal scholar whose work has focused on immigration, citizenship, critical race theory, and Asian Americans and Pacific Islanders and the law. I have written articles on the Insular Cases that have been published in the *Harvard Law Review* and *California Law Review*. I have included links to those articles in my submitted written testimony.

On a personal level, I was born in the Philippines and grew up on the island of Saipan in the Commonwealth of the Northern Mariana Islands. I therefore also have a personal connection to issues that involve people in the U.S. territories. Today, I offer my qualified support for House Resolution 279. There are three reasons why my support is qualified.

First, I support denouncing the Insular Cases for their racist origins and racist subordination of people in the U.S. territories that rendered millions of people second-class citizens.

Second, I recognize that the Insular Cases have led to unequal application of U.S. constitutional principles in the U.S. territories and that unequal application of the U.S. Constitution has ongoing harms today.

Having said the above, allow me to explain my third point which addresses why my support for House Resolution 279 is qualified. Despite the racist origins of the Insular Cases, it is important to recognize that these cases may be seen in a different light when viewed from the perspective of individuals who negotiated the political agreement known as a "Covenant" that established the Commonwealth of the Northern Mariana Islands in political union with the United States.

In particular, the Covenant provided that because of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic advancement and self-sufficiency, only persons of Northern Marianas descent may own permanent and long-term interests in real property in the CNMI.

As originally written, Article XII of the CNMI Constitution defined persons of Northern Marianas descent as a U.S. citizen or U.S. national who has at least one-quarter of Northern Marianas Chamorro or Northern Marianas Carolinian blood. Article XII has since been amended so that now persons of Northern Marianas descent refers to a U.S. citizen or U.S. national who has at least some degree of Northern Marianas Chamorro or Northern Marianas Carolinian blood. Notably, because Article XII restricts land ownership in the CNMI based on bloodline it would no doubt be categorized as a racial classification and thereby open to being challenged under the 14th Amendment's Equal Protection Clause.

Under conventional equal protection analysis, race-based laws are subjected, and rightly so, to the most rigorous and exacting constitutional standard of strict scrutiny, which provides that for the law to survive it must have a compelling government interest and that the means employed is narrowly tailored to achieve that compelling government interest. Crucially, laws that are viewed as racially discriminatory are generally struck down.

Article XII faced such an equal protection challenge in the 1980s and 1990s but survived. In *Wabol v. Villacrusis*, the U.S. Court of Appeals of the Ninth Circuit chose not to use traditional equal protection analysis but instead relied on the Insular Cases to uphold Article XII's constitutionality. It should be noted that when it was then challenged, Article XII had the narrower and arguably non-racial version of Article XII.

As I have explained in my articles, if Article XII were challenged today, a court would most likely use equal protection analysis instead of relying on the Insular Cases, and it would likely strike it down because it is race based. The most recent Supreme Court case that would support this conclusion is *Rice v. Cayetano* in which the Supreme Court struck down the blood quantum preference for Native Hawaiians as violative of the 15th Amendment.

My goal for today was to simply prompt a discussion on the limits of equal protection analysis and my concern that the law is ill equipped to address the unique laws that are designed to promote the political and cultural rights of the people of Northern Marianas descent.

Thank you very much for the opportunity to offer my testimony today.

[The prepared statement of Ms. Cuison-Villazor follows:]

PREPARED STATEMENT OF PROFESSOR ROSE CUISON-VILLAZOR, RUTGERS LAW SCHOOL

My name is Rose Cruz Cuison-Villazor. I am Vice Dean and Professor of Law at Rutgers Law School in New Jersey.

Thank you for inviting me to provide testimony on the *Insular Cases* and territorial incorporation doctrine.

As you may know, I am a legal scholar whose work has focused on immigration, citizenship, critical race theory, Asian Americans and the Law and Pacific Islanders and the Law. In my work on Pacific Islanders and the Law, I have written about the *Insular Cases*, which have been published in various journals, including the *California Law Review*, *Harvard Law Review Forum*, and *Southern California Law Review*. My remarks today are based on articles published in those journals and I include links to those articles at the end of my written testimony.

On a personal level, I was born in the Philippines and grew up on the island of Saipan in the Commonwealth of the Northern Mariana Islands (CNMI). I therefore also have a personal connection to issues that involve people in the U.S. territories.

Today, I offer my qualified support for House Resolution 279, which acknowledges "that the U.S. Supreme Court's decisions in the *Insular Cases* and the "territorial incorporation doctrine" are contrary to the text and history of the U.S. Constitution, rest on racial views and stereotypes from the era of *Plessy v. Ferguson* that have long been rejected, are contrary to the Nation's most basic constitutional principles, and should be rejected as having no place in U.S. constitutional law."

There are three reasons why my support for House Resolution 279, is qualified.

First, I support denouncing the *Insular Cases*' for their racist origins and racial subordination of people in the U.S. territories. The words from the most well-known of the *Insular Cases*, *Downes v. Bidwell*,[1] evidence racism when Justice Brown wrote that the territories were, "inhabited by alien races, differing from us in

[1] 182 U.S. 244 (1901).

religion, customs, and . . . modes of thought," which made it impossible for the United States to govern them "according to Anglo-Saxon principles." Another Supreme Court jurist, Justice White, referred to the millions of people in the U.S. territories as "uncivilized" and "unfit" for citizenship. In light of the country's current reckoning with historical, structural and ongoing racism, it is important to acknowledge how these racist and hurtful words racialized U.S. territorial peoples as inferior and rendered them second-class citizens.

Second, I recognize that the *Insular Cases* have led to unequal application of U.S. constitutional principles in the U.S. territories, which has led to the denial of constitutional rights in the territories. Understanding and amplifying this relatively unknown and complex history is crucial for recognizing the unique harms that people in the U.S. territories have experienced since the 1900s and that these harms are ongoing.[2]

Having said the above, allow me to explain my third point, which addresses why my support for House Resolution 279 is qualified. Despite the racist origins of the *Insular Cases*, it is important to recognize that these cases may be seen in a different light when viewed from the perspective of individuals who negotiated the political agreement known as the "Covenant" that established the commonwealth of the Northern Mariana Islands in political union with the United States.[3] In particular, the Covenant provided that because of the "importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands" and "in order to protect them against exploitation and to promote their economic advancement and self-sufficiency," only "persons of Northern Marianas descent" may own "permanent and long-term interests in real property" in the CNMI.[4] As originally written, Article XII of the CNMI Constitution defined "persons of Northern Marianas descent" as a U.S. citizen or U.S. national who is at least "one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian."[5] For purpose of determining Northern Marianas descent, Article XII defines such person as "full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands."[6] As originally written, Article XII was narrow in scope and did not include all Chamorros or Carolinians in what became the CNMI.

Article XII has since been amended so that now "persons of Northern Marianas descent" refers to a U.S. citizen or U.S. national "who has at least some degree of Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof."[7] Notably, because Article XII restricts landownership in the CNMI based on bloodline, it would no doubt be categorized as a racial classification and thereby open to being challenged under the Fourteenth Amendment's Equal Protection Clause. Under conventional equal protection analysis, race-based laws are subjected to the most rigorous and exacting constitutional standard of strict scrutiny, which provides that for the law to survive, it must have a compelling government interest and that the means employed is narrowly tailored to achieve that compelling government interest. Crucially, laws that are viewed as racially discriminatory are generally struck down.[8]

Article XII faced such an equal protection challenge in the 1980s but survived. In *Wabol v. Villacrusis*,[9] the U.S. Court of Appeals for the Ninth Circuit chose not to use traditional equal protection analysis but instead relied on the *Insular Cases* to uphold Article XII's constitutionality.[10] It should be noted that what was then challenged was the narrower and arguably non-racial version of Article XII. I

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[2] For example, in multiple cases in which Filipinos argued that they were entitled to birthright citizenship because they were born in the Philippines when the islands were subject to the jurisdiction of the United States, several appellate courts relied on the *Insular Cases* to hold that the Citizenship Clause did not apply in the Philippines. The non-recognition of citizenship had concrete and negative consequences, including deportation of Filipinos from the United States and inability to pass down citizenship to family members. *See* Friend v. Reno, 172 F.3d 638 (9th Cir. 1999); Valmonte v. Immigration & Naturalization Serv., 136 F.3d 914, 920 (2d Cir. 1998); Lacap v. Immigration & Naturalization Serv., 138 F.3d 518 (3d Cir. 1998); Rabang v. Immigration & Naturalization Serv., 35 F.3d 1449 (9th Cir. 1994).

[3] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. LO. No. 94-241, 90 Stat. 263 (1976).

[4] *See id.* at § 805.

[5] N. Mar. I. Const. art. XII, § 4.

[6] *Id.*

[7] *Id.*

[8] *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

[9] 958 F.2d 1450 (9th Cir. 1990).

[10] *See id.* at 1459.

discuss in detail the Ninth Circuit's analysis in *Wabol* in my *California Law Review*, and in the interest of time, I will not revisit the court's analysis today.[11]

But as I explain in that article and subsequent writing, if Article XII were to be challenged again today, and a court were to use equal protection analysis instead of relying on the *Insular Cases*, it would likely strike it down because it is race-based. As I explain in that article, equal protection jurisprudence today classifies blood quantum land laws along a political versus racial binary. Significantly, under this binary, courts have upheld laws that protect federally recognized tribes as non-racial, political laws. By contrast, groups that are not federally recognized tribes have seen their laws struck down as racially discriminatory. The most recent Supreme Court case that demonstrates the juxtaposition of race versus political laws with respect to indigenous peoples is *Rice v. Cayetano*, in which the Supreme Court struck down a blood quantum preference for Native Hawaiians as violative of the Fifteenth Amendment.[12]

My goal for today is to prompt a discussion on the limits of equal protection analysis and my concern that the law is ill-equipped to address unique laws that are designed to promote the political and cultural rights of the people of Northern Marianas descent. While Congress would be correct in condemning the *Insular Cases* for their racism, it should also be mindful that the alternative here—equal protection law—might also not be as helpful in protecting the rights of certain indigenous peoples.

In case the Committee finds it helpful, I include below links and brief summaries to my articles that expand on my remarks.

- *Problematizing the Protection of Culture in the Insular Cases*, 131 Harv. L. Rev. F. 127 (2018), https://harvardlawreview.org/2018/04/problematizing-the-protection-of-culture-and-the-insular-cases/.
  - o Explains the need for equal protection law to make room and recognize as valid cultural claims by indigenous peoples that do not belong to federally recognized tribes.
  - o Points out that claims to culture must also recognize that culture is dynamic and changes over time.
- *Reading Between the (Blood) Lines*, 83 S. Cal. L. Rev. 473 (2010), https://southerncalifornialawreview.com/wp-content/uploads/2018/01/83_473.pdf.
  - o Argues that the original Article XII of the CNMI Constitution furthered a political and non-racial purpose.
- *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 Cal. L. Rev. 801 (2008), https://cslc.law.columbia.edu/sites/default/files/content/docs/Villazor-Blood-Quantum-and-Equal-Protection.pdf.
  - o Examines the framing of equal protection law along a racial versus political binary such that laws that protect federally recognized American Indian tribes are viewed as "political" in nature and laws that address the rights of non-American Indian indigenous groups as racially based and subject to a higher level of constitutional inquiry.

Thank you for this opportunity and honor to share my views with you.

Mr. SABLAN. Thank you. One of the best times kept so far.

And now finally Dr. Peter Watson. Dr. Watson, you have 5 minutes.

[11] *See* Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 Cal. L. Rev. 801 (2008).

[12] *See* 528 U.S. 495 (2000).

STATEMENT OF DR. PETER S. WATSON, PRESIDENT & CEO, THE DWIGHT GROUP, LLC, FORMER WHITE HOUSE DIRECTOR OF ASIAN AFFAIRS, NATIONAL SECURITY COUNCIL, WASHINGTON, DC

Dr. WATSON. Thank you very much for the opportunity of being here today, Mr. Chairman and members of the Committee. By way of background, I was actually born like others not in the United States. I am a first generation immigrant here. My background is from a working class immigrant community in New Zealand where I first came to appreciate the sensitivities of immigrants from all around the world which led me to representation of peoples before, for example, the United Nations Trusteeship Council where I appeared twice before the decolonization and self-determination hearings in the 1980s and on behalf of the Pacific Islands Association, and therefore my frame of reference as you might imagine is first and foremost the protection and advancement of the most deep and sovereign rights of self-determination.

And that is obviously at core, at least what I perceive we are seeking to do today, taking into consideration as we all can and should do the racist and abhorrent language that was used in many cases, not just in the Insular Cases but I'm going to reference others that actually cite the Insular Cases.

So, at core today, what we are doing is to urge protection first and foremost for the self-determination and rights of sovereign-owned peoples whose rights are freely given to them not by the government but by God, and indeed, of course, the rights are not granted to them by government at all. And, accordingly, further to my written statement, I would like to just reference some observations that I have on the resolution as written.

What is immediately evident through even non-lawyers is when you look at the resolution there is no offered definition of what is considered to be Insular Cases. People think they know what that means, but jurists indeed cite from up to 16 rulings of the U.S. Supreme Court in that line of decisions.

And accordingly, the use of the term "Insular Cases" in resolving Clause 4 of the Resolution has no effective juridical mention. The resolution naturally, therefore, is a nullity without identifying the specific laws of each ruling that it seeks to, in fact, overturn or to nullify and how that each element they seek to do so is unconstitutional, and that clearly is the only way that courts can subsequently discern which way or the rationale for how it is that the Congress determined which was indeed unconstitutional law, bad law, or indeed good law remaining.

Actually, limiting the resolution's Part IV purge to jurisprudence of the Insular Cases, if you could do it, which I've just referenced it is very difficult, raises the really problematic question of how to treat other cases which reference or cite the Insular Cases, which includes the *Fitisemanu* case where, as we know, the Court and plaintiff lawyers rely on the 1880 case of *United States v. Wong Kim Ark* which cites the *Dred Scott* case and favorably quotes the Court's own racist epithets directed at Mexicans and Chinese in the earlier *Slaughterhouse Cases*. So, if *Wong Kim Ark* is not purged from the *Fitisemanu* case, then Resolution 279 will only be selectively anti-racist.

Under House Resolution 279 as proposed, there is material doubt about how the courts will play the role of judicial review assigned by the Constitution if both sides of the argument on the Insular Cases that have been relied upon by Congress and the courts for 120 years cannot be openly and fully deliberated in pending and future litigation on application of the Constitution in the territories.

And of gravest concern, House Resolution 279, in fact, could be interpreted as an invitation for the courts to repeal the Insular Cases without giving any rights to sovereign people exercising their self-determination.

Thank you.

[The prepared statement of Mr. Watson follows:]

PREPARED STATEMENT OF DR. PETER S. WATSON

Mr. Chairman, allow me to thank you and the Committee members for this oversight hearing to consider America's commitment to self-determination in our nation's territories, necessarily doing so in the context of today's appreciation of the needs for racial justice.

This witness has grappled with the Insular Cases in federal court litigation, representation of the Marshall Islands on political status affairs, and twice in testimony for the Pacific Islands Association on territorial self-determination before the United Nations.

In the American system of constitutional federalism, the traditional remedies for anti-democratic, discriminatory, unjust or otherwise aggrieved outcomes under federal law are well understood. For a number of years, this witness exercised quasi-judicial powers when a member of the Congressionally established/mandated International Trade Commission, our decisions thereof being subject to judicial review, including up to the Supreme Court—which indeed has overturned the same.

This witness accordingly has first-hand experience, and no minor ego-bruising, arising from dueling between the congressional and judicial branches, in the process testing their respective constitutional roles and limits, including relative to each other: And, in no small part, it is this personal frame of reference that I place over the proposed resolution to discern how it fits relative to federal court jurisdiction, and vice-versa.

In brief: H. Res. 279 exemplifies circumstances in which Congress would seek to exercise its powers to redress grievances arising from a statute and/or the Constitution, but not by enactment of a corrective remedial statute under Art. I, which, in the case of territories, is also an exercise of the Article IV, Sec 3, Clause 2 territorial power. Nor does H. Res 279 propose where otherwise necessary a corrective remedial amendment to the Constitution under Article V.

Thus, H. Res. 279 is in lieu of a statute that would extend SSI or Medicare/Medicaid in the territories on the same basis as the states. Likewise, H. Res. 279 is in lieu of a statute repealing all federal laws since 1901 ratifying or based on the Insular Cases unincorporated territory doctrine.

Moreover, nor is H. Res. 279 a proposed Art. V amendment to extend to Americans in the territories federal voting rights for full and equal representation in Congress and the Electoral College.

Instead, H.R. 279 would seek by an act of Congress to restrain or even restrict the President and the courts from relying upon the Insular Cases, which currently are controlling federal court decisional law, jurisprudence which is legally authoritative. That is to say, the supreme law of the land.

Some commentators refer to a proposal like H. Res. 279 as a Congressional override of court made law. But court rulings overridden by Congress generally involve court orders interpreting an act of Congress where the statute, and/or the court interpretation of it, is flawed.

H. Res. 279 is not that: One reason is that H. Res. 279 must be understood as a Congressional endorsement of the remedies sought by plaintiffs in the *Vaello Madero*, *Peña Martínez*, and *Schaller* cases challenging the Insular Cases. That linkage is confirmed by that March 10, 2021 letter from leadership and members of this Committee asking the Attorney General to abandon Insular Cases defense in those cases.

However, as a proposed Congressional override, H. Res. 279 is not aimed at a flaw in the SSI statute as it applies in the states: it is aimed at the constitutionality of

the Insular Cases unincorporated territory doctrine as court made law allowing Congress to apply federal statutes to non-incorporated territories differently than in states.

As such, H. Res. 279 would seek to deprive the President and federal courts of reliance on the Insular Cases as applicable under the rule of law as it existed when those three lawsuits began. The result would be that those three plaintiffs likely would prevail.

But that would be in the nature of a statutory remedy for a statutory injury. There is another case in the federal appellate process, Fitisemanu v. U.S., that is a constitutional claim that national citizenship half of the national and state citizenship clause in Section 1 of the 14th Amendment applies in American Samoa as it applies in the states of the union and territories joined permanently in union with the United States.

In the Northwest Ordinance tradition and under the Insular Cases permanent union means incorporation and equality under the Constitution, except that full equality still comes only with voting rights that come only with statehood.

Accordingly, if H. Res. 279 is adopted and has its expressly stated impact, and the U.S. Justice Department abandons an Insular Cases defense—leading to a ruling upholding the trial court decision extending the 14th Amendment to all five current territories—here is what that might mean:

- All current unincorporated territories permanently incorporated into union without self-determination or statutory action by elected representatives.
- Uniformity clause taxation, equal protection, due process, all federal law applies as in states and incorporated territories.
- Guam, U.S. Virgin Islands, American Samoa join Puerto Rico, CNMI removal from U.N. list of non-self-governing territories with right of independence.

In close, most fundamentally of all, the immediately preceding scenario could leave territories in a judicially determined status which would not secure a congressional commitment to full equality through statehood, nor, in the alternative, independent nationhood, based on democratic self-determination—obviously the very basis upon which our founding constitutional fabric was founded.

Mr. SABLAN. Thank you, Dr. Watson.

I want to thank all of the witnesses for their testimony. Next, we will go to questions. Committee Rule 3(d) imposes a 5-minute limit on questions. The Chair will now recognize Members for any questions that they may wish to ask. I am going to start with my questions.

In my opening statement, I said I am concerned that *Wabol v. Villacrusis*, in which the Ninth Circuit uses the Insular Cases to uphold Article XII of the Commonwealth of the Northern Marianas Constitution and the restriction of land ownership to persons of Northern Marianas descent might have a completely different outcome today, 30 years later.

In that time, the Federal court has said Northern Marianas descent is a race-based classification, and now Supreme Court Justice Brett Kavanaugh wrote an amicus brief challenging race-based voting in *Rice v. Cayetano*. So, anyone who wants to protect Article XII should be thinking of alternative legal theories or even new local support exclusive NMD land ownership to protect culture and tradition because the Insular Cases may not help.

As a matter of fact, Commonwealth and Federal courts have held as legal fee simple ownership of land claims made by individuals who are neither domiciled in the Northern Marianas in 1950, nor were they ever citizens of the territory of the Pacific Islands.

Professor Villazor, some quick yes or no questions, please. In *Wabol*, the Ninth Circuit said the equal protection guaranteed to

all U.S. citizens by the 14th Amendment did not apply to the Northern Marianas in the case of property ownership, correct?

Dr. CUISON-VILLAZOR. Yes.

Mr. SABLAN. The *Wabol* decision rested on the conclusion that some aspects of the 14th Amendment are not "fundamental in the international sense," correct?

Dr. CUISON-VILLAZOR. Yes.

Mr. SABLAN. And this idea that some constitutional protections are fundamental and others can be taken away by an act of Congress derives from *Balzac v. Porto Rico*, one of the Insular Cases, correct?

Dr. CUISON-VILLAZOR. That is correct.

Mr. SABLAN. To determine whether property ownership was a fundamental right, the *Wabol* Court applied the standard using *King v. Morton*: "The Importance of the constitutional right of State makes it essential that a decision rest on a solid understanding of the present conditions in the territory. It must be based on facts."

You point that out in your 2018 *Law Review* article that present conditions in the Marianas are that a significant portion of land is no longer in native lands but rather leased or occupied for decades by non-indigenous groups, correct?

Dr. CUISON-VILLAZOR. Yes.

Mr. SABLAN. So, a court today might look at this change pattern and conclude that permanent control of land is no longer fundamental to the people in the Marianas, correct?

Dr. CUISON-VILLAZOR. It might.

Mr. SABLAN. Professor, there can be exceptions from the equal protections of the U.S. Constitution if there are compelling public interests, correct?

Dr. CUISON-VILLAZOR. If there are compelling government interests, that is correct.

Mr. SABLAN. And public is the government, so I say yes. In *Wabol*, the Court found a public interest in protecting land ownership because land is the basis of family organization in the Islands, passes from generation to generation contributing to the well-being of family members, correct?

Dr. CUISON-VILLAZOR. Yes.

Mr. SABLAN. Yet, in 1985, the term of land leases was extended from 40 years to 55 years so that considerably two generations of Northern Marianas descendants would derive no direct benefit from family land or have any say in how that land is used, correct?

Dr. CUISON-VILLAZOR. Yes.

Mr. SABLAN. And in 1990, when the *Wabol* Court decided that equal protection did not apply, only persons of at least one-quarter Chamorro or Carolinian could own land, correct?

Dr. CUISON-VILLAZOR. Yes.

Mr. SABLAN. Yet, in 2014, the Constitution was amended so that a person with any Chamorro or Carolinian blood could own land. So, instead of requiring a Chamorro or Carolinian grandparent now you only need a great, great, great, great, great and on and on and on grandparent. The *Wabol* Court noted that the looser the fit, the more likely the asserted interest is mere pretext. The fit between who is enemy and who is not has become very, very loose since *Wabol* was decided, has it not?

Dr. CUISON-VILLAZOR. That is correct.

Mr. SABLAN. And that loose fit weakens the argument there is a compelling public interest in exempting Article XII from the equal protection of the 14th Amendment, correct?

Dr. CUISON-VILLAZOR. That will be correct under both the Insular Cases and equal protection law.

Mr. SABLAN. Thank you. As I said, I am not here to take sides on the question of Article XII. This is an issue for the people of the Marianas to debate and decide. What I do want to establish, however, is there are reasons to think that if a court today were to look at whether the equal protection of the 14th Amendment applies in the case of Article XII, the conclusion might be very different than it was 30 years ago in *Wabol*, and if anyone is holding onto these racist Insular Cases as a way of keeping Article XII afloat, they may be holding onto an anchor, not a life preserver because the next time around, the Insular Cases may not protect Article XII.

I need to now recognize Miss González-Colón. Please. You have 5 minutes. I hope I didn't exceed my time. Did I exceed my time?

Miss GONZÁLEZ-COLÓN. Thank you, Mr. Chairman. Thank you and the witnesses for being with us today. My first question will be to Dr. Watson. First of all, thank you for coming. I think your experience as a former White House Director for Asian Affairs and National Security Council provides some ideas as to how the government always deals with the Insular Cases.

Dr. Watson, the resolution we are considering today rejects the Insular Cases and their use in present and in future cases involving the application of the Constitution in the U.S. territories. If this resolution passed, it would not overturn the Insular Cases, but it will establish that the House of Representatives rejects their treatment as precedent by the executive branch and the courts. However, wouldn't you say that Congress already has the power and the authority to over-ride the inequities perpetrated by the Insular Cases under its Article I authority?

Dr. WATSON. No. I wouldn't say that, actually. In the event that what Congress is seeking to do—well, at least there are two powers that—and just by way of background, ma'am, while I did spend some time at the National Security Council, for several years I served in a quasi-judicial capacity at the congressionally mandated and established International Trade Commission, which indeed had its decisions upheld not by the U.S. Supreme Court.

So, I've had some opportunity to look at the relationship between——

Miss GONZÁLEZ-COLÓN. Could you answer the question, sir?

Dr. WATSON. The question is that Congress can overturn those elements that are not constitutional and are administrative in nature. If they wish to overturn matters that are constitutionally based, you have to do so likely in Article IX.

Miss GONZÁLEZ-COLÓN. But Congress has authority to do that, right?

Dr. WATSON. That involves, by the way, I mean, by definition, what I'm referring to is a constitutional amendment, ma'am.

Miss GONZÁLEZ-COLÓN. Yes.

Dr. WATSON. Yes, they do.

Miss GONZÁLEZ-COLÓN. That is the answer I was expecting. You said that you can discuss previous examples of cases in which the Court refused to overturn precedent of case law that was discriminatory, but Congress always steps in to address and correct those inequities. Can we say that the *Ledbetter* case can be one of them that Congress actually acted on that precedent of the courts and then acted directly to amend law?

Dr. WATSON. Ma'am, with respect, I was here before the Committee to reference the interest of those exercising self-determination. I am not a constitutional expert on particular applications, and I would not presume to opine on those.

Miss GONZÁLEZ-COLÓN. Thank you, Mr. Watson. Then I have questions to Mr. Neil Weare, President of Equally American. You recently co-authored an article in which you pointed out that at least since the 1950s the Supreme Court has expressed skepticism of the Insular Cases' Territorial Incorporation Doctrine and has said courts should not extend that further. In that essay, you pointed out that in the *Aurelius* case the Court continued its decades-long trend of narrowing the reach of Insular Cases while still coming up short of over-ruling them all together.

Can you discuss why in your opinion it is critical that the Court take an extra step in finally over-ruling the Insular Cases, or do you understand that Congress should act first?

Mr. WEARE. Over-ruling the Insular Cases is important for residents of the territories just like over-ruling *Plessy v. Ferguson* was important for African Americans and the civil rights movement. Just as you can't really imagine the Civil Rights Act of the 1960s or the Voting Rights Act without *Plessy* being over-ruled, many of these policy changes which Congresswoman González-Colón correctly noted, Congress does currently have the power to address statutorily, but so long as this constitutional framework of inequality is in existence it really takes away a lot of the pressure for Congress or the White House to act on these issues.

Over-ruling the Insular Cases is an important step, but it is just the first step to move forward on the range of issues that you have been working to address in your role as Representative of Puerto Rico.

Miss GONZÁLEZ-COLÓN. Thank you. My time expired. Mr. Chairman, I yield back.

Mr. SABLAN. Thank you. Jennifer, we could go back for another round if you wish. Ms. Radewagen of American Samoa, you have 5 minutes. Thank you.

Mrs. RADEWAGEN. Thank you, Chairman Sablan and Ranking Member González-Colón for holding this hearing today. And thank you to the panel for your testimony.

I find myself unable to fully support H. Res. 279 because I believe wholesale rejection of the Insular Cases may have unforeseen or undesirable implications on the future relationship between the territories and the United States. I also do not feel personally comfortable signing onto a resolution that makes judgments on what precedents another independent branch of government can and cannot base their decisions on.

However, I still want to express my sincere appreciation for the intent behind the Chairman's resolution and my sincere gratitude

for his efforts on behalf of the territories. It is undeniable that the cases contain outdated and racially biased language. Such language can be harmful, and I am sure we will all agree that we have a responsibility to distance ourselves from such outdated views as well as a responsibility to do right by the people of the territories.

In my opinion, rather than making moral judgments on the decisions of another branch of government, it would be prudent to use our powers as a legislative body to address the issues of the territories directly. Congress has better tools than a House Resolution to make things right, and we have a responsibility to act rather than do things indirectly through the other branches of government. This is the most effective way to actively distance ourselves from the racist rhetoric of the past while making real and substantial changes.

I also want to emphasize that we act in Congress aligned with the will of the governed. The residents of the territories each have their own opinions about their relationship with the mainland and their future and express that to Congress. The D.C. Court of Appeals in the case of *Tuaua v. United States* and the American Samoa government protected against what many in American Samoa, including the territorial government itself, considered to be an imposition of citizenship by judicial fiat.

We simply cannot ignore the basic truth that the super majority of people actually living in American Samoa vociferously opposed the case and the relief that it sought and continue to oppose the forum shopping going on in *Fitisemanu* case. One may disagree with racist tones underlying the Insular Cases but do not abandon the wishes of the residents of American Samoa in the process.

Finally, I want to point out that American Samoa is unique by virtue that it became the only U.S. territory by deed secession starting in 1900. The Matai, or local chiefs of Tutuila, the largest island in American Samoa while in tyranny ceded the island to the United States in 1900, and Manu'a followed in 1904.

Lieutenant Governor Ale, in the hearing materials and testimony submitted today, there are references to a pending decision in the Tenth Circuit Court of Appeals on a Utah District Court as to whether or not American Samoans born in the territory should have birth right citizenship. While we anxiously await the outcome of this case, could you elaborate on what the D.C. Appeals Court held, that it was anomalous to impose citizenship over the objections of the American Samoan people themselves as expressed through their democratically elected representatives?

Lieutenant Governor ALE. Thank you for that, Congresswoman. That was the decision in the *Tuaua* case. The D.C. Circuit held applying the framework of the Insular Cases that the decision on whether or not the Constitution applies has to be decided from the viewpoint of the governed, from the viewpoint of the people of American Samoa in this case, whether or not this application of citizenship is practical and/or anomalous to the culture of American Samoa. The evidence presented in that case led the Court to conclude that applying the citizenship clause to American Samoa is both impractical and anomalous, and therefore it wasn't applied. So, that is the short answer to your question.

Mrs. RADEWAGEN. Mr. Chairman, before I yield, I would like to ask unanimous consent to enter into the record an article from the Guam bar brief and a statement on H. Res. 279 both written by Dr. William B. Cleary, Professor of Law at Hiroshima Shudo University and former Assistant Attorney General for the Territory of Guam.

Mr. SABLAN. So ordered. Thank you.

Mrs. RADEWAGEN. Mr. Chairman, I yield back.

[The information follows:]

Submissions for the Record by Rep. Radewagen

Statement for the Record

Dr. William B. Cleary

Professor of Law, Hiroshima Shudo University[1]

H.R. 279: Historical and Legal Revisionism Detracts from Serious Assessment of Federal Territorial Jurisprudence

I. An Overview of Insular Case Law

- Reasonable people can agree or disagree with the juridical rectitude of the Insular Cases, a 120-year-old line of rulings articulating the incorporation/non-incorporation doctrine as upheld by federal courts in the modern era. Members of the U.S. Supreme Court have been alternately agreeing and disagreeing on the rectitude of the Insular Cases since 1901.
- However, H.R. 279 is materially flawed by the incorrect premise that racial bias expressed by some members of the U.S. Supreme Court in opinions filed in that case constitute the law of the Insular Cases, both at the time of the Downes v. Bidwell ruling in 1901 until the present, and render the incorporation/non-incorporation doctrine invidiously and impermissibly discriminatory.
- H.R. 279 asserts that the law of Insular Cases is so tainted by racial bias that reliance by the Department of Justice, federal courts or Congress on the Insular Cases in the modern era is in effect a form of active institutionalized systemic racism.
- If upholding the Insular Cases is systemic racism, that alleged unconstitutional race hate driven abuse of judicial power has been perpetrated by—
  - o Warren Court members who overturned Plessy in 1954 but upheld the Insular Cases in 1957 (Reid v. Covert)
  - o Burger Court reliance on the law of the Insular Cases in 1976 (Examiners v. Flores de Otero), including Justice Marshall
  - o Roberts Court reliance on the law of the Insular Cases in 2008 (Boumediene v. Bush) and 2016 (Puerto Rico v. Sanchez Valle), including Justice Ruth Bader Ginsburg.
- Instead of legal and historical revisionism, the reality is that the flawed and imperfect Insular Cases should be relied upon unless and until superseded in an orderly manner by a better status doctrine based on self-determination, not a repeat of judicial activism that began with the Insular Cases after Congress abdicated its role defining territorial status in 1900.
- Until a better model is democratically adopted, it must be understood the Insular Cases recognize and do not prevent Congress from exercising its authority to permanently integrate and join (i.e. "incorporate") territories into the union. This would extend 14th Amendment U.S. citizenship,

[1] Dr. Cleary is also a former Assistant Attorney General for the Territory of Guam.

equal protection, due process, uniformity under federal law to territories as in states.

- Insular Cases recognize authority of Congress to secure equal civil and political rights for Americans in territories that are attainable only through statehood or incorporation into an existing state, including equal voting rights in federal elections for full, equal and proportional representation in Congress and the Electoral College.
- Insular Cases recognize the authority of Congress to extend "equity" to U.S. nationals and citizens in territories under federal statutory law, including equal access to Medicare, Medicaid, SSI and SNAP and other
- Instead of undemocratically determining the permanent status and rights of territories and residents thereof by judicial edict, the Insular Cases recognize the authority of Congress to determine the political status of territories and the civil/political rights of peoples thereof based on the national interest, including democratic self-determination by the people of past, current and future territories.
- The incorporation/non-incorporation doctrine of the Insular Cases recognizes that Congress has authority and responsibility under Article IV to determine disposition of the status of U.S. territory outside a state, whether or not inhabited by foreign nationals, American nationals or citizens of the United States, as the case may have been in the past, or may be in the present or future.
- 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.
- *From 1901 to the present Congress has embraced, ratified, confirmed by statute and codified the unincorporated territory doctrine of the Insular Cases as prescribed originally and in the modern era, and approval of H.R. 279 by Congress would not have any legal effect repealing, altering or modifying federal territorial law institutionalizing the law of the Insular Cases.*

II. U.S. Citizenship and Insular Cases

- At the time decided the Insular Cases referred to in H.R. 279 did not apply to persons recognized to have acquired U.S. nationality or citizenship.
- It was the Fuller Court (1888–1910) that recognized its 1901 ruling in Downes v. Bidwell did not address Congressional failure in the Foraker Act of 1900 to define the status of residents in Puerto Rico beyond classification as residents of the territory.
- The Fuller Court accordingly clarified in the 1903 case of Gonzales v. Williams that residents of unincorporated territories are not foreign national aliens for purposes of U.S. immigration laws, and were "under the national protection of the U.S." but not U.S. citizens.
- This national but not citizen sub-doctrine of the Insular Cases applied in the Philippines Territory until it became an independent nation in 1946, and applied to all other unincorporated territories unless and until Congress conferred statutory citizenship.
- That lead to classification of persons born in the unincorporated territories under the Insular Cases as "U.S. nationals but not citizens" unless and until Congress conferred statutory U.S. citizenship based on birth in a territory, as it has in Guam, Northern Mariana Islands, Puerto Rico and U.S. Virgin Islands.
- Because there is no constitutionally material difference between the status and rights of a "citizen" or "national" while residing in an unincorporated territory, so far American Samoa has not petitioned for statutory reclassification as "citizens" except as an option upon relocation establishing residence in a state.
- H.R. 279 misleadingly imputes denial of equal rights to U.S. citizens based on systemic racism against U.S. citizens practiced in the states under the separate but equal doctrine of Plessy v. Ferguson.

- The historical truth is that the incorporation/non-incorporation doctrine of the Insular Cases was not applied to territories in which Congress had conferred statutory U.S. citizenship until 1922, after Congress granted U.S. citizenship in Puerto Rico in 1917.
- For the first time since the Northwest Ordinance was adopted as U.S. law in 1879, it was the 1922 ruling by the Taft Court in Balzac v. Puerto Rico that applied the unincorporated territory doctrine of the Insular Cases law to a territory in which Congress conferred U.S. citizenship.
- *If the Taft Court had followed the tradition of the Northwest Ordinance as the Fuller Court had in connection with U.S. Congress conferral of U.S. citizenship on foreign national aliens in the annexation and acquisition of the territories of Hawaii and Alaska, Puerto Rico would have been recognized in the Balzac case as an incorporated territory.*
- *Had the Taft Court followed the Insular Cases as applied by the Fuller Court only to unincorporated territories, Puerto Rico and all other territories in which Congress chose to confer U.S. citizenship would have been incorporated into the union.*
- We will never know if Congress would have granted U.S. citizenship to U.S. Virgin Islands, Guam or Northern Mariana Islands if Balzac had not applied the unincorporated territory doctrine of the Insular Doctrine to Puerto Rico after citizenship was conferred by Congress. The Balzac ruling meant citizenship did not require application of the U.S. Constitution as in incorporated territories and states.

III. H.R. 279 Revisionism Regarding Fuller Court Record

- H.R. 279 narrative on Fuller Court rulings (1888–1910) is politically contrived and lacks juridical foundation.
- In Plessy v. Ferguson (1896) the court majority adopted "separate but equal" doctrine upholding race segregation in states.
- In Downes v. Bidwell (1901) a different alignment of court members defines territory of Puerto Rico as "not incorporated," meaning U.S. Constitution does not apply as in incorporated territories or states.
- In Rassmussen v. U.S. (1905) yet another different realignment of court members defines territory of Alaska as incorporated under U.S. Constitution as in states and 27 territories that had become states since 1796.
- *The only difference between Fuller Court rulings defining Alaska and Hawaii incorporated under the U.S. Constitution and Puerto Rico or Philippines as unincorporated was NOT RACE, it was that CONGRESS CONFERRED U.S. CITIZENSHIP IN ALASKA AND HAWAII, BUT DENIED U.S. CITIZENSHIP TO PUERTO RICO AND GUAM BEGINNING IN 1900.*
- The Fuller Court attempted in the Insular Cases to give Congress some latitude and time to decide on conferral of citizenship in Philippines, Puerto Rico and Guam, and later U.S. Virgin Islands, by inventing the non-incorporation doctrine, but when Congress finally made the decision in 1917 the 1922 Balzac ruling separated citizenship from permanent incorporation under the U.S. Constitution.
- Thus, Balzac made conferral of citizenship in Puerto Rico, U.S. Virgin Islands, Guam and Northern Mariana in effect a "non-event" constitutionally, because it perpetuated instead of ending unincorporated territory status.
- That condition of arrested political status persisted into the modern era, when Congress could have acted to resolve status for all the organized territories as it did in the Philippines, Hawaii and Alaska after WWII.
- Instead of affording all territories informed self-determination—the choices between continued unincorporated territory status, incorporation leading to equality through statehood or integration with an existing state, or nationhood based on the right to independence, Congress has avoided status resolution and relied on the Insular Cases law of non-incorporation that H.R. 279 to rationalize failure to manage a federally sponsored self-determination process.

- Federal territorial law in Hawaii and Alaska discriminated against native Hawaiians and Native Alaskans, but the Constitution applied and equal citizenship was achieved through incorporation leading to statehood.
- It was not the original Insular Cases cited in H.R. 279 but the Balzac ruling that applied the unincorporated territory doctrine of the Insular Cases to the current U.S. territories in which Congress has conferred U.S. citizenship.
- *From 1922 to the present Congress has accepted and confirmed by statute the law of the Balzac case and its application of non-incorporation to the territories Congress still defines as unincorporated.*
- *Approval of H.R. 279 by Congress would not have any legal effect repealing, altering or modifying federal territorial law institutionalizing the law of the Insular Cases.*

IV. H.R. 279 and Pending Litigation in Federal Courts

- Some content of H.R. 279 appears nearly verbatim identical to editorial advocacy promoting adversarial legal position in federal civil litigation pending before U.S. courts at this time, as well as legal briefs filed by attorneys in those cases.
- These cases include *Tuaua v. U.S.*, No. 13-5272 (D.C. Cir. 2015) (cert. denied); *Segovia v. U.S.*, 880 F. 3d 384-2018 (cert. denied); *Fitisemanu v. U.S.*, Case No. 1:18-CV-36 (D. Utah Dec. 12, 2019).
- It is not insignificant that the same attorneys representing Americans in the *Fitisemanu* case filed briefs and as advocates in those cases publicly defend another 1898 ruling by the same Fuller Court that handed down Plessy v. Ferguson two years earlier in 1896.
- How is it racist-by-association to rely on the Fuller Court's decision in 1901 Downes v. Bidwell case because the same court handed down Plessy five years earlier, but not racist to rely on the U.S. v. Wong Kim Ark case handed down three years earlier by the same Fuller Court?
- Wong Kim Ark is misrepresented by these attorneys as grounds for hyper-extending Section 1 of the 14th Amendment to the U.S. Constitution by making the national and state citizenship clause in that post-Civil War amendment applicable to what the court currently defines as unincorporated U.S. territories not in a state.
- This misleadingly ignores that question of whether that would incorporate the territories into the union whether the people of the territories democratically consent or not.
- The Fitisemanu lawyers and advocates also ignore the fact that the Wong Kim Ark ruling actually limited its scope and reach to birthright citizenship for persons born in a state of the union to parents who were lawfully present in the U.S. under the systemic racism of the Chinese Exclusion Act and other racists immigration laws.
- The Congressional Research Service has reported that Wong Kim Ark did not establish that children born in the U.S. to parents present in the U.S. unlawfully are entitled to birthright citizenship under the 14th Amendment (CRS Report RL33079, Aug. 12, 2010), which makes Wong Kim Ark even more controversial than the Insular Cases in the context of modern era civil rights debate.
- Yet, lawyers and the trial court in the Fitisemanu case relied on the Wong Kim Ark ruling in attacking Downes and Insular Cases as racist by virtue of being decided by the Fuller Court in proximity to its ruling in the Plessy v. Ferguson case, ignoring that Wong Kim Ark was decided two years after Plessy and Insular Cases came five years after Plessy.

Fair play for nationals and citizens of unincorporated territories

By Dr. William B. Cleary

Congress not courts define political status of U.S. territories

Congress should consider whether or not to intervene and resolve by federal statutory measures the political questions raised in recent federal court cases, including Tuaua v. U.S., No. 13-5272 (D.C. Cir. 2015)(cert. denied); Segovia v. U.S., 880 F. 3d 384-2018 (cert. denied); Fitisemanu v. U.S., Case No. 1:18-CV-36 (D. Utah Dec. 12, 2019); U.S. v. Vaello-Madero, No. 19-1390 (1st Cir. 2020).

In each of these cases, individual Americans have asked federal courts to provide judicial remedies for anomalies, inconsistencies and irrational discrimination in how residents of unincorporated territories are treated under federal territorial law and policy. But why are lawyers in these cases and even members of the U.S. Congress calling on courts to extend the U.S. Constitution as it applies in states to achieve equal access to Supplemental Security Income (SSI) to all territories equally, when Congress can simply pass a law to do so?

The real question for Congress is one of equity: Does the territory want a one size fits all equal treatment on a particular issue? If so, Congress doesn't need to be ordered by a court to provide equal treatment under federal social safety net programs created by statute not the Constitution. Even if ordered by a court, Congress still must find the funding, which is the real political issue courts can't decide.

Lawyers in the cases cited above also are calling for territories to have the same political rights not only as other territories but as states of the union. That includes voting representation in Congress and the Electoral College that is limited by Art. I, Sec. 2 and Art. II, Sec. 1 of the U.S. Constitution to states.

Statutory equity for territories and equal rights of citizenship compared to Americans in the states of the union are two different questions. Fully equal national citizenship can be attained through incorporation into the Union leading to statehood like Hawaii and Alaska in 1959, or independent nationhood like the U.S. Territory of the Philippine Islands in 1946, or independence with revocable free association like FSM, RMI and Palau that does not include U.S. citizenship.

For U.S. citizens, full equality comes only with statehood, and statehood for a territory can include integration into an existing state or newly formed state. But Congress has not exercised its authority to determine disposition of the status of the unincorporated territories, mostly because the territories so far seem to prefer the existing home rule regimes over full integration or independence.

Some territories seem to want autonomy more than one size fits all equal treatment (American Samoa), and other territories appear to want both home rule autonomy and equality with states (Guam). That was tried for 70 years by Puerto Rico, but the U.S. Supreme Court ruling in Puerto Rico v. Sanchez, 579 U.S. __ (2016), confirmed "commonwealth" constitutions Congress authorized in Philippines, Puerto Rico and Northern Mariana Islands continue unincorporated territory status until a territory is incorporated into the union or transitions to independent nationhood.

That's why federal courts so far are entertaining the above referenced lawsuits with a mixture of confusion and concern about whether "fundamental rights" are being respected in the unincorporated territories. So far, any judicial frustration and restlessness because territorial political status questions come visiting courts dressed up as legal claims has not overcome judicial reluctance to decide political questions that Congress lacks the political will to tackle.

Dr. William B. Cleary, Professor of Law, Hiroshima Shudo University. Dr. Cleary is also a former Assistant Attorney General for the Territory of Guam.

Mr. SABLAN. Mr. Gohmert, are you on? Mr. Gohmert, going once, going twice. Just bear with me. Mr. Tiffany? Mr. Tiffany, going once, going twice. Mr. Obernolte, you've been patient, sir. You have 5 minutes.

Mr. OBERNOLTE. Thank you very much, Mr. Chairman, and thank you to our witnesses for a very interesting hearing here. I have a question for Dr. Watson. I realize that we are not here to debate legal terms, but I have a question regarding the intention of H. Res. 279. Obviously, this would be signaling Congress' objection to the Insular Case rulings to the court system in the hopes that they would revisit that, right?

So, do you think that the term "Insular Cases" as used in H. Res. 279 is clear and concisely understood enough to put the courts on notice about which court cases are bad law that Congress wants to be purged and which cases are still good law?

Dr. WATSON. Absolutely not. There is no clarity from the resolution as drafted as to what is intended by that term. And as I mentioned in my testimony, even the judiciary has extended the interpretation of this up to at least 12 cases, and this does not include, as I mentioned, cases that cite the Insular Cases. It would be unconstitutionally vague and would invite excessive judicial participation against congressional action.

With your permission, sir, may I just provide a little finesse to my earlier response to Miss González-Colón, with your permission?

Mr. OBERNOLTE. That is fine.

Dr. WATSON. Miss González-Colón, I actually need to state with a little more clarity that Congress obviously using its existing authority under Article V, and Article I and Article V can, in fact, deal with statutory refinements within its existing constitutional authority.

Mr. OBERNOLTE. All right. Thank you, Mr. Watson.

Dr. WATSON. Thank you, sir.

Mr. OBERNOLTE. A follow-up question for Mr. Weare if I could. I found your testimony very interesting. You have stated the necessity of changing the constitutional framework of the Insular Cases, and I'm wondering what you would recommend that we as a society do about that and how to go about it because, obviously, this resolution doesn't accomplish that. So, what is the path that you would recommend?

Mr. WEARE. Thank you for that question. As a matter of constitutional doctrine what examination of constitutional issues in the territories could look like is really what it looked like for the more than a century prior to the Insular Cases in the Territorial Incorporation Doctrine being invented, and continuing forward, the relationship between the Federal Government and the District of Columbia also provides a framework for constitutional interpretation in non-state areas.

Beyond that, though, one of the important consequences of the Insular Cases was creating this view that it is OK for the United States to, essentially, have colonies and not do anything about it, and that is why places like Puerto Rico and Guam have now been part of the United States for more than 123 years. That is more than half as long as our country has had a constitution.

Having the Congress, the Supreme Court, and the executive branch condemn the Insular Cases, condemn the colonial framework that they established is an important step toward engaging the political branches and engaging the people of each of the territories in a serious conversation about what their future relationship with the United States is.

So, this is just a first step, but it is an important one in disrupting a status quo that has existed now for too long and fully bringing to the table all of the different parties that have equities and stakes in these issues.

Mr. OBERNOLTE. OK, I understand that the resolution is a first step, but the next steps would be what? A Supreme Court decision

over-ruling and changing the ruling of the Insular Cases? A constitutional amendment initiated by Congress and ratified by the states? Both of those?

Dr. WATSON. Yes. I think having the Supreme Court review and over-rule the Insular Cases would be a strong step forward in turning the page on the Insular Cases in its colonial framework in terms of the political branches engaging in a serious process of self-determination and decolonization whether for some areas that meant a path to statehood, whether for others that meant independence or perhaps a constitutional amendment to address some of these issues.

But really until there is this pressure on the political branches to act on what we have seen over the last decades is either a lack of will or an unwillingness to engage with these really challenging questions, and because residents of the territories don't have voting rights, as the Delegates and Resident Commissioner on this Committee know all too well, there needs to be pressure and support from others who do in order to bring the Congress together, bring this country together to move past what is really a regrettable chapter in American history that has gone on far too long.

Mr. OBERNOLTE. Well, thank you very much. It is an important topic. I am glad we are having the discussion. I yield back, Mr. Chairman.

Mr. SABLAN. Thank you. I would now like to recognize Ms. Porter. Are you still on, Katie? Ms. Porter, going once, twice. I think Ms. Porter is not with us. Mr. Bentz, please.

Mr. BENTZ. Thank you, Mr. Chair.

Mr. SABLAN. You have 5 minutes.

Mr. BENTZ. Thank you, Mr. Chair. Thank you for this most interesting hearing, and thanks to all the witnesses for taking the time to testify today. And I want to yield my time to Congresswoman González-Colón. Thank you.

Miss GONZÁLEZ-COLÓN. Thank you for yielding. I do have a question, Mr. Chair, to the Honorable Tina Rose Muña, the Vice Speaker of Guam, if you are available. Vice Speaker, in your testimony, you correctly pointed out that the resolution we are considering today will be non-binding on the courts—and I agree with you on that—and it would not over-ride the Insular Cases. Can you discuss why it is crucial that Congress go beyond just renouncing the Insular Cases and use its constitutional power, including its plenary powers over the territories, to address the inequities we face?

And I know that you discussed inequal treatment under Medicaid and the inability to access SSI programs as just some examples of inequities that Congress should address. And I agree with you that Congress can make this different just allowing territories to access and have full citizenship in terms of erasing the inequities. So, again, can you address the inequities we face?

Ms. BARNES. Thank you so very much for that question, Congresswoman. As I mentioned in my testimony, my resolution states that denouncing the Insular Cases as racist is the first step, but it is my hope that this means that we now can urge Congress to use its plenary powers and begin binding a political status

reconciliation process, one where I believe each territory is brought to the table as we chart our path forward.

Again, in short, that would be my answer, and I could further detail this especially with all the committee testimonies that were done at our public hearing last week and submit it into the record. I hope that this would further answer your inquiry today. And I want to just say thank you for that question.

Miss GONZÁLEZ-COLÓN. Recognizing the cultural and racial bias underlying the Insular Cases in 1956, the Court began stating that neither the cases nor their reasoning should be given any further expansion, and it has not, however reversed the decisions and continues to cite them consistent with previous holding as reversal would mean. All of the current territories will be considered eventual state and a constitution empowered Congress to determine statehood or the territories will have to pay taxes under the Uniformity Clause, and so on.

So, my question for you now will be—Some contend that the Insular Cases are the reason that the current territories can be treated worse than a state in Federal programs, but didn't the Supreme Court say in *Harris v. Rosario* that Congress, which is empowered under the Territorial Clause of the Constitution to make all needful rules, regulations respecting the territory belonging to the United States, may treat territories differently from states so long as there is a rational basis for this action? Yes, right?

Ms. BARNES. Yes, and as I support the closer relationship with the United States like statehood, I believe in my heart that everybody needs to come to the table and make that decision.

Miss GONZÁLEZ-COLÓN. I agree with you on that. So, a reversal of the Insular Cases doctrine that some territories can be possessions instead of part of the United States unincorporated will not amend a Territorial Clause power of each Congress to treat territories as its widgets in Federal programs. Even if equal treatment is extended to a territory, it can be withdrawn as was done in the case of Puerto Rico for food stamps. Aren't the only ways to guarantee that treatment in the hands of Congress?

Ms. BARNES. I agree that every territory is unique and that they should be able to share their story, and that is why I truly believe that Congress does have this plenary power to begin this political status reconciliation process as we tell each story with each territory and see how we can chart this path moving forward. So, again, each territory is unique and different from the other.

Miss GONZÁLEZ-COLÓN. I agree with you, and I agree that Congress should act, and then the Court will follow. I yield back. My time has expired.

Mr. SABLAN. Thank you very much. Mr. Lowenthal, sir, you have 5 minutes, and you can yield it to me. I wouldn't mind.

Dr. LOWENTHAL. Thank you. I am learning so much. Mr. Chair, I thank you for holding this hearing, but I am going to pass on questions. I just really want to——

Mr. SABLAN. I said you could yield your time to me. I wouldn't mind.

Dr. LOWENTHAL. I will yield. I would definitely yield my time to you.

Mr. SABLAN. Thank you. I am just going to have this question because, look, I fully understand that in the thousands of Federal programs that exist in law, there are 700-plus programs that apply to the territories. Either some of them apply to—like SSI it applies to the Northern Marianas, but SNAP applies to Guam and the U.S. Virgin Islands. I mean, there is all of this mixture.

But let me ask, I guess, the legal minds. Let me start with Mr. Weare. Does the Territorial Clause prevent Congress from making the different Federal programs applicable to the five territories? Does it prohibit Congress to make the laws applicable to the territories?

Mr. WEARE. Congress does have broad powers under its plenary powers in the Territorial Clause. Whether they can treat different territories differently really depends on the reason for doing so. And with respect to the SSI program, that is a question currently before the U.S. Supreme Court. The reasons that the Federal Government has given for that disparate treatment to date have really not been very good, which is why Federal judges unanimously have ruled that discrimination unconstitutional in the First Circuit and the Federal District Court.

Mr. SABLAN. Right.

Mr. WEARE. But these are complicated constitutional questions for sure.

Mr. SABLAN. But it doesn't prevent Congress to pass a law today saying SSI should apply to all the territories?

Mr. WEARE. Oh, no. Absolutely, sir. Congress has the power to do that immediately, and I know that there is legislation you have supported that would do that, and I appreciate that.

Mr. SABLAN. Professor Villazor, does the Territorial Clause prevent Congress from passing a law making these Federal programs available to all the territories?

Dr. CUISON-VILLAZOR. No, not at all. Congress has plenary powers over the territories and can exercise its powers in treating all territories equally.

Mr. SABLAN. Vice Speaker Barnes, would you say Congress has the plenary power to make all these Federal programs apply to the five territories?

Ms. BARNES. Most definitely, Congressman.

Mr. SABLAN. And let me see, Mr. Watson, does Congress have the authority, the power to do this?

Dr. WATSON. Absolutely. I concur. Congress can, if they wish to, extend Federal contributions, Medicare, Medicaid, SSI, and other Federal social safety net programs for the territories as in the states.

Mr. SABLAN. So far we agree. Dr. Immerwahr, does Congress have the authority to make Federal programs apply to the Insular areas?

Dr. IMMERWAHR. Yes, of course it does.

Mr. SABLAN. Thank you. And Lieutenant Governor Ale, does Congress have the authority to do this?

Lieutenant Governor ALE. Yes. We believe Congress does. And with respect to the Insular Cases, Congress also has the right to say provisions of the Constitution apply to which territory that they want or to all the territories. And what American Samoa is

saying when Congress decides that it should be done on a one-by-one basis, that each territory would come before Congress like Guam and CNMI and Virgin Islands have done before and negotiate the terms of their compact. And that is why the danger of eliminating the Insular Cases now is the one we are opposing at this time. Thank you.

Mr. SABLAN. OK. I am yielding my time.

Mr. Tiffany, sir, you have 5 minutes. Welcome.

Mr. TIFFANY. Mr. Chairman, did you call on me, Representative Tiffany?

Mr. SABLAN. Yes, sir. Yes, I just did. Thank you.

Mr. TIFFANY. OK. Thank you very much. I am trying to juggle a couple things here. Thank you so much for your patience, and thank you for giving me the time here.

I have a question to Dr. Watson. In the effort to purge racism from those cases sought to be covered by this Resolution 279, should other court rulings likewise be included? Today, we are hearing about the *Fitisemanu* territorial status case in which the Court and plaintiffs relied entirely on the 1888 ruling in the *United States v. Wong Kim Ark*, a landmark case recognizing any person born in a state of the Union as a citizen under the 14th Amendment. However, as I understand, in *Plessy v. Ferguson* it was decided in 1886, *Wong Kim Ark* by the same Court in 1888, and the Insular Cases in 1901.

In *Wong Kim Ark*, the Court upheld the racist Chinese Exclusion Act, relied on comments by Justices in the *Slaughterhouse Cases* referring to Mexicans and the Chinese in derogative terms and even relied not on dictum on the law of *Dred Scott* case, a Supreme Court ruling far more racist than *Plessy*. Given the intentions expressed in the resolution, should we include *Wong Kim Ark*? I hope you were able to follow that. That is a long and complicated question.

Dr. WATSON. Oh, no. That is quite clear. The objectives undergirding the resolution to remove legacy judicial racism obviously cannot be adequately achieved if *Wong Kim Ark* and its ilk are excluded. Any other outcome naturally makes nonsense of the resolution's most worthy core and justified goal.

Mr. SABLAN. No. I disagree, but go ahead.

Mr. TIFFANY. Well, thank you very much, Dr. Watson. That is the only question I had for this. I don't know if you wanted to extend your remarks any further in regards to that. We certainly have time if you choose to.

Dr. WATSON. Not really. It is rather fundamental. What you have is, and again you have not really a unanimity or consensus as to what really constitutes the Insular Cases as referenced. There are the core ones that were originally set, but some jurists extend that, of course, quite naturally to the cases which adopted, are cited or implemented.

And, of course, the number of cases have, in fact, implemented the Insular Cases such that it is natural and it is important that the focus of this hearing and the intention to deal with racially based decisions and those that are extended by the Supreme Court in the Insular Cases such as *Wong Kim Ark* be excluded. That would be not appropriate.

Mr. TIFFANY. OK. Thank you very much, Dr. Watson. Mr. Chairman, I yield back.

Mr. SABLAN. Thank you, Mr. Tiffany. I now recognize Mr. Gohmert. Mr. Gohmert, you have 5 minutes.

Mr. GOHMERT. OK. Thank you, Mr. Chairman. I appreciate that. I was thinking about yielding my time to Mr. Lowenthal, but he had said he was still learning.

Mr. SABLAN. You could yield to me, Mr. Gohmert. I would welcome it.

Mr. GOHMERT. Well, thank you. I am like Mr. Lowenthal. I am learning, too, and I appreciate all of the witnesses here. I am going to ask a question. It may seem a bit strange, but I really am trying to learn, and we have witnesses from different territories.

Some of us have been saying for many years that the United States is so unusual because we are not out to be an empire, and we are not out to brag as the British did that the sun never sets on the British empire, and we have given so much of our greatest treasure, American blood, so that people in all parts of the world could be free and make their own decisions.

And I know at one time there was a feeling in Puerto Rico among some that they wanted to be independent, and from what I am hearing it sounds like there is more of a desire than there used to be to perhaps be a state. But I am wondering about the different territories. The British seemed to be really surprised when there was such a big move in India to be independent, and they didn't really see it coming as they should have.

It may seem overly simplistic, but I am curious since we have people from different places, is there a feeling among the different territories that they would want independence? I mean, it doesn't seem like we ought to force anybody to be part of the United States because we are not looking for an empire. We are all about trying to be about freedom.

I don't want to be surprised some time down the road. I would ask any of our witnesses, is there a desire in the area you are representing that they would want to be independent from the United States? We don't want to ever lose our friends and especially as beautiful as some of your areas are. Holy smoke, they are just wonderful places to visit. But is there such a feeling that some of us are not aware of? Anybody?

Lieutenant Governor ALE. I can speak for American Samoa that as far as I know there is no discussion, serious discussion, of going that direction. Some 121 years of being part of the American family has really instilled in all of us that we are Americans and part of the American family. What we want to do is to be given the opportunity to negotiate in a democratic way, to be provided the opportunity to self-determination and have the people of American Samoa decide. And that is why we oppose this resolution and its intended effect because it empowers courts to make decisions—for example, there is a case going on whether or not people from American Samoa should be citizens by birth, and we oppose it because the decision is made by a judge. We don't particularly oppose becoming U.S. citizens, but it is the process. We want that process to be done in a democratic way by the people of American

Samoa and its leaders and not by a judge. So, that is the opposition that we have in this case. Thank you.

Mr. GOHMERT. OK. Thank you.

Ms. BARNES. Mr. Chair, from the Island of Guam, we truly believe that our island here in the Marianas is beautiful, but for Guam we also believe that we are crucial and strategically critical to Uncle Sam. And whether or not I personally believe I want a closer relationship with the United States or not, the decision whether to choose to be independent, be a state, or have a free association with the United States, it should be up to our people to decide, and that process should be afforded to us.

So, that is where I personally stand, and I know that with Congress having these powers to begin this political reconciliation process I think that this is a way that we can truly chart our path forward for our island of Guam, and that is something that we have been asking for, to acknowledge the right to self-determination.

Mr. GOHMERT. Thank you, Mr. Chairman.

Mr. SABLAN. Seeing that Mr. Gohmert has no more time to yield to me, I would now recognize Mr. Moore. Sir, you have 5 minutes.

Mr. MOORE. Thank you, Chairman. I appreciate the opportunity. Thank you, experts and guests for being here. It is an important discussion and I am glad we have the opportunity to talk about these challenges.

Dr. Watson, just two hopefully very pretty straight-forward questions to get your statement. Can H. Res. 279 lead to political status resolution for the U.S. territories, and (2) is that resolution the best way to address statutory equity and constitutional inequity issues facing the territories?

Dr. WATSON. I think I would just like to reference a question as to whether or not it has the effect that you have intended by saying that this is—I have heard that it is non-binding today, so that would suggest that it does not have that effect. I am, obviously, not a parliamentary expert. Could you repeat the second part of the question, please?

Mr. MOORE. Yes. And thanks for highlighting the non-binding part. That would definitely be something to consider. Is H. Res. 279 the best way to address the statutory equity and constitutional inequity issues facing the territories?

Dr. WATSON. No. I would say not. What one needs to do in government is to make efficient use of relevant tools and authorities and do it in a very clear and demonstrable way using the constitutional rights and authorities that you have. It is clear that as we have talked about today, constitutionally Congress has the right, Article I, Article V, statutorily to deal with matters, including Social Security in other places. If there is any uncertainty about that, those are the powers and authority that should be used.

The application and utilization of resolutions which do not have clarity, which are uncertain in their terms, I do not believe is helpful.

Mr. MOORE. Thank you. And would you add any additional context on the principles of self-determination and federalism? Just continuing on with some of your statements, would you add any additional context with self-determination, federalism and how

they are related and why they are so important to our insular areas?

Dr. WATSON. It is obviously a very different set of, as we know, political relationship, different treaties at the very beginning, different sovereign nations that have dealt with the United States. But I think at its core, and this is really important from the American Samoan perspective, one size does not fit all in terms of the constitutional structures that deal with application of self-governing and self-determination.

What is critical, however, is to protect and preserve relative to federalism the rights of people in these respective territories to exercise those powers in a way that their God-given rights are relative to the Federal Government. It is not the Federal Government to tell, in that sense, to over-ride the appropriate exercise of self-determination in the respective territorial environments.

Mr. MOORE. Excellent. Thank you. As we reflected, and we have had several committee hearings on territories and insular areas, and as I reflected on it, it is very clear to me that there are many similarities, but I would never ever go out to highlight and make sure to constantly highlight, there is distinct interest, and there is varying different need. You cannot treat everything the same.

This final question will be for Lieutenant Governor Ale. Since the resolution fails to recognize territory self-determination, how do you think it might affect territories that have different interests? How might it be detrimental, if you believe so?

Lieutenant Governor ALE. It is detrimental to American Samoa, for example. If this resolution is passed and we move on to a future where the Insular Cases are removed, then the culture of American Samoa is affected. We have a community land culture that provides that the land is for the native people of American Samoa. That will automatically be a violation of the Equal Protection Clause if all provisions of the Constitution apply to American Samoa. By saying that the Insular Cases are not applicable, then all Constitution applies everywhere where there is American land. So, that is the concern, and that is the reality for people in American Samoa, and that is why we believe that this resolution should be reconsidered.

Mr. MOORE. Thank you, Lieutenant Governor. And with respect to the culture, I am from Utah, and there is nothing that we appreciate more than our close relationship with American Samoa. So, thank you. I yield back.

Mr. SABLAN. Mr. Moore, thank you. Ms. Tlaib, you have 5 minutes, and if you are not going to use up your time, you can yield it to me. Feel free.

Ms. TLAIB. Mr. Chair, I will make sure to leave you some time if you would like. Thank you so much for this opportunity. I appreciate it.

We are a country that likes to believe we have moved away or moved beyond separate but equal, but in reality we are closer to the *Plessy v. Ferguson* famous racism than we would like to admit. So, from students in my hometown in Detroit, Detroit Public School students being denied an education capable of teaching them to read—they actually filed, Mr. Chairman, a right to literacy case—to the number of residents in our U.S. territories having their

constitutional rights curtailed, we still have so much work to do to make good on the promise of freedom and justice for all.

So, I want to focus my remarks today on the legacy of the Insular Cases and how they work today to deny residents of the U.S. territories access to life-saving Federal programs. As everyone knows, I really try to put a human face to the impact of what is actually happening. We are all familiar with the Medicaid program and that it is a critical lifeline for many low-income people seeking health care. It is critical for them to survive and thrive and so much more, but it is so outrageous, Mr. Chairman, that Medicaid funding to U.S. territories is subject to an arbitrary cap that prevents responding to changing economic conditions or emergency situations like the pandemic.

Residents in the Michigan 13th have access to SSI that helps them keep a roof over their heads and food on their tables, yet residents, our neighbors in the U.S. territories, are unfairly excluded from receiving the same benefits. Food and security especially is bad during this pandemic, and the economic downturns our communities have felt has been tremendous, but yet SNAP and TANF are only available in certain territories, and their funding again is arbitrarily limited.

So, Congress, I believe, has a duty to the 3.5 million people of the U.S. territories, to undue the separate and unequal status quo to deliver life-saving relief.

Mr. Weare, can you talk about the human impact in Guam and elsewhere in the U.S. territories for being denied the same social service benefits that people in my district have access to?

Ms. BARNES. Thank you. Mr. Chair, if I may, I'd like to extend a thank you to the Congresswoman. I couldn't have agreed with you even more, and I truly appreciate your comments. And I believe that with Congress having the plenary powers I think this is something that we could do and work together to uplift all the territories and work with the Federal programs and make it have that parity with all the territories as it relates to the Federal programs. And that is something that can truly uplift our communities.

Ms. TLAIB. Absolutely. Thank you so much, Vice Speaker. And Mr. Weare, can you talk a little bit more in detail again about the direct impact on some of the caps and arbitrary kind of process? But I do appreciate your comments, Vice Speaker.

Mr. WEARE. Well said by the Vice Speaker. And, yes, these are life and death choices that residents of the territories have no political voice in deciding. That is the arbitrary undemocratic and colonial nature of the Insular Cases. This is one the cases that the Vice Speaker had mentioned earlier in her testimony, *Schaller v. Social Security Administration*.

You have a situation where a woman facing severe health challenges because of a genetic condition, both her and her twin sister have faced this condition, received SSI benefits in Pennsylvania, but when she moved home to Guam to be cared for by her family members she was denied those benefits while her twin sister, who had the same identical genetic condition, continued to receive them in Pennsylvania.

This is a challenge that has been brought in the Guam District Court, ruled unconstitutional by Judge Tydingco-Gatewood. It is going to be one of several cases that are going to be in play as the Supreme Court considers this *Vaello Madero* case. Mr. Vaello Madero is a gentleman who the U.S. Government came after after they gave him SSI benefits when he moved from New York to Puerto Rico. Here is a person who is getting the benefits because he is indigent, and the Federal Government prosecutors come after him for $20,000 that he didn't have, weeks before Hurricane Maria.

Ms. TLAIB. Unbelievable.

Mr. WEARE. And, again, the Federal Government has lost in the lower courts. Now it is before the Supreme Court. So, as you identified, these are real people's lives, and these are benefits that Americans in other communities just take for granted.

Ms. TLAIB. Thank you, Mr. Weare. I know my time is up, but for all my colleagues as we continue our movements for justice for all in our own country here, we must include our brothers and sisters in the U.S. territories and make their fights our own as well. Thank you so much.

Mr. SABLAN. Thank you very much. As Chair, I need to sort of get some more clarity onto the hearing record because as one of the witnesses alluded, the *Wong Kim Ark* case was decided on as a racist case. Professor Villazor, would you like to explain? Because my understanding is that *United States v. Wong Kim Ark* was a landmark decision of the U.S. Supreme Court which held that a child born in the United States of parents of Chinese descent who at the time of this birth are subjects of the Emperor of China but have a permanent domiciliary and residence of the United States. Can you please explain in more detail the *Wong Kim Ark*, just so the hearing record reflects that?

Dr. CUISON-VILLAZOR. Yes. Thank you, Congressman. *Wong Kim Ark* is indeed a landmark decision by the Supreme Court. In interpreting the 14th Amendment, the Supreme Court held that anyone who is born in the United States is a U.S. citizen subject to the jurisdiction thereof under the 14th Amendment Citizenship Clause. So, I am a bit surprised, actually, that *Wong Kim Ark* has been described here as a racist case. Far from that, I argue because it was at this time that the Chinese Exclusion Act was operating to exclude Chinese from our U.S. borders. So, *Wong Kim Ark* is an important opinion with respect to strengthening what the Citizenship Clause means.

Mr. SABLAN. Thank you. Dr. Immerwahr?

Dr. IMMERWAHR. Thank you so much.

I think it is important to distinguish a ruling made by racists from a racist ruling. The argument that we are making here is that the Insular Cases are not only rulings made by racists who reason racially as they do so but that the ruling itself has a racially discriminatory outcome. *Wong Kim Ark* goes the other way. If the suggestion is that any ruling made by anyone who had discriminatory racial views should be overturned that would be the entire 19th century right there.

What we are pointing out here is that the Insular Cases are decided by a racist ruling that is relevant, and the racism of the judges is sort of core and not incidental to the ruling.

Mr. SABLAN. All right. Thank you very much. I see having no other—Ms. Plaskett—is Ms. Plaskett on?

Ms. BARNES. Mr. Chairman, if I may, Vice Speaker Tina Muña Barnes from Guam. If I could just add a tiny note.

Mr. SABLAN. Make it short, please.

Ms. BARNES. Yes. I truly believe that Congress does not have to wait. This is the opportunity for this Committee to propose sweeping legislation to address these inequities in the territories, protect our individual cultures, and pursue self-determination, and I truly appreciate what is happening today because this is a time where we can take this opportunity to move forward. Thank you for that input, Mr. Chair.

Mr. SABLAN. Yes. Well, self-determination I think would be an entirely separate issue from today's hearing, but anyway, I want to thank the witnesses for their testimony—this is a really good hearing—and the Members for their questions. The members of the Committee may have some additional questions for the witnesses, and we will ask you to please respond to those in writing. Under Committee Rule 3(o), members of the Committee must submit witness questions within 3 business days following the hearing, and the hearing record will be held open for 10 business days for these responses. If there is no further business——

Miss GONZÁLEZ-COLÓN. Mr. Chairman?

Mr. SABLAN. Yes, Miss González-Colón.

Miss GONZÁLEZ-COLÓN. Mr. Chairman, I just want to introduce to the record the book of "The De Facto Incorporated, U.S. Territory of Puerto Rico" of Mr. Gregorio Igartua. We will send it to the Committee, and the book of the Chief Justice of Puerto Rico, Gustavo Gelpi, "The Constitutional Revolution of Puerto Rico and the other U.S. Territories." I think it is an important lecture for this Committee, and I will also submit to the record other further questions. Thank you, Mr. Chairman. I yield back.

Mr. SABLAN. With no objection. You have up until 5 o'clock today, I think, or the end of this hearing, whichever first occurs.

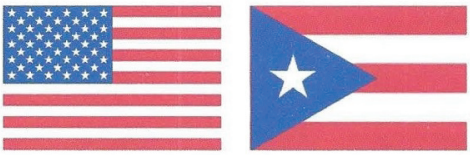
[The information follows:]

Submission for the Record by Rep. González-Colón

Extracts From The Book

The "de facto" Incorporated U.S. Territory of Puerto Rico

By Gregorio Igartua



The degree of incorporation of Puerto Rico to be like a state can be considered by implication as strong as to exclude any other view than that it is an incorporated territory of the United States. (Balzac v People of Puerto Rico 258 US 298, 314, (1922.)

INCORPORATION AND NON INCORPORATION POLITICAL STATUS SUMMARY

- **Treaty of Paris**

...The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress....[11] .

Within this original legal source of authority Congress started a local process of gradual incorporation over the years adopting legislation to organize the government of Puerto Rico to be compatible with its federalist structure, like states are to the federal government. In fact, as will be shown, Puerto Rico has been legally incorporated to be "like a state" gradually to the same (or more) extent as any other territory before becoming a state, or as the territories that were incorporated in transit to statehood under the Northwest Ordinance.

U.S. TERRITORIAL POLICY AFTER 1898: THE CURSE OF NON-INCORPORATED TERRITORIES BY JUDICIAL INTERPRETATION

INSULAR CASES OF 1901

In 1901 the U.S. Supreme Court decided the Insular Cases, usurping congressional powers for U.S. territorial policy as set forth in Article IV, Section 3, Clause 2 of the U.S. Constitution. In the Insular Cases the U.S. Supreme Court established its own judicial interpretation of when the U.S. Constitution would apply to newly acquired territories. The Court decided that newly acquired territories could be incorporated by the United States to be like states, or could be kept temporarily as non-incorporated until Congress determined that the residents of those territories could be considered to be part of the "American Family", at which time the U.S. Constitution would fully apply. (See: *De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. N.Y. & P.R.S.S. Co., 182 U.S. 392 (1901) . See also Balzac v. Puerto Rico, 258 U.S. 298 (1922).* They were adopted by the Supreme Court to justify keeping Puerto Rico and other territorial booty acquired by the United States after the SpanishAmerican War of 1898 in a subjugated colonial status ad infinitum. (*See Juan R. Torruella, The Insular Cases: The Establishment of a Regime of Political Apartheid, 29 U. Pa. J. int'l L. 283 (2007).*

The Court, however, did not offer the criteria that the federal Courts and Congress would use to determine when a newly acquired territory was fit to be part of the American Family, and thus would be ready for the full application of the Constitution of the U.S. In failing to do so the Supreme Court left the door open for the federal courts and for Congress to discriminate against the American citizens residing in Puerto Rico, regardless of where they were born, just as it did concerning American citizens of African ancestry in *Plessy v. Ferguson (163 US 537, 1896).* Because of the Insular Cases the federal courts have been ever since judicially disposing of cases related to Puerto Rico "switching on and off" the applicability of the U.S. Constitution on a case by case basis, as will be shown. What is being discriminated against is not a piece of land, Puerto Rico, but the human rights of 3.4 million American citizens by birth. This discriminatory practice has continued for more than 120 years. It complicates the political scenario with a detente like effect in fiscal policies and civil rights, without incorporating Puerto Rico, nor admitting it as a state.

Three opinions of the U.S. Supreme Court qualifying Puerto Rico as a non-incorporated territory are cited below:

(a) *DOWNES V. BIDWELL 182 US 244; 1901*

In the Downes case of 1901, as in other cases similarly decided by the U.S. Supreme Court and known as the Insular Cases, the Court said:

> "....Incorporation into the United States of territory acquired by treaty of cession, in which there are conditions against the incorporation of the territory until Congress provides there for, will not take place until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family..."
>
> ".... If those possessions are inhabited by alien races, differencing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible ...." (See also, e.g., *DeLima* v. *Bidwell,* 182 U.S. 1; (1901)).

(b) *BALZAC V. PUERTO RICO 258 US 298, at 312-13 (1922)*

This case involved a claim to trial by jury in a criminal prosecution in which the Court concluded that it was unavailable in Puerto Rico because trial by jury was not a "fundamental right", thus ignoring one of the pillars of the Common Law system, a right dating at least back to the Magna Carta. The application of the Constitution was to be determined by the locality of the person, not the person's citizenship. U.S. Constitution Amendment VI was found not to apply to a territory that belonged to the United States but was not incorporated, and where its population was not familiar with the jury system. The Court Stated:

> "... As previously stated, under the Insular Cases doctrine only fundamental constitutional rights extend to unincorporated United States territories, whereas in incorporated territories all constitutional provisions are in force..."

The fact that American Citizenship had been granted to the residents of the territory of Puerto Rico in 1917 was not legally sufficient for the U.S. Supreme Court to dispose otherwise. (Chief Justice *William H. Taft* wrote the Opinion. He was Governor of the Philippines in 1901 when the first of the Insular Cases was decided.) Moreover, the Court stated that incorporation is an important step that leads to statehood, and also as follows:

> ".... Since the Spanish War, an intention of Congress to incorporate new territory into the Union is not to be admitted without express declaration or an implication so strong as to exclude any other view ...."(Id at 306).

The Balzac decision is in contradiction to the Court's holding in *U.S. v Rasmussen 197 U.S. 596, 1905 (Alaska);* and, *Hawaii v Mankichi 190 U.S. 197, 1903*; that incorporation was inferred, and to Congress' constitutional mandate for territories. (U.S. Const. Art. IV, Section 3, Clause 2).

(c) *HARRIS V. ROSARIO (446 US 651, 1980).*

Harris v. Rosario is another judicial opinion decided under the veil of the Insular Cases doctrine affecting Puerto Rico adversely. It was decided under wrong and incorrect legal bases. This case questioned the validity of policy under which Puerto Rico received less assistance than states do in the program of Aid to Families with Dependent Children. (AFDC) The Court held that there was a rational basis for the statutory classification since:

1) Puerto Rico's residents do not contribute to the Federal Treasury. (Incorrect. See IRC 933 and IRS Tax Highlights 2017).
2) The cost of treating Puerto Rico as a state for purposes of AFDC assistance would be high. (Incorrect and discriminatory).
3) Granting greater AFDC benefits could disrupt the Puerto Rican economy. (Discriminatory- Paraphrasing Justice Thurgood Marshall's dissent,..."those programs designed to help those who need them the most should not be extended to Puerto Rico's poor out of concern that if extended they would disrupt the local economy....")

The cases cited above do not define any specific legal criteria to be followed by the courts to confer non-incorporation or incorporation status to a territory. From a reading of the cases above one can conclude that the Courts have decided expressly, or by implication, to classify Puerto Rico as a nonincorporated territory using discriminatory arguments as follows:

1) Puerto Rico is a non-incorporated territory of the United States.
2) The 4th, 5th and 6th generation American citizens of Puerto Rico are still not part of the American Family, and will only be apt when Congress determines.
3) Puerto Rico is a territory belonging to the United States, but is not a part of the United States.
4) Only fundamental constitutional rights extend to the American citizens residing in Puerto Rico, notwithstanding congressional and judicial dispositions to the contrary.
5) The American citizens of Puerto Rico don't pay Federal taxes.
6) The cost of treating Puerto Rico like a state, like an incorporated territory, would be large for purposes of federal assistance (Incorporated with parity in federal funds, like states).
7) Granting greater benefits to Puerto Rico to be treated like a state would disrupt the Puerto Rico economy, as if it were not disrupted already.
8) The blessings of a free government under the Constitution cannot still be extended to the American citizens of Puerto Rico.
9) An intention of Congress to incorporate new territory into the Union is not to be admitted without express declaration or animplication so strong as to exclude any other view.
10) Puerto Rico is still inhabited by an alien race. [Aborigines.] (Racist?) (Contrary to US Const. Amendments XIV and XV).

The three cases cited above classifying Puerto Rico as a non-incorporated territory have been used in the past century by the Federal Courts to discriminatorily switch —on and offl the U.S. Constitution in controversies arising in relation to Puerto Rico to be like a state, blatantly ignoring congressional policies that have gradually incorporated Puerto Rico. As a consequence, the in transit to statehood process that the incorporated status carries with it is in "detente". How discriminatory and incorrect is the non-incorporated treatment given to Puerto Rico by the Courts, will be shown below. Should a Federal Court dispose of a case under such discriminatory premises? Can such discriminatory treatment be applied to all future judicial dispositions concerning Puerto Rico? Does the judicial theory of incorporation fit within the U. S. constitutional framework? Before considering the incorporation process of Puerto Rico it is pertinent to consider that the non-incorporation cases cited above were decided with dissident opinions, and/or under wrong legal premises, which evidence that from the outset the majority supporting the non-incorporation theory confronted opposition.

COMMENTS IN OPPOSITION TO THE INSULAR CASES

a) DOWNES Y. BIDWELL, 244 US (1901)

This case was decided with a split vote (5-4) by the Court. Hon. Supreme Court Judge Harlan wrote a dissenting opinion which may be quoted in part as follows:

> "....The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces,-the people inhabiting them to enjoy only such rights as Congress chooses to accord to them is wholly inconsistent with the spirit and genius as well as with the words of the U.S. Constitution..."
>
> —....I reject altogether the theory that Congress, in its discretion, can exclude the Constitution from a domestic territory of the United Sates acquired, and which could only have been acquired, in virtue of the Constitution...."
>
> (See: *DeLima v Bidwell, 182 US 1 (1901).* Puerto Rico is part of the U.S. for tariff purposes. Ironically the court said: "...We are unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic..."

Moreover, contrary to Downes the U.S Supreme Court decided in *González v Williams*, 24 Sup. Ct. Reporter 177, 1903, that the nationality of the residents of Puerto Rico was American. Part of the American Family? See also the case of Mr. Molinas, a native of Puerto Rico, who was qualified as an American artist for purposes of tariffs exemptions of works of art

produced abroad in Biarritz, France (24 Ops. Atty. Gen. 40, 1901). Notwithstanding, until the Insular Cases are revoked by the Supreme Court, and/or until Congress implements legislation to incorporate Puerto Rico, the applicability of the Cases may still be invoked. On the other hand, as will be shown, some Courts have judicially disposed of cases as if Puerto Rico is an incorporated territory. (See: Part III (9) (b))

b) BALZAC OPINION (258 US 298, 1922)

The Court refused to acknowledge that American citizenship granted in 1917, the presence of a U.S. Federal District Court in San Juan, military service, "extension of revenue, navigation, and immigration" laws, and the use of U.S. stamps were de jure and de facto acts of incorporation.

Since the Insular Cases were decided an intention of Congress to incorporate new territory into the Union is not to be admitted without express declaration or an implication so strong as to exclude any other view. *(Balzac v. Puerto Rico).*

c) HARRIS V ROSARIO OPINION (446 US 651, 1980)

The Harris case was decided on wrong premises. It is incorrect to say (as in Harris) that the American residents of Puerto Rico do not contribute to the Federal Treasury, they do. Today the American citizens residents of Puerto Rico pay more than three billion dollars annually to the U.S. Treasury in taxes from different sources, as required by the Federal Income Tax Law, but with a discriminatory applicability to Puerto Rico by unequal transfer of payments in Federal Funds. (2017 IRS Highlights). There cannot be any rational basis for Congress to discriminate against a class of citizens, the 3.4 million American citizens who live in Puerto Rico. To treat any American citizen differently on a basis other than on individual merit fulfills the dictionary definition of discrimination, especially taking into consideration the fact that the Equal Protection Under the Laws and Due Process clause of the U.S. Constitution applies in Puerto Rico. (*U.S. v. P.R. Police Dept. 922 FS 2nd. 185 (2013).*

INCORPORATION AND NON-INCORPORATION AS A RESULT OF THE INSULAR CASES
Outline Of Subject Related To The Incorporation Process As Applied Gradually To Puerto Rico

I- U.S. TERRITORIAL POLICY

(1) U. S. Territorial Policy Before 1898
(2) U.S. Acquires Puerto Rico In 1898
(3) Territorial Policy After The Curse of Incorporated and non-Incorporated Territories by Judicial Interpretation Insular Cases Of 1901

(3) (a) Downes v. Bidwell 182 US 244; 1901
(3) (b) Balzac v. Puerto Rico 258 US 298, at 312-13 (1922)
(3) (c) Harris v. Rosario (446 US 651, 1980)

(4) Comments in Opposition to the Insular Cases

(a) Downes v. Bidwell, 244 US (1901)
(b) Balzac Opinion US (258 US 298, 1922)
(c) Harris v Rosario Opinion (446 US 651, 1980)

II

Legal Incorporation Process of Puerto Rico

(1) Statement of General Nelson A. Miles-1898
(2) Oath of Loyalty by P.R. Govt. Officials 1898
(3) The Henry Carrol Report /Executive Order 1899
(4) 1900- FORAKER ACT. (31 Stat.77) – (Initial steps to Organize the Puerto Rico Government in republican form of three branches like that of states)
(5) Jones Act. -1917 (39 Stat. 951)- American Citizenship Granted (1951 By Birth)
(6) 1947 — Us Const. Art. IV Section
(7) 1948 - Right to Elect a Governor
(8) Right to Adopt A Constitution as in States
(9) (a) Acts Of Incorporation Of Puerto Rico by The Federal Judicial Branch
(9) (b) Judicial Opinions That are of Particular Importance to The Incorporation Process
(10) Federal Laws Apply in Puerto Rico (39 Stat 954- Law 600 Section 9)
(11) U.S. Agencies Treat Puerto Rico as a State
(12) Federal Taxes Paid From Puerto Rico to the U.S. Treasury
(13) Federal Electoral Process in Puerto Rico
(14) Participation in World Wars by American Citizens Residents of Puerto Rico
(15) Other Support for Incorporation Status of Puerto Rico

CHAPTER V

CONCLUSION

As it has been shown, for the Federal Courts to continue considering the Insular Cases as the legal basis and precedent for their decisions in the 21st Century is legally unfounded and incorrect. The practice of treating Puerto Rico as a non-incorporated territory where some constitutional dispositions do not apply, and as an incorporated territory for others where it applies must end. The uncertainty of whether the U.S. Constitution applies leads to a capricious, unequal, and discriminatory treatment by each of the three Branches of the Federal Government against its own American Citizens, those residing in Puerto Rico. (3.4 million 4th, 5th and 6th generation American Citizens by birth). (See e.g., *Hon. Judge J. Torruella, Igartua v U.S., 229 F3d 80, 85 (1st Cir. 2000)*; Hon. Judge J. Torruella. The Doctrine of Separate and Unequal 1980; GA Gelpí, The Constitutional Evolution of Puerto Rico and other U.S. Territories (1898 – Present, 2017); G. Igartua, Letter Requesting Treatment of Puerto Rico As An Incorporated Territory - Hon. Colin L. Powell, Sec. Dept. of State, Oct. 1, 2003. Treating Puerto Rico as an

unincorporated territory has the effect of provoking a legal, political, economic, and unfair government practice with its negative consequences. (See, G. Igartua, Muñoz El Americano, Chapter 8, 3rd edition 2015). It has led the Federal Government in most cases to treat Puerto Rico politically not based on what it is, a de facto incorporated territory of the United States with 3.4 million American citizens by birth, but based on what it politically might be. For these purposes the American citizens of Puerto Rico have been ignored as being part of the American Family with the implication of still being considered as if they are an alien race. (See: *Downes v. Bidwell, supra II A (3) (a)*.)

Notwithstanding the conflicting views of the legal and political relation of Puerto Rico to the United States, its gradual assimilation since 1898 by Congress in transit to statehood cannot be ignored. In 2018 the ties between United States and Puerto Rico have strengthened and evolved in such a way, and in such a constitutional significance, that it is definitely an incorporated territory of the United States on its way to statehood, one where the fullness of the U.S. Constitution applies, just as the U.S. Supreme Court did in 1954 by deciding *Brown v. Board of Education* 347 U.S. 483.(Compare to *Boumediene v. Bush, 553 U.S. 723)*. The theory of a permanent non-incorporated territorial status does not fit within the U.S. constitutional framework. The degree of incorporation of Puerto Rico to be like a state can be considered by implication as strong as to exclude any other view than that it is an incorporated territory of the United States. (Balzac Supra II A (3) (b)). Discriminatory treatment to the 3.4 million American citizens of Puerto Rico will only be eliminated when Congress adopts a resolution certifying Puerto Rico as an incorporated territory of the United States and in transit to statehood with a definite date of admission. This resolution most certainly will be required apriori to the Act of Statehood. (Compare process with, H. *Hills, Not Foreign In Any Sense, Ready For Transition To Taxation, Puerto Rico Reports, December 16, 2017*). The adoption of such a resolution is 120 years overdue.

Mr. SABLAN. Without objection, the Committee stands adjourned.
[Whereupon, at 2:51 p.m., the Committee was adjourned.]

[LIST OF DOCUMENTS SUBMITTED FOR THE RECORD RETAINED IN THE COMMITTEE'S OFFICIAL FILES]

Submissions for the Record by Rep. Sablan

— Testimony on H. Res. 279 by Donna M. Christensen, MD, Former Member of Congress, U.S. Virgin Islands

Submissions for the Record by Rep. Soto

— Remarks to the Committee on H. Res. 279

Submissions for the Record by Rep. Radewagen

— Article titled, "Asking judges to decide status threatens self-determination" by Dr. Peter S. Watson, *Pacific Island Times*, May 25, 2021

Submissions for the Record by Rep. González-Colón

— Book titled, "The Constitutional Evolution of Puerto Rico and Other U.S. Territories (1898–Present)," by Gustavo A. Gelpí, 2017

Submissions for the Record by Gov. Guerrero of Guam

— Letter to Chairman Grijalva dated May 12, 2021 re: testimony on H. Res. 279

Submissions for the Record by Witnesses

Vice Speaker Barnes

— Author's Report on Resolution No. 56-36
— Supplement to the Author Report on Resolution 56-36 (COR)

Dr. Peter Watson

— Commentary and Rebuttal for the Record

Other Submissions for the Record

ACLU

— Letter of support for H. Res. 279, dated May 10, 2021

Charles Ala'ilima, America Samoa

— Statement for the Record on H. Res. 279
— Article titled, "Citizenship in Empire: The Legal History of U.S. Citizenship in American Samoa, 1899–1960" by Ross Dardani, *American Journal of Legal History* 2020, 60, 311–356.
— Amicus Brief, Samoan Federation of America, Tenth Circuit U.S. Court of Appeals, United States of America; U.S. Department of State; Michael R. Pompeo and The American Samoa Government and the Hon. Aumua Amata v. John Fitisemanu, Pale Tuli, Rosavita Tuli, and Southern Utah Pacific Islander Coalition, May 12, 2020

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