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Testimony on H. Res. 279

May 12, 2021

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

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

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 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 towards 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*

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

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.

Harm of *Insular Cases* "Not Hypothetical"

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[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).

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

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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).

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, 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

[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).
[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).

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 cosponsors 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]

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[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 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.

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 United States 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.

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