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**Testimony on Resolution No. 56-36 (COR)**  
**Committee on Rules**

**May 5, 2021**

Chair Muña Barnes, and distinguished committee members:

Buenas yan Hafa Adai. Thank you for the opportunity to testify in support of the Guam Legislature's Resolution 56-36, relative to supporting House Resolution 279, and to reject the discrimination faced by the 3.5 million citizens living in U.S. Territories — 98% of whom are racial or ethnic minorities, including indigenous peoples.

I am Neil Weare, President and Founder of Equally American Legal Defense & Education Fund. I founded Equally American in 2013, and it remains the only public interest law organization focused exclusively on advancing equality and civil rights in Guam and other 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 undemocratic status quo. In other words, we seek to obtain full constitutional rights and political equality for disenfranchised communities in the Territories while also supporting these communities' right to determine their own future relationship to the United States through a process of self-determination and decolonization.

**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.

Guam is, of course, a central part of any conversation about the *Insular Cases* and America's colonies problem. Guam has been a part of the United States now for 123 years, more than half as long as the United States has had a Constitution. Yet from a civil rights perspective, the United States continues to deny residents of Guam the right to vote for President, any voting representation in Congress, or even recognize a constitutional right to citizenship, even as Congress maintains the power to govern

Guam unilaterally. From a human rights perspective, the United States has fallen far short of its commitments to self-determination, decolonization, and indigenous rights. However you look at it, Guam is a colony of the United States.

Following the acquisition of Guam, Hawaii, Puerto Rico, and other 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.<sup>1</sup> As commonly understood, under the *Insular Cases* the Constitution applies "in full" in incorporated territories, but only "in part" in unincorporated territories like Guam.<sup>2</sup> 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 Chamorus and other inhabitants of 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*.<sup>3</sup> 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."<sup>4</sup> 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."<sup>5</sup>

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.

While the *Insular Cases* are perhaps best known for limiting the application of certain constitutional provisions in so-called "unincorporated" Territories, their most far-reaching effect has been to justify the perpetual denial of political equality to these overseas communities of color. But unlike *Plessy's* doctrine of "separate but equal,"

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<sup>1</sup> Neil C. Weare and Adriel I. Cepeda Derieux, [After Aurelius: What Future for the Insular Cases?](#), 130 YALE L.J. (Nov. 2, 2020).

<sup>2</sup> *Boumediene v. Bush*, 553 U.S. 723, 757 (2008).

<sup>3</sup> Neil Weare, [Why the Insular Cases Must Become the Next Plessy](#), HARV. L. REV.: BLOG (Mar. 28, 2018).

<sup>4</sup> *Downes v. Bidwell*, 182 U.S. 244, 282-83 (1901).

<sup>5</sup> *Id.* at 372 (Fuller, J., dissenting)

which has long been overruled, the *Insular Cases* doctrine of “separate and unequal” remains valid Supreme Court precedent.

### **Structural Political Inequality Results in Structural Economic Inequality**

Political inequality for residents of Guam has resulted in significant economic inequality, demonstrating why the *Insular Cases* and the colonial framework they established must be viewed as kitchen table issues, not simply abstract matters of principle.

Deprived of a voice in presidential elections and voting representation in Congress, residents of Guam are short-changed in a range of federal benefits programs that most Americans take for granted. Disparities in federal Medicaid policy leave citizens in Guam and other territories without the funding that ensures a basic level of healthcare sustainability to most American communities.<sup>6</sup> 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 Guam 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.<sup>7</sup> 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 Guam and other Territories.<sup>8</sup>

Another example of how political inequality in the Territories leads to benefits discrimination is the Supplemental Security Income (SSI) program. Under federal law, otherwise eligible low-income aged, blind, or disabled Americans living in Guam and other 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 Ohio or Illinois 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

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<sup>6</sup> Selena Simmons-Duffin, [America's 'Shame': Medicaid Funding Slashed In U.S. Territories](#), NPR.org (November 20, 2019).

<sup>7</sup> Lena O'Rourke, [Congress is Holding Health, Wellbeing of U.S. Territory Residents in the Balance](#), CLASP.org (December 19, 2019).

<sup>8</sup> Javier Balmaceda, [Territories' Looming Medicaid "Cliff" Highlights Need for Full, Permanent Funding](#), CBPP.org (March 16, 2021).

soon be tested by the Supreme Court in *United States v. Vaello Madero*,<sup>9</sup> which will address questions similar to those raised in another Guam case currently pending in the Ninth Circuit.<sup>10</sup>

Military service members from Guam and other 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. Military service rates in Guam exceed any State, with casualty rates during these conflicts more than four times the national average. Service members from the Territories have been awarded the Medal of Honor by the President of the United States on multiple occasions, yet denied the right to vote for President even as they receive that honor. Political equality should not be denied these patriotic citizens, or the communities in which they live.

The contributions of citizens in the Territories to our Nation's security is not limited to service in uniform. Guam, for instance, is often called the "tip of the spear" because of its proximity to threats in Asia, hosting forward deployed weapons like the B-2 stealth bomber and other powerful military assets. Because of the military assets stationed in Guam, North Korea has made credible threats to attack the island with nuclear weapons.<sup>11</sup> Possible military threats against Guam from China or other adversaries are also taken seriously in military circles.<sup>12</sup> If citizens in Guam and other Territories face a disproportionate share of military threats, should they not have some say in electing the leaders who make America's national security decisions?

At bottom, political inequality for residents of Guam and other Territories means these vital decisions are being made in the absence of the usual democratic checks and balances. The grim reality is that until residents of the Territories are able to vote for President and have voting representation in Congress, decisions will continue to be made without their input that could be the difference between life or death for too many.

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<sup>9</sup> 956 F.3d 12 (1st Cir. 2020).

<sup>10</sup> Schaller v. U.S. Soc. Sec. Admin., No. 18-00044, slip op. at 20 (D. Guam June 19, 2020)

<sup>11</sup> Choe Sang-Hun, [North Korean Threat to Guam Tests Credibility of Kim and Trump](#), NY Times (Aug. 10, 2017).

<sup>12</sup> David Ax, [China Aims Missiles At Guam. How Should the Pentagon Defend America's Pacific Bomber Base?](#), Forbes (July 23, 2020).

## Where Are We Now, and Where Do We Go From Here?

All this raises two fundamental questions that are critical to both ask and answer as we chart a path past the *Insular Cases* and the colonial framework they established:

**United States:** The people of the United States must ask themselves: *Who are we and who do we want to be? And what does that mean regarding our relationship with residents of U.S. territories?*

**Guam:** The people of Guam must ask themselves: *Who are we and who do we want to be? And what does that mean regarding our relationship with the United States?*

Groups like the Fanohge Coalition and the Commission on Decolonization are doing excellent work addressing this second question, primarily through a human rights framework. Over the last decade, they have raised the bar significantly in terms of both the quality and quantity of discourse and advocacy on these issues.

Equally American is focused on the first question, primarily through a civil rights framework. That is, so long as Guam and other territories are part of the United States, what rights should residents of these areas enjoy as U.S. citizens? If the United States is to be the anti-colonial Nation it was founded as, what does this mean for its relationship with residents of U.S. territories today?

There is a view by many in Washington, DC that the federal government does not need to do anything regarding the territories until the people of the territories clearly express what it is that they want. We reject that view, arguing that the United States – all three branches – has an independent duty to act to bring the status of residents of the territories in line with America’s democratic and constitutional values, even as the people of the territories continue to engage in the process of self-determination and decolonization.

At the same time, the people of the territories need not and should not wait for the United States to act to stand up for their civil and human rights.

In many if not most ways, these human rights and civil rights conversations are parallel and mutually reinforcing. In particular, all sides should be able to agree that the *Insular Cases* and the colonial framework they established are a continuing threat to civil and human rights that need to be dismantled once and for all.

## Historic Opportunities to Overrule the *Insular Cases*

The next two years present unprecedented opportunities in all three branches to turn the page on the *Insular Cases* and the colonial framework they established.

Last year, the Supreme Court questioned the “continued validity” of the *Insular Cases*, indicating “that the *Insular Cases* should not be further extended”.<sup>13</sup> In *Aurelius v. FOMB*, the Supreme Court continued the trend of narrowing and cabining the *Insular Cases*, although it stopped short of overruling them, noting the issue was not squarely presented.<sup>14</sup> A new vehicle for the Supreme Court to reconsider the *Insular Cases* is currently working its way towards the Court. In *Fitisemanu v. United States* – a case brought by Equally American on behalf of American Samoans who are denied recognition as U.S. citizens – the United States is relying on the *Insular Cases* to argue that there is no constitutional right to U.S. citizenship for people born in so-called “unincorporated” territories, meaning Congress could unilaterally revoke citizenship for people born in Guam (possibly both prospectively and retrospectively). A district court in Utah rejected the U.S. view, holding that people born in overseas territories have a constitutional right to U.S. citizenship.<sup>15</sup> If this decision is affirmed by the U.S. Court of Appeals for the Tenth Circuit, that would create a “circuit split” with the D.C. Circuit, making it very likely the Supreme Court will take up the issue.

If history teaches us anything, simply waiting for the Supreme Court to reverse a century of injustice is not enough. I commend House Resources Chair Raúl Grijalva for his bipartisan resolution, H.Res. 279, which calls on the *Insular Cases* to be “rejected in their entirety” as decisions that have “no place in United States Constitutional law.”<sup>16</sup> Next week Chair Grijalva will be holding an historic hearing on H.Res. 279, marking the first time ever that Congress will hold a hearing specifically focused on rejecting the *Insular Cases*.

It is also important that we directly push the Biden-Harris Administration to reject the *Insular Cases* and the colonial framework they established. President Joe Biden and Vice President Kamala Harris have made a commitment to equality and racial justice a centerpiece of their Administration. This commitment will soon be put to the test when the Biden-Harris Department of Justice must decide in cases like *Fitisemanu v. United States* whether to continue relying on the *Insular Cases*.

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<sup>13</sup> Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., 140 S.Ct. 1649, 1665 (2020).

<sup>14</sup> 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).

<sup>15</sup> *Fitisemanu v. United States*, 426 F. Supp 3d. 1155 (D. Utah 2019).

<sup>16</sup> 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).

It is exciting to see Guam's leaders taking an active role in pushing the federal government on these issues. Resolutions like the Guam Legislature's Resolution 56-36 help build pressure for all three branches of the federal government to act to condemn the *Insular Cases* and take seriously the need to advance civil and human rights for residents of Guam and other territories. A century of colonialism as constitutional doctrine is enough.

## Conclusion

The United States has long championed democracy both at home and around the world. Indeed, the Declaration of Independence rooted our Nation in a rejection of colonialism and the embrace of the principle that governments derive their just powers from the consent of the governed. From the Reconstruction Amendments to women's suffrage to the Voting Rights Act of 1965, the arc of American history has bent toward ever more inclusion and representation. Yet, when it comes to the rights of the 3.5 million U.S. citizens living in Guam and other territories, the United States falls far short of its democratic and constitutional principles.

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 vote for President or have voting representation in Congress. While such racist sentiments are no longer stated so openly, it is not a mere coincidence that more than 98 percent of territorial residents are racial or ethnic minorities, including indigenous peoples.<sup>17</sup>

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

We urge the Guam Legislature to adopt Resolution 56-36 to condemn the *Insular Cases* and reject both their colonial framework that the racial discrimination they are grounded in. It is the right thing to do, the moral thing to do, and it is long overdue.

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<sup>17</sup> Stacey Plaskett, [The Left and Right's Blind Spot in Systemic Racism: The US Colonies](#), THE GRIO (June 24, 2020).