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SUBMITTED FOR THE RECORD

COMMITTEE ON NATURAL RESOURCES

U.S. HOUSE OF REPRESENTATIVES

ON

H.R. 279

INSULAR CASES RESOLUTION

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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 –

    - Warren Court members who overturned Plessy in 1954 but upheld the Insular Cases in 1957 (Reid v. Covert)

    - Burger Court reliance on the law of the Insular Cases in 1976 (Examiners v. Flores de Otero), including Justice Marshall

    - 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revisionism, the reality is that the flawed and imperfect Insular Cases should be relied upon unless and until superseded in an orderly manner by a better status doctrine based on self-determination, not a repeat of judicial activism that began with the Insular Cases after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, 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 federal social safety net laws

- 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.

- <u>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.</u>

- <u>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.</u>

- 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 o 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.

- <u>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.</u>

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.