

# 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.*