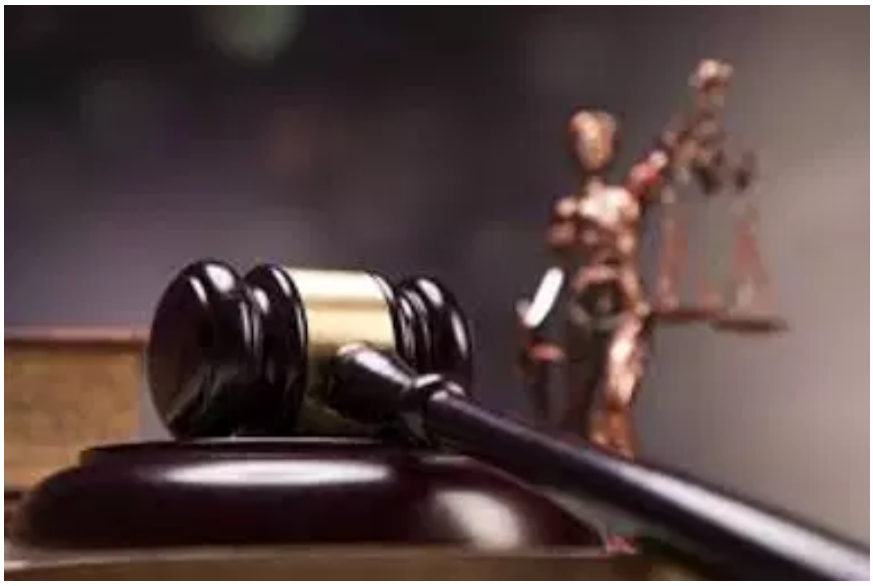
Dr. Peter S. Watson a day ago 3 min read

Asking judges to decide status threatens self-determination



At the May 12 hearing on Insular Cases (House Resolution 279) came to a close, the Vice Speaker Tina Muna Barnes of the Guam Legislature made these powerful final remarks: "Congress does not have to wait. This is the opportunity ... to propose sweeping legislation to address these inequities, protect our individual cultures, and pursue self-determination. [T]his is the time where we can take this opportunity to move forward."

Sitting in for the committee chairman, Rep. Gregorio Sablan (CNMI), however, got the last word, "Self-determination would be an entirely separate issue from today's hearing."

From another perspective, it can be urged with the utmost respect to the Committee chair that H. Res. 279, and the record of that hearing, are as much or more about self-determination as about the Insular Cases litigation in federal court.

H. Res. 279 is an aggressive endorsement of plaintiffs in pending federal lawsuits seeking SSI and Medicare in the territories equal to the states. Guam's vice speaker is of course correct — the Insular Cases do not prevent Congress from reversing by statute the political decisions made by statute to deny full SSI and Medicare to all territories.

However, H. Res. 279 also seeks to influence another lawsuit about U.S. nationality in American Samoa that is not about statutory equities but seeks federal court intervention to redefine the constitutional status and rights of all the territories.

Naturally, however, this is a political question for Congress, and again Guam's vice speaker is correct that sooner or later Congress must provide a mechanism under federal law for each of five current less than fully self-governing territories to exercise self-determination.

That means to consent to either remain a territory without equality that comes only with statehood or seek equality under a non-territorial status recognized under the U.S. Constitution.

But varied supporters of H.Res. 279 want to use American Samoa as a guinea pig in litigation instigated by special interest lobbyists to reverse the Insular Cases through a court order applying the U.S. Constitution directly to American Samoa, against the wishes of its elected and traditional leaders.

At the same time, H. Res. 279 demands federal courts treat all five territories as a single body politic instead of five separate bodies politic under current organic acts. That would mean an appellate ruling upholding the lower court ruling in Utah applying the U.S. Constitution directly to American Samoa as in the states and incorporated territories presumably would apply to all territories.

If the U.S. appeal is not successful, and the heavily criticized ruling in the American Samoa case is instead upheld, it will mean unelected judges will be changing the current political status of all five territories without democratic self-determination and consent of the governed.

I was pleased to assist the committee as a witness in the May 12 hearing, not as a defender of or apologist for the Insular Cases, but to defend an accurate understanding of them.

Personally, I tend to agree with Judge Harlan's dissent in *Downes v. Bidwell,* and with Judge Gelpi on the Federal District Court in Puerto Rico, the "unincorporated" territory doctrine of the Insular Cases was "invented" without a constitutional predicate.

However, the predictable effect of overruling the actual tax law ruling in the *Downes* decision would be the application of the uniform taxation clause in Article I, Section 8, Clause 1 of the U.S Constitution to all five territories. That would mean federal taxes as in the states, without any commitment to full equality of representation that comes only with statehood.

If denied statehood, for U.S. citizens in territories the only path to equality at the national level would be an Article V constitutional amendment to give territories the same rights as states without uniform duties and burdens. Should the American Samoa lawsuit invite courts to repeat the mistake of the Insular Cases, and define the status of territories without self-determination, anything less than full equal representation nationally will be as imperialist as the Insular Cases.

That is why self-determination by the people of each territory on the real status options rather than sweeping judicial activism by unelected judges is that path forward from the Insular Cases that can unite all Americans.

Dr. Watson is former Chair of the ABA committee on South Pacific Law, and former Director of Asian Affairs for the White House National Security Council responsible for the Pacific Islands and Freely Associated States.

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