Statement of Dr. Peter S. Watson

Committee on Natural Resources

U.S. House of Representatives

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H. Res. 279

Mr. Chairman, allow me to thank you and the Committee members for this oversight hearing to consider America's commitment to self-determination in our nation's territories, necessarily doing so in the context of today's appreciation of the needs for racial justice.

This witness has grappled with the Insular Cases in federal court litigation, representation of the Marshall Islands on political status affairs, and twice in testimony for the Pacific Islands Association on territorial self-determination before the United Nations.

In the American system of constitutional federalism, the traditional remedies for anti-democratic, discriminatory, unjust or otherwise aggrieved outcomes under federal law are well understood. For a number of years, this witness exercised quasi-judicial powers when a member of the Congressionally established/mandated International Trade Commission, our decisions thereof being subject to judicial review, including up to the Supreme Court -- which indeed has overturned the same.

This witness accordingly has first-hand experience, and no minor ego-bruising, arising from dueling between the congressional and judicial branches, in the process testing their respective constitutional roles and limits, including relative to each other: And, in no small part, it is this personal frame of reference that I place over the proposed resolution to discern how it fits relative to federal court jurisdiction, and vice-versa.

In brief: H. Res. 279 exemplifies circumstances in which Congress would seek to exercise its powers to redress grievances arising from a statute and/or the Constitution, but not by enactment of a corrective remedial statute under Art. I, which, in the case of territories, is also an exercise of the Article IV, Sec 3, Clause 2 territorial power. Nor does H. Res 279 propose where otherwise necessary a corrective remedial amendment to the Constitution under Article V.

Thus, H. Res. 279 is in lieu of a statute that would extend SSI or Medicare/Medicaid in the territories on the same basis as the states. Likewise, H. Res. 279 is in lieu of a statute

repealing all federal laws since 1901 ratifying or based on the Insular Cases unincorporated territory doctrine.

Moreover, nor is H. Res. 279 a proposed Art. V amendment to extend to Americans in the territories federal voting rights for full and equal representation in Congress and the Electoral College.

Instead, H.R. 279 would seek by an act of Congress to restrain or even restrict the President and the courts from relying upon the Insular Cases, which currently are controlling federal court decisional law, jurisprudence which is legally authoritative. That is to say, the supreme law of the land.

Some commentators refer to a proposal like H. Res. 279 as a Congressional override of court made law. But court rulings overridden by congress generally involve court orders interpreting an act of Congress where the statute, and/or the court interpretation of it, is flawed.

H. Res. 279 is not that: One reason is that H. Res. 279 must be understood as a Congressional endorsement of the remedies sought by plaintiffs in the *Vaello Madero*, *Peña Martínez*, and *Schaller* cases challenging the Insular Cases. That linkage is confirmed by that March 10, 2021 letter from leadership and members of this Committee asking the Attorney General to abandon Insular Cases defense in those cases.

However, as a proposed Congressional override, H. Res. 279 is not aimed at a flaw in the SSI statute as it applies in the states: it is aimed at the constitutionality of the Insular Cases unincorporated territory doctrine as court made law allowing Congress to apply federal statutes to non-incorporated territories differently than in states.

As such, H. Res. 279 would seek to deprive the President and federal courts of reliance on the Insular Cases as applicable under the rule of law as it existed when those three lawsuits began. The result would be that those three plaintiffs likely would prevail.

But that would be in the nature of a statutory remedy for a statutory injury. There is another case in the federal appellate process, Fitisemanu v. U.S., that is a constitutional claim that national citizenship half of the national and state citizenship clause in Section 1 of the 14th Amendment applies in American Samoa as it applies in the states of the union and territories joined permanently in union with the United States.

In the Northwest Ordinance tradition and under the Insular Cases permanent union means incorporation and equality under the Constitution, except that full equality still comes only with voting rights that come only with statehood.

Accordingly, if H. Res. 279 is adopted and has its expressly stated impact, and the U.S. Justice Department abandons an Insular Cases defense -- leading to a ruling upholding the trial court decision extending the 14th Amendment to all five current territories -- here is what that might mean:

- All current unincorporated territories permanently incorporated into union without self-determination or statutory action by elected representatives.

- Uniformity clause taxation, equal protection, due process, all federal law applies as in states and incorporated territories

- Guam, U.S. Virgin Islands, American Samoa join Puerto Rico, CNMI removal from U.N. list of non-self-governing territories with right of independence

In close, most fundamentally of all, the immediately-preceding scenario could leave territories in a judicially-determined status which would not secure a congressional commitment to full equality through statehood, nor, in the alternative, independent nationhood, based on democratic self-determination – obviously the very basis upon which our founding constitutional fabric was founded.