

QUESTIONS FROM COMMITTEE MEMBERS

Questions from Rep. Sablan for Mr. Neil Weare, President, Equally American

Although the authority to overturn the Insular Cases lies with the Supreme Court, how may Congress and the Administration intervene to help resolve the issues discussed in this hearing?

The Supreme Court has to date hesitated to act on calls for it to overrule the *Insular Cases*. So while the responsibility and authority to overrule the *Insular Cases* rests with the Supreme Court, Congress and the Executive Branch can play an important role in signaling that the Court should take clear and decisive action to turn the page once and for all on the *Insular Cases* and the colonial framework they established. At the same time, the political branches should act immediately to address ongoing discrimination against residents of U.S. territories that are a legacy of the *Insular Cases*. In this way, all three branches have an important role to play in ensuring that every U.S. citizen enjoys equal rights, wherever they live.

In 2019, Equally American led efforts in *Financial Oversight and Management Board v. Aurelius Investment, LLC*, to call on the Supreme Court to finally overrule the *Insular Cases*.¹ At oral argument in *Aurelius*, Attorney Jessica Méndez-Colberg expressly called on the Supreme Court to overrule the *Insular Cases*, an historic first.² Unfortunately, the Supreme Court did not take up this call to action.³ But the Supreme Court was not silent either. Building on prior precedent, it made clear that the “much-criticized” *Insular Cases* “should not be further extended.”⁴ The Court spoke in undeniably questioning terms on the *Insular Cases*’ perdurance, noting that “whatever their continued validity” it would not expand on their framework, despite such an invitation from at least one party in the case.⁵ The Supreme Court’s skepticism towards the *Insular Cases* suggests it is open to reconsidering them when a case more squarely presents the opportunity to do so.⁶

The Supreme Court will have another opportunity soon to weigh in on the *Insular Cases* in *United States v. Vaello Madero*, a case that considers whether discrimination against residents of U.S. territories in the Supplemental Security Income program violates the Constitution’s guarantee of Equal Protection.⁷ It may also have the opportunity soon in *Fitisemanu v. United States*, a case brought by Equally American which challenges the federal government’s position

¹ See, e.g., [Brief For Amicus Curiae Equally American Legal Defense And Education Fund In Support Of Neither Party](#); [Brief Amici Curiae Of The American Civil Liberties Union And The ACLU Of Puerto Rico, Supporting The First Circuit’s Ruling On The Appointments Clause Issue](#); [Brief Of Amicus Curiae Virgin Islands Bar Association Supporting The Ruling On The Appointments Clause](#); [Brief For Amici Curiae Scholars Of Constitutional Law And Legal History Supporting The First Circuit’s Ruling On The Appointments Clause Issue](#); [Brief Of Former Federal And Local Judges As Amici Curiae Supporting The First Circuit’s Ruling On The Appointments Clause](#).

² Transcript of Oral Argument, October 15, 2019.

³ Kyla Eastling, Danny Li, and Neil Weare, [The Supreme Court Just Passed Up a Chance to Overrule Appallingly Racist Precedents](#), Slate.com, June 1, 2020.

⁴ 140 S.Ct. 1649, 1665 (2020) (quoting Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion)).

⁵ *Id.*

⁶ Adriel Cepeda-Derieux and Neil Weare, [After Aurelius: What Future for the Insular Cases?](#) 130 YALE L.J.F. 284 (2020).

⁷ Neil Weare, Rosa Hayes, and Mary Charlotte Carroll, [The Constitution, COVID-19, and Growing Healthcare Disparities in U.S. Territories](#), Expert Forum, ACSlaw.org, April 28, 2020.

that citizenship in U.S. territories is a mere privilege to be determined unilaterally by Congress, rather than a right guaranteed by the Constitution.⁸

All this attention before the Supreme Court makes it critical that Congress and the Executive Branch weigh in on whether the racist *Insular Cases* should continue to be the governing legal framework for the 3.5 million residents of U.S. territories – more than 95% of whom are racial or ethnic minorities. H.Res. 279 is important because it puts the other branches on notice that the House of Representatives rejects any continued reliance on the *Insular Cases* and their doctrine of territorial incorporation. This is significant, in part, because the *Insular Cases* stand as a kind of super-deference towards Congress when it acts to govern the territories. But the Constitution already provides Congress extremely broad powers over the territories through the Territories Clause,⁹ so it does not need any of the extra-constitutional powers the *Insular Cases* purport to provide. As the U.S. Department of Justice continues to develop its approach to litigation involving U.S. territories, H.Res. 279 may also shape whether and how it will rely on the *Insular Cases* moving forward. The U.S. Department of Justice has taken steps before to reject continued adherence to constitutional frameworks that rest on racist or bigoted foundations, such as the Japanese-American internment case *Korematsu v. United States*,¹⁰ so reversing course on the *Insular Cases* would not be unprecedented and is in fact long overdue.

But even as the *Insular Cases* come up for reconsideration before the Supreme Court, Congress and the Executive Branch should prioritize statutory solutions to fix what the late Judge Juan Torruella called the *Insular Cases*' legacy of "separate and unequal" treatment. For example, H.R.1, the For the People Act, includes provisions to increase voting rights, justice and democracy in the U.S. territories. S.1228, the Territorial Equity Act of 2021, provides equitable treatment for the territories in a range of federal programs. H.R. 265, the Insular Area Medicaid Parity Act, eliminates Medicaid funding limitations for U.S. territories beginning in FY2021. H.R.1722, the Puerto Rico Health Care Fairness, Accountability, and Beneficiary Access Act of 2021, amends titles XI and XIX of the Social Security Act to stabilize the Medicaid program in Puerto Rico. H.R. 537, the Supplemental Security Income Equality Act, seeks to extend the SSI program to Puerto Rico, the U.S. Virgin Islands, Guam, and American Samoa. H.R.1773, the Northern Marianas Family Assistance Act, seeks to make the Commonwealth of the Northern Mariana Islands eligible to operate TANF programs. H.R. 3434 amends Title XVIII and XIX of the Social Security Act to make improvements to the treatment of U.S. territories under the Medicare and Medicaid programs. The Biden-Harris Administration has committed to supporting a number of these critical legislative solutions,¹¹ which could have an immediate impact on residents of U.S. territories regardless what action is taken by the Supreme Court.

The time for all three branches of the federal government to act to dismantle the legacy of the *Insular Cases* is now. In 2021, no one should be discriminated against based solely on what Zip Code they happen to live in.

⁸ Mark Joseph Stern, [Federal Judge Rules American Samoans are U.S. Citizens by Birth. Finally.](#) Slate.com, December 12, 2019.

⁹ U.S. Const. art. IV, § 3., Cl. 2.

¹⁰ See, e.g., [Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act](#), February 23, 2011; [Confession Of Error: The Solicitor General's Mistakes During The Japanese-American Internment Cases](#), May 20, 2011.

¹¹ See, e.g., [The Biden-Harris Plan For Recovery, Renewal And Respect For Puerto Rico.](#)