

“Half an American”:
Guam Veterans’ Struggle for Voter Equality

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* Franklin Fegurgur is a J.D. Candidate at the University of Hawai‘i at Mānoa, William S. Richardson School of Law. This paper is dedicated to the men and women of Guam who have honorably served their country and island with loyalty and courage. I am eternally grateful for all the veterans who participated in my interviews and provided me their voice in writing this paper. I could not have done this without you. I offer this paper as a tribute to your sacrifice. Special thanks also to Professor Susan Serrano and Professor Troy Andrade in helping me achieve my goal to complete this paper. Si Yu'os Ma'āse' to Mr. Julian Aguon for starting me on the path towards this project and serving as an inspiration. Para i tata-hu, para i familia-ku, yan para islan-ku. (For my father, for my family, and for my island).

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PROLOGUE

To limit their full rights as American citizens strictly due to their residence tells veterans that: ‘[w]e only want you to be Americans when we want you to be, not when you want to’.¹

The dead do not speak.² Operation Iraqi Freedom claimed another of Guam’s children.³ No consolation can be given to the grieving Chamorro⁴ family when they welcome their fallen soldier home. No words, no actions can relieve the family’s bereaved hearts. As the coffin clears the airport exit, it is immediately surrounded by the soldier’s loved ones – the same loved ones who prayed every day for their child’s safe return, the ones who placed his picture on the inner walls of the village church.⁵ The soldier’s final resting place is the Guam Veterans Cemetery. Although the 21-gun salute⁶ pays tribute to his sacrifice, it provides little comfort. Hundreds of marked graves welcome their new fallen comrade. The dead do not speak, but did this fallen soldier even have a voice while fighting for his country?

The United States honors its active duty military and veterans. Not all veterans, however, are equally recognized. While all active duty military and veterans in the continental U.S. enjoy the ability to fully participate in

¹ Email Interview with Benny A. Fegurgur, Commander, United States Navy, 25 years, Retired (Feb. 27, 2017).

² The narrative that follows is a first-hand account that this author experienced. My deepest sympathies and condolences go to all families that lost their loved ones while serving in the United States military.

³ See *Guam Mourns its 11th Casualty of the War in Iraq*, STARS AND STRIPES, PAC. NEWS FIRST, Dec. 26, 2005, <https://www.stripes.com/news/guam-mourns-its-11th-casualty-of-the-war-in-iraq-1.42890> (discussing Guam’s 11th casualty from Operation Iraqi Freedom).

⁴ The Chamorro people are the indigenous inhabitants of Guam and the Marianas Islands. See also Anthony F. Quan, *Respeta I Taotao Tano: The Recognition and Establishment of the Self-Determination and Sovereign Rights of the Indigenous Chamorros of Guam under International, Federal, and Local Law*, 3 *ASIAN-PAC. L. & POL’Y J.* 56, 119 n. 12 (2002) (“Chamorros are the indigenous inhabitants of the Marian Islands, while Guam is the largest and southernmost of the Marianas chain. Chamorros settled about 3,000 to 5,000 years ago.”).

⁵ Telephone Interview with Benny A. Fegurgur, Commander, United States Navy, Retired (Apr. 21, 2017) (discussing how it is common for families to display pictures of active duty military family members in the Catholic Churches and that Catholic Mass usually contains a special prayer for those who are serving and for their safe journey home).

⁶ See *Origin of the 21 Gun Salute*, U.S. ARMY CTR. OF MIL. HIST. <https://history.army.mil/html/faq/salute.html>, Oct. 31, 2017 (discussing the origin of the 21-gun salute).

democratic elections, the sailors and soldiers returning to Guam, however, are denied a fundamental right:⁷ the right to vote in presidential elections.⁸

I. INTRODUCTION: SEGOVIA V. BOARD OF ELECTION COMMISSIONERS

I think it is a disgrace that someone who risked their lives to protect [this] country, cannot vote for the leadership that puts him/her at risk.⁹

This article considers whether United States citizens residing in United States' territories should participate in U.S. presidential elections as a fundamental right. The lack of voting rights in the U.S. territories is not a novel concept, however, as this issue has been litigated and discussed with little progress.¹⁰ Territorial citizens are still unable to vote in presidential elections.¹¹ Furthermore, those American citizens who previously participated in presidential elections in their last domicile become barred from voter participation upon declaring residency within the U.S. territories, specifically Guam.¹² This article seeks to address the issue regarding territorial voting rights by approaching it with a fresh perspective, that of U.S. veterans currently residing on Guam. Guam veterans, who have democratically participated in their right to vote for president while maintaining residence elsewhere in the United States, lose this right upon their re-entry to Guam. Recently, this exact issue was addressed in *Segovia v. Board of Election Commissioners*, a 2016 Illinois Federal District Court case, which is currently pending appeal.¹³

⁷ A fundamental right embodies those “principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Benton v. Maryland*, 395 U.S. 784, 810 (1969) (citations omitted); *See generally* MILTON R. KONVITZ, *FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE*, 85, (2001).

⁸ *See Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969) (holding that “the right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government”).

⁹ Email Interview with Leonard Stohr, Chief Master Sergeant, U.S.A.F., retired (Feb. 27, 2017).

¹⁰ *See Romeu v. Cohen*, 265 F.3d 118, 129 (2d Cir. 2001) (holding that the UOCAVA does not violate a former New York resident’s right to travel to Puerto Rico by denying absentee voting privileges in New York); *Igartua De La Rosa v. United States*, 32 F.3d 8, 11 (1st Cir. 1994) (holding that the UOCAVA does not discriminate between overseas voters and residents in Puerto Rico); *Att’y Gen. of Guam v. United States*, 738 F.2d 1017, 1020 (9th Cir. 1984) (holding that the OCVRA did not extend presidential voting privileges to the citizens on Guam due to Guam’s political status as an unincorporated territory).

¹¹ *See Romeu*, 265 F.3d 118, 129 (2d Cir. 2001).

¹² *See id.*

¹³ *Segovia v. Bd. of Elec. Comm'rs for Chi.*, 201 F. Supp. 3d 924, 930 (N.D. Ill. 2016).

Plaintiff Luis Segovia is a former Illinois resident who previously participated in Illinois elections.¹⁴ After years of service in the Army, he now resides in Guam, where he is no longer able to vote for President.¹⁵ Segovia argued that the Uniform and Overseas Citizens Absentee Voting Act (“UOCAVA”)¹⁶ violated his equal protection¹⁷ and due process¹⁸ rights by permitting former Illinois residents in the Commonwealth of the Northern Marianas Islands (“CNMI”)¹⁹ to cast absentee ballots, while denying those similarly situated former Illinois residents in Guam.²⁰ The UOCAVA “allows United States citizens residing outside the United States to retain the right to vote in federal elections via absentee ballot in their last state of residence, provided these citizens otherwise qualify to vote under the laws of the state in which they last resided.”²¹ Although Guam was

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See* Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C.A. § 20310 (West 1986).

¹⁷ The Equal Protection Clause of the Fourteenth Amendment reads in pertinent part “...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Plaintiffs argue that the UOCAVA violates their equal protection as the UOCAVA permits “former Illinois residents who currently reside in the NMI and who were qualified to vote in federal elections when they lived in Illinois to cast Illinois absentee ballots but allows Illinois to deny the franchise to similarly situated individuals who reside in Puerto Rico, Guam, and the U.S. Virgin Islands.” *Segovia v. Bd. of Election Commissioners for City of Chicago*, 201 F. Supp. 3d 924, 939 (N.D. Ill. 2016).

¹⁸ Plaintiffs argue that the UOCAVA and Illinois MOVE violate their “fundamental right to interstate travel, which is protected by the substantive component of due process.” *Segovia v. Bd. of Election Comm’rs for Chi.*, 218 F. Supp. 3d 643, 653 (N.D. Ill. 2016). Plaintiffs argue that the Illinois MOVE [Military and Overseas Voter Empowerment Act, violates their equal protection rights as the Illinois MOVE “allows voters who were formerly qualified to vote in federal elections in Illinois and who now reside in the United States Territory of American Samoa to vote in federal elections via Illinois absentee ballot.” *Segovia v. Bd. of Election Commissioners for City of Chicago*, 201 F. Supp. 3d at 928, n. 1; *see also* 10 Ill. Comp. Stat. Ann. 5/20-1.

¹⁹ *Definition of Insular Area Political Organizations*, U.S. DEP’T OF THE INTERIOR, OFF. OF INSULAR AFF., <https://www.doi.gov/oia/islands/politicatypes> (Nov. 18, 2017) (defining a commonwealth as “[a]n organized United States insular area, which has established with the Federal Government, a more highly developed relationship, usually embodied in a written mutual agreement. Currently, two United States insular areas are commonwealths, the Northern Mariana Islands and Puerto Rico.”).

²⁰ *See Segovia*, 201 F. Supp. 3d at 948.

²¹ Amber L. Cottle, *Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections*, U. CHI. LEGAL F. 315, 319 (1995) (citing 52 U.S.C.A. § 20302 (West 2009) (discussing how UOCAVA does not protect rights of former state residents who travel to U.S. territories)).

included within the UOCAVA's definition of "State," CNMI was not.²² Because CNMI was not included within this definition, CNMI is viewed as a foreign country within the context of the UOCAVA.²³ For example, former Illinois residents in CNMI are viewed as "overseas voters" who are residing outside the United States.²⁴ As "overseas voters," these former Illinois residents are permitted to cast absentee ballots in the last jurisdiction they were qualified to vote.²⁵

The U.S. District Court for the Northern District of Illinois first addressed Segovia's equal protection claim, where the court disagreed that a violation existed,²⁶ by noting that CNMI's "historical relationship with the United States is consistent with the UOCAVA's treatment" of the CNMI.²⁷ Therefore, the court applied rational basis review.²⁸ The court determined that there was a "rational reason" support[ing] the UOCAVA's exclusion of the CNMI . . . from its definition of the territorial limits of the United States."²⁹ The court noted further that "[i]t is rational, at least as the term is understood in the context of rational basis review, to enact a law that does not differentiate between residents living in a particular United States Territory based on whether they could previously vote in a federal election administered by a state."³⁰ The court lastly concluded that there is a rational reason to exclude CNMI from the UOCAVA's definition of "State" due to its unique relationship³¹ with the United States.³²

²² 52 U.S.C.A. § 20310 (West 1986).

²³ *See id.*

²⁴ *See Segovia*, 201 F. Supp. 3d at 948.

²⁵ *See id.*

²⁶ *See id.* at 929.

²⁷ *See id.* at 945.

²⁸ Rational basis review considers "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993). In *Segovia*, the court noted that Congress did not draw a distinction. Thus, the fact that Congress drew a distinction "between United States citizens/former state residents now residing in the CNMI versus United States citizens/former state residents who now reside in other territories does not mean that it was required to extend absentee voting across the board to all territories." *Segovia*, 201 F. Supp. 3d at 945. The court concluded that this differing treatment did not trigger strict scrutiny. Under strict scrutiny "the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986).

²⁹ *Segovia*, 201 F. Supp. 3d at 946.

³⁰ *Id.* at 950.

³¹ *See infra* Part IV B for an explanation of the history of CNMI's relationship with the United States.

³² *See Segovia*, 201 F. Supp. 3d at 950.

In response to Segovia's due process claim, the court considered whether the UOCAVA violated plaintiffs' fundamental right to interstate travel "which is protected by the substantive component of due process."³³ Applying the three part test in *Saenz v. Roe*,³⁴ the court held that "[t]he plaintiffs' inability to vote by absentee ballot in their respective territories stems not from a violation of their right to travel, but from the constitutional status of Puerto Rico, Guam, and the USVI."³⁵ In response to the court's holdings, Segovia, as well as other individual plaintiffs, appealed to the Seventh Circuit Court of Appeals and filed an appellant brief in April 2017.³⁶

The holding in *Segovia* is based, in part, on a line of decisions known as the *Insular Cases*.³⁷ The *Insular Cases* are "a series of cases that directly address the political and constitutional status of the United States' island territories."³⁸ These cases purport to justify and define Congress' plenary power "to decide which parts of the Constitution were applicable, subject only to the [Supreme] Court's designation of certain rights as fundamental."³⁹ Because Guam is an unincorporated territory,⁴⁰ the U.S. District Court for the Northern District of Illinois concluded there was no violation of a fundamental right since residents of the island do not have a constitutional right to participate in presidential elections.⁴¹ "Citizens

³³ *Segovia v. Bd. of Election Comm'rs for Chi.*, 218 F. Supp. 3d 643, 653 (N.D. Ill. 2016).

³⁴ 526 U.S. 489, 500 (1999) (holding that the right to travel under the Fourteenth Amendment includes three parts: "[1] the right of a citizen of one State to enter and leave another State [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and [3] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.").

³⁵ *Segovia*, 218 F. Supp. 3d at 654.

³⁶ Brief of Appellants at 1, *Luis Segovia v. United States.*, No. 16-4240 (7th Cir. Apr. 12, 2017).

³⁷ *See infra* Part III.

³⁸ BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 4 (2006).

³⁹ Lisa M. Kömives, *Enfranchising A Discrete and Insular Minority: Extending Federal Voting Rights to American Citizens Living in United States Territories*, 36 U. MIAMI INTER-AM. L. REV. 115, 129 (2004) (arguing for the Supreme Court to "re-conceptualized the term 'fundamental' in the Insular Cases to be consonant with the concept of fundamental rights for Americans citizens," thus ending the disenfranchisement of territorial citizens).

⁴⁰ *Definition of Insular Area Political Organizations*, U.S. DEP'T OF THE INTERIOR, OFF. OF INSULAR AFF., <https://www.doi.gov/oia/islands/politicatypes> (Nov. 18, 2017) (defining an unincorporated territory as "a United States insular area in which the United States Congress has determined that only selected parts of the United States Constitution apply.").

⁴¹ *Segovia v. Bd. of Election Comm'rs for Chi.*, 201 F. Supp. 3d 924, 940 (N.D.

residing in territories do not have a constitutional right to vote as citizens of a state do.”⁴² The court’s decision aligned with the *Insular Cases* by declaring “only ‘the guaranties of certain fundamental personal rights declared in the Constitution’ apply to the territories.”⁴³

Segovia exposes the UOCAVA’s maintenance of disparate treatment toward Guam veterans and all U.S. citizens residing in U.S. territories.⁴⁴ The current framework of the UOCAVA denies voting rights of Guam veterans by significantly hindering their right to travel.⁴⁵ The UOCAVA also violates Guam’s veterans’ equal protection rights by granting absentee voting privileges to former Illinois residents living in CNMI but not to those living in Guam.⁴⁶ Thus, the UOCAVA should be amended to expressly include the right for veterans to travel to the insular territories⁴⁷ and maintain their right to vote in presidential elections while residing there.

This article advances two objectives. The first objective is to point out the flaws in *Segovia* by highlighting the court’s error in its legal analysis. To accomplish this objective, this article will first introduce relevant statistics regarding the groups of people directly affected by *Segovia*. Part II will provide a statistical analysis of Guam’s veteran population based on

Ill. 2016).

⁴² *Id.* (citing *Igartua De La Rosa v. United States*, 229 F.3d 80, 83 (1st Cir. 2000)).

⁴³ *Id.* at 938 (citing *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922)). In *Balzac*, the Supreme Court defined fundamental personal rights as:

[t]he guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in the Philippines and Porto Rico, and, as this guaranty is one of the most fruitful in causing litigation in our own country, provision was naturally made for similar controversy in Porto Rico.

258 U.S. at 312-13 (1922).

⁴⁴ *See Segovia*, 201 F. Supp. 3d at 938.

⁴⁵ *See Dunn v. Blumstein*, 405 U.S. 330, 338 (1972); *see also* 52 U.S.C.A. § 20310 (West 1986).

⁴⁶ *See Segovia*, 201 F. Supp. 3d at 938.

⁴⁷ The phrase “insular territories” describes all the American Territories: Guam, Puerto Rico, CNMI, American Samoa and the U.S. Virgin Islands. Part of this definition comes from the U.S. Census Bureau blog that discusses the Island Area Census. Braedyn Kromer, Thousands of U.S. Veterans Call the Island Areas Home, U.S. CENSUS BUREAU: CENSUS BLOGS (May 2, 2016), <https://www.census.gov/newsroom/blogs/random-samplings/2016/05/thousands-of-u-s-veterans-call-the-island-areas-home.html> (based on this statistic, Guam has the highest total number of veterans living within the Island Area Census. The Island Area Census consists of American Samoa, Guam, CNMI, and the U.S. Virgin Islands where 14,047 veterans reside. Puerto Rico currently has over 90,000 veterans but is not considered part of the Island Areas Census).

the 2010 U.S. Census Bureau data.⁴⁸ Part II will conclude with the relevant policy reasons to enfranchise Guam's veterans in presidential elections.

As illustrated earlier, *Segovia* was adjudicated on two prongs: the *Insular Cases* and the UOCAVA. Part III of this article continues the *Segovia* analysis by discussing the *Insular Cases*' role in shaping the political status of the territories as well as Congress' control.⁴⁹ This part then delves into the history and legislative purpose of the UOCAVA. Lastly, Part III concludes by discussing the line of cases that show how the UOCAVA's statutory language denies voting rights to American citizens who travel to the territories. Part IV will analyze how the *Insular Cases* and the UOCAVA as applied in *Segovia* are outdated and unjust. Within this context, I argue that the UOCAVA violates Guam's veterans' substantive due process right to travel as articulated in the U.S Supreme Court case, *Dunn v. Blumstein*.⁵⁰ Part IV will further discuss how the UOCAVA violates Guam veterans' equal protection rights. I argue that the Illinois district court erred in applying rational basis review due to its reliance on the *Insular Cases*.

The secondary objective of this article is to present a new structure for the UOCAVA so that it adheres to the original legislative intent, to incorporate all American citizen voters.⁵¹ Part V will first explore the possible solutions that legal scholars and judges have proposed in solving territorial voting rights.⁵² This section concludes with a proposed amendment to the UOCAVA that will provide a foundation to not only enfranchise Guam's veterans, but also Guam's general populace and, by extension, all territorial residents.

Although Guam veterans are the subject of my analysis, this in no way diminishes the wider claims of residents belonging to the insular territories. Rather, as previewed earlier, I seek to explore the previously unargued perspective of a veteran in establishing voting rights in *all* the insular territories. The veterans of Guam encompass an entire population that has long been deprived of its right to vote.⁵³ Highlighting the injustice suffered by a veteran, who is denied a right to vote for President, may raise

⁴⁸ See CENSUS BUREAU *infra* note 65.

⁴⁹ See JAMES E. KERR, THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM 117 (1982).

⁵⁰ See 405 U.S. 330, 338 (1972) ("Freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.").

⁵¹ 132 CONG. REC. H5973-03 (Aug. 12, 1986) (statement of Rep. Swift), 132 CONG. REC. H5973-03, at WL 783576.

⁵² See Brian C. Kalt, *Unconstitutional but Entrenched Putting UOCAVA and Voting Rights for Permanent Expatriates on A Sound Constitutional Footing*, 81 BROOK. L. REV. 441, 493-94 (2016) (arguing that one way to solve the UOCAVA's constitutional problems is to find a more constitutionally suitable way to enfranchise permanent expatriates).

⁵³ Email Interview with Benny A. Fegurgur, *supra* note 1.

the public conscience to effect real change. I argue the proverbial foot in the door: establishing the rights of 8,000 veterans may open the door for millions of territorial citizens.

II. ISLAND OF WARRIORS⁵⁴

But, a Veteran from Guam or one that calls Guam home, should be allowed to vote because of the insight and the experiences that they bring having seen the bigger things in and around Guam, the USA and the world . . . It's that kind of insight and knowledge that can help shape the direction of our island in the vote they give to the person that they believe wants to help shape Guam for the betterment of its people, culture and the generations that will come after.⁵⁵

Guam veterans are a class of American citizens directly affected by *Segovia*. Luis Segovia represents the first type of Guam veteran (hereinafter "Type 1"); these are veterans who have participated in presidential elections in a U.S. state, but were denied this fundamental right when they subsequently domiciled in a U.S. territory.⁵⁶

There is another group of veterans that never voted for their commander in chief. This second type of veteran (hereinafter "Type 2") are those who were born in a U.S. territory, or otherwise first established their legal domicile in a U.S. territory, and never changed their legal residency.⁵⁷ For the purposes of this analysis, the Type 2 classification will include those men and women who join the military directly from Guam. Despite residing in a state where they would be qualified to vote for president, these veterans did not change their legal residence from Guam to the state in which they were domiciled.⁵⁸ One veteran suggested there may be various personal reasons to not change their residency status.⁵⁹ Both Type 1 and 2 veterans reside on the island without a fundamental right to vote for the commander in chief. The first part of this section discusses veteran statistics in Guam.

⁵⁴ *America by the Numbers: Island of Warriors*, PUB. BROAD. SERV. (Oct. 11, 2014), <http://www.pbs.org/wgbh/america-by-the-numbers/episodes/episode-102/>.

⁵⁵ Email Interview with Tommy Aflague, Colonel, U.S. Army, retired (Feb. 27, 2017).

⁵⁶ See Email Interview with Franklin Leon Guerrero, Lieutenant Colonel, U.S. Air Force, retired (Feb. 27, 2017).

⁵⁷ Email Interview with Benny A. Fegurgur, *supra* note 1; Email Interview with Francisco Paulino, Major, U.S. Army, retired (Feb. 27, 2017).

⁵⁸ Email Interview with Marvin Manibusan, Colonel, U.S. Army, retired (Feb. 27, 2017).

⁵⁹ Telephone Interview with Benny A. Fegurgur, *supra* note 5 (discussing how one reason to not change residency is due to tax purposes. For example, if he changed his residency to California then he would have to pay higher income for California's taxes).

Statistics on the Guam veteran population are vital in understanding who the *Segovia* case affected. After presenting these statistics, the last section will explore the relevant reasons why these veterans should be permitted to have a voice in presidential elections.

A. Veteran Statistics

The *Segovia* decision not only affected former residents of the states who relocated to the territories, but also returning Guam veterans. More importantly, this decision negatively affected current Guam veterans as well. It is vital to consider the raw data of the current veteran population on Guam before addressing the necessary reasons to address a possible solution. The 2010 U.S. Census Bureau Island Area Census report states that 8,041 veterans reside on the island of Guam.⁶⁰ Per a Public Broadcasting Service (“PBS”) documentary series: *America by the Numbers*, the census data on the current veteran population may be inaccurate.⁶¹ In the documentary, journalist Maria Hinojosa spoke with “Guamanian advocates and politicians [who] believe the [Veteran Affairs] is using inaccurate census data which records roughly 9,000 vets on Guam when the actual number can be nearly double.”⁶² According to Hinojosa’s investigation, there may be as many as 13,000-16,000 veterans on Guam.⁶³ Hinojosa reported this possible inaccuracy when she interviewed a Guam health advocacy group which conducted door to door surveys to determine an accurate number for Guam veterans.⁶⁴

The statistics for Guam’s veterans’ place of birth further implies how veterans lack a voice in voter participation. Fifty-two percent (4,168) of Guam veterans were born in Guam.⁶⁵ These are typically the Type 2 veterans who entered the military as Guam residents. Because Guam is an unincorporated territory and not a state, its residents do not participate in

⁶⁰ Braedyn Kromer, *Thousands of U.S. Veterans Call the Island Areas Home*, U.S. CENSUS BUREAU: CENSUS BLOGS (May 2, 2016), <https://www.census.gov/newsroom/blogs/random-samplings/2016/05/thousands-of-u-s-veterans-call-the-island-areas-home.html> (based on this statistic, Guam has the highest total number of veterans living within the Island Area Census. The Island Area Census consists of American Samoa, Guam, CNMI, and the U.S. Virgin Islands where 14,047 veterans reside. Puerto Rico currently has over 90,000 veterans but is not considered part of the Island Areas Census).

⁶¹ See *America by the Numbers: Island of Warriors*, *supra* note 54.

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See *id.* (PBS did not speculate as to why the discrepancy in numbers exists).

⁶⁵ U.S. CENSUS BUREAU, GUAM 2010 CENSUS DETAILED CROSS TABULATIONS (2010), https://www2.census.gov/census_2010/10-Island_Areas_Detailed_Cross_Tabulations/Guam/ (the data also notes that 3,996 veterans are indigenous Chamoru); see also Appendix Figure 2.

U.S. presidential elections.⁶⁶ Although the UOCAVA permits servicemen and women to cast absentee ballots, they can only be cast in Guam's elections.⁶⁷ For example, a Guam soldier in Afghanistan, serving the United States, can only vote in his island's elections and not for the U.S. commander in chief.⁶⁸ Based on these numbers, 52% (or 4,168) of Guam veterans arguably could not vote in presidential elections because they were born in Guam, an unincorporated territory that does not send any electors to the Electoral College. One veteran remarked that such a predicament is a disgrace and that voting enfranchisement should be extended: "Voting is a *right*, and after serving your country, especially in war, a person deserves the right to exercise a vote for president."⁶⁹ The Type 2 veterans embody this injustice: serving in the military and yet not being able to vote for their commander-in-chief.⁷⁰ Due to the Type 2 veterans place of birth (i.e. Guam), Type 2 veterans lack a voice in presidential elections.

A Type 2 veteran can obtain voting privileges if they change their legal residency to one of the 50 states. This would then convert the Type 2 veteran to a Type 1. Such was the case for veteran Franklin Leon Guerrero. Leon Guerrero changed his residency from Guam to Virginia when he worked at the Pentagon.⁷¹ He detailed his personal experience with discrimination faced by veterans: "Once I returned to Guam, even as a 10-year commander of the Reserve Aerial Port at Andersen AFB, Guam, I was not allowed to vote for President as I had returned to my Guam residency and was not permitted to vote for my Commander-in-Chief (President)."⁷²

Leon Guerrero and Segovia are examples of Type 1 veterans who had a right to vote, but lost that right upon declaring residency in Guam. According to the Census Bureau, 30% (or 2,385) of Guam's veteran population were born within one of the fifty states in the United States.⁷³ Thus, at least 30% of the island's veterans were qualified to vote at one point of their lives.⁷⁴ Such was the case for veteran Gregory Jacobs, who participated in his State's elections in 2008 and 2012.⁷⁵ After twenty-three

⁶⁶ See *Att'y Gen. of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984).

⁶⁷ GUAM ELECTION COMMISSION, ABSENTEE VOTING (2012), <https://gec.guam.gov/index.php/elections/absentee-voting>.

⁶⁸ Telephone Interview with Benny A. Fegurgur, *supra* note 5.

⁶⁹ Email Interview with Leonard Stohr, *supra* note 9.

⁷⁰ *See id.*

⁷¹ Email Interview with Franklin Leon Guerrero, *supra* note 56.

⁷² *Id.*

⁷³ See CENSUS BUREAU, *supra* note 65.

⁷⁴ *See id.*

⁷⁵ Email Interview with Gregory Jacobs, Lieutenant, U.S. Navy, retired (Feb. 27, 2017).

years of service, Jacobs retired in Guam.⁷⁶ Like Leon Guerrero and Segovia, Jacobs lost his right to vote for president of the U.S. upon declaring residency on Guam. He remarked: “[s]ince the President has the power to send troops in harm’s way, voting for that office should be a fundamental right of all veterans. This is an injustice that needs to be corrected immediately.”⁷⁷ Jacobs echoes the frustration and injustice that a Type 1 veteran would encounter especially after several years of service and sacrifice. Guam veterans should be included within the voting franchise not only due to their sacrifice, but also to address vital issues that surround Guam veterans.

B. *Relevancy: Why Should Guam Veterans Vote?*

Voting in presidential elections is a fundamental right that should be extended to veterans residing in Guam because of their service and sacrifice for the United States. In Guam, the rate of military service per capita is three times higher than the rest of the United States.⁷⁸ “In the wars of Iraq and Afghanistan, Pacific Islanders have the highest rate per capita of casualties and deaths.”⁷⁹ Extending the voting franchise to these veterans is consistent with the oath that they swore upon entering service which is to support and defend the Constitution.⁸⁰ One veteran commented, “the irony is that the very oath that I swore to uphold states: ‘I . . . do solemnly swear to support the [C]onstitution . . . And that I will obey the orders of the President of the United States and orders of the Officers appointed over me.’ What good is the oath of allegiance if it is not reciprocal!?”⁸¹ Another veteran argued that service members earn the title of veteran due to the oath they swore to defend the Constitution during their military service:

Veterans have more than earned the right to vote. It’s one of the rights that veterans are sworn to defend when they take the oath of enlistment or commission upon entering the

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *See America by the Numbers: Island of Warriors, supra* note 54.

⁷⁹ *See id.*

⁸⁰ *See* 10 U.S.C.A. § 502(a) (West 2006):

(a) Enlistment oath. -- Each person enlisting in an armed force shall take the following oath:

“I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.”

⁸¹ Email Interview with Marvin Manibusan, *supra* note 58.

military . . . they've earned the title of 'veteran', especially [if] they've participated or supported any of the nation's conflicts.⁸²

One could argue this oath or service alone is not enough to warrant voter protection.⁸³ As will be discussed *infra* Part III, however, the original legislative intent of the UOCAVA was to protect the rights of military personnel due to their service throughout this nation's conflicts.⁸⁴ Why are veterans not afforded the same protections?

Guam veterans should also be allowed to vote in presidential elections to address the vital health care issues that these veterans encounter due in part from their years of service.⁸⁵ Although Guam's local politicians attempt to address these healthcare problems, many veterans are still underserved.⁸⁶ "In 2015, Guam ranked third to last in per capita spending on medical care (\$2,143) by the US Department of Veteran Affairs."⁸⁷ Post-traumatic stress disorder ("PTSD") affects 1 in 5 Iraq Veterans.⁸⁸ "These veterans say that the lack of awareness and the lack of money translates into a lack of services. Specialized programs for PTSD can be inaccessible for many."⁸⁹ In Guam, instead of going to a VA hospital, veterans may go to the Community Based Outpatient Clinic ("CBOC").⁹⁰ As evidenced by the scarcity in the number of facilities like CBOC compared to the number of veterans that populate the island, veterans suffer from a lack of service.⁹¹ Some veterans wait weeks to months for an appointment.⁹² As a result, some

⁸² Email Interview with John P. Guerrero, Lieutenant Colonel, U.S. Army, 30 years, retired (Feb. 27, 2017).

⁸³ See H.R. REP. NO. 94-649 at 13 (1975) reprinted in 1975 U.S.C.C.A.N. 2358, 2369 (discussing the Minority view of the OCVRA).

⁸⁴ See 132 CONG. REC. H5973-03 (Aug. 12, 1986) (statement of Rep. Swift) 132 Cong Rec H 5973-03, at WL 783576 (WEST).

⁸⁵ See *Don't Just Listen to Veterans' Problems, Get Them Fixed*, PAC. DAILY NEWS, Mar. 11, 2017, <http://www.guampdn.com/story/opinion/editorials/2017/03/11/our-view-dont-just-listen-veterans-problems-get-them-fixed/99048602/> (discussing the plight of veterans such as inadequate funding and specialists).

⁸⁶ See Shawn Raymundo, *Town Hall on VA Services to Address Resource Issues*, PAC. DAILY NEWS, Feb. 7, 2017, <http://www.guampdn.com/story/news/2017/02/07/town-hall-va-services-address-resource-issues/97575960/>.

⁸⁷ *America by the Numbers: Island of Warriors*, *supra* note 54.

⁸⁸ *See id.*

⁸⁹ *Id.*

⁹⁰ See Email Interview with Benny A. Fegurgur, *supra* note 1.

⁹¹ *America by the Numbers: Island of Warriors*, *supra* note 54.

⁹² Email Interview with Francisco Paulino, Major, U.S. Army, retired (Apr. 9, 2017).

veterans are forced to travel off island to obtain specialized treatment.⁹³ One veteran explained, “although Guam is a U.S. Territory, it can be argued that veterans residing in the Philippines receive better healthcare than those on island.”⁹⁴ This veteran further explained that even if the VA pays for travel and lodging, “it’s still a hardship on [the veterans’] family having to be away for weeks a time.”⁹⁵ Granting veteran voter participation will allow Guam veterans to address some of these concerns. Since the President appoints the next Secretary of the Department of Veteran Affairs, Guam veterans have an interest in voting for the next commander in chief.⁹⁶ Thus, granting voter privileges for presidential elections further allows Guam veterans to petition for changes that could drastically affect their daily lives. When asked whether the United States is living up to its commitment to Guam veterans, Guam’s Governor Eddie Calvo⁹⁷ responded:

The Federal Government has not done their part to assist the very patriotic group of American citizens fighting in so many distant lands in areas that never tasted democracy. Yet, these American citizens of Guam really have not felt what true democracy is all about. What do you call a people that cannot vote for the representatives that make the laws? What do you call a people that can’t vote in the Electoral College to elect a chief executive that will send us to war I guess in the 19th century sense, you can call [Guam] a colony.⁹⁸

Despite the service and sacrifice of Guam veterans, these veterans are still not given a voice in the election of their next commander in chief.

⁹³ See *id.*; see also Email Interview with Tommy Aflague, Colonel, U.S. Army, retired (Apr. 9, 2017); Email Interview with John Guerrero, Lieutenant Colonel, U.S. Army, retired (Apr. 9, 2017).

⁹⁴ Email Interview with Gregory Jacobs, *supra* note 75.

⁹⁵ *Id.*

⁹⁶ See 38 U.S.C.A. § 511(a) (West 1991) (listing the duties of the Secretary of Veteran Affairs: “The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans.”); See also Brett Samuels, *VA Secretary Shulkin Seeks Larger Role for Private Health Care*, THE HILL, Nov. 20, 2017, <http://thehill.com/news-by-subject/healthcare/361185-va-secretary-shulkin-wants-bigger-role-for-private-health-care>. (reporting that current Veterans Affairs Secretary is working towards veterans to not rely on the VA to approve or coordinate healthcare. This article illustrates the methods that the Secretary of Veteran Affairs has the propensity to make decisions that could potentially affect the daily lives of veterans.)

⁹⁷ “Eddie Baza Calvo is the eighth elected Governor of Guam who, along with Lt. Governor Ray Tenorio, won the General Elections of November 2014...”. *Biography of Governor, Eddie Baza Calvo*, Nov. 19, 2017, <http://governor.guam.gov/governor-eddie-calvo/>.

⁹⁸ *America by the Numbers: Island of Warriors*, *supra* note 54.

As Governor Calvo suggested, until that voice is given, the island will continue to be viewed as a colony of the United States.⁹⁹ The justification to maintain Guam's colonial status is attributed to the line of cases known as the *Insular Cases*.

III. HISTORICAL BACKGROUND: *INSULAR CASES* AND THE UOCAVA

The underlying principle should be that if you are a U.S. citizen – regardless of race, gender, religious belief, or geographical location . . . we should be allowed to vote. This rationale of past decisions [is] so dated that they are not commensurate with current societal change.¹⁰⁰

The *Segovia* decision fatally relies upon two prongs: the *Insular Cases* and the UOCAVA. The legislative history of the UOCAVA and its predecessor, the Overseas Citizens Voting Rights Act (“OCVRA”), demonstrates that the original legislative intent was to incorporate all American voters wherever in the world they may be.¹⁰¹ As this section will suggest, however, the line of cases preceding the UOCAVA's enactment contradicts the original legislative purpose.

A. *The Insular Cases: Justifying Imperialism in America*

At the end of the Spanish American War of 1898, the United States promoted its imperialist and manifest destiny¹⁰² values by claiming as spoils of war the territories of Cuba, Puerto Rico, the Philippines, and Guam.¹⁰³ The implications of governing the territories became a fiercely debatable topic in both academic and political spheres.¹⁰⁴ As one scholar noted, “the basic issue being explored was how these new territories were to be governed, whether the Constitution applied therein, and if so, to what extent.”¹⁰⁵

⁹⁹ *See id.*

¹⁰⁰ Email Interview with Marvin Manibusan, *supra* note 58.

¹⁰¹ *See* 132 Cong. Rec. H5973-03, 1986 WL 783576.

¹⁰² *See generally* Robert J. Miller, *American Indians, the Doctrine of Discovery, and Manifest Destiny*, 11 WYO. L. REV. 329, 350 (2011) (describing how Manifest Destiny is defined by three aspects which reflect the spirit of the American continental empire).

¹⁰³ *See* SPARROW, *supra* note 38, at 4; Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 287 (2007) (arguing that the *Insular Cases* represent an outdated or obsolete framework that is no longer consistent with current constitutional principles).

¹⁰⁴ *See* Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 299 (2007).

¹⁰⁵ *Id.* at 291.

The *Insular Cases* are “a series of cases that directly addressed the political and constitutional status of the United States’ island territories.”¹⁰⁶ These nine cases sanctioned an imperialistic precedent that is still relied upon in our common-law system.¹⁰⁷ The *Insular Cases* justified the imperialistic values that America held during the early twentieth century.¹⁰⁸ Tracing these values require a contextual inquiry of the cases decided before the Spanish-American War. Understanding the U.S. Supreme Court’s rationale prior to the *Insular Cases* lends further insight into how the *Insular Cases* were decided.

1. Perpetuation of Imperialist Values

At the close of the nineteenth century, the U.S. Supreme Court’s position on American expansionism and imperialism became decisively clear through its holding prior to the *Insular Cases*. In 1889, the Supreme Court in *Chae Chan Ping v. United States* upheld the exclusion of Chinese laborers.¹⁰⁹ “Accordingly, the Supreme Court acquiesced to Congress’s racist decision to exclude the Chinese from the United States, and the Court deferred to congressional determinations regarding the presence or absence of racially different foreigners with the United States.”¹¹⁰ Declaring that the Chinese Exclusion Act was constitutionally valid, Justice Stephen J. Field further noted that the Chinese people “remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people.”¹¹¹ Scholar Juan Perea suggests the opinion “focused on racial differences between whites and the Chinese and the difficulties these differences posed for whites.”¹¹² These racial differences were also highlighted in *Plessy v. Ferguson*,¹¹³ where the Supreme Court reinforced

¹⁰⁶ SPARROW, *supra* note 38, at 4.

¹⁰⁷ See Torruella, *supra* note 103, at 333 (“The Insular Cases have promoted the continued status of United States as a colonial nation in a world where that condition is not only obsolete, but unacceptable as a matter of international law.”).

¹⁰⁸ See *id.* at 287.

¹⁰⁹ See 130 U.S. 581, 582 (1889). Plaintiff, Chae Chan Ping, was unable to reenter the United States despite previously living in California for 12 years. He resided in San Francisco as a laborer and was in possession of a certificate that entitled him re-entry. Despite having the proper custom documentation, he was denied entry due to the Congressional Acts of 1888, more commonly known as the Chinese Exclusion Act. See *id.*

¹¹⁰ JUAN PEREA, *Fulfilling Manifest Destiny: Conquest, Race, and the Insular Cases*, in *FOREIGN IN A DOMESTIC SENSE* 154 (2001).

¹¹¹ *Chae Chan Ping*, 130 U.S. at 595.

¹¹² PEREA, *supra* note 110, at 153.

¹¹³ See 163 U.S. 537, 538 (1896) *overruled by* *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954).

“domestic white supremacy.”¹¹⁴ Defendant Plessy, challenged a Louisiana law that provided for separate railway cars for whites and “colored races.”¹¹⁵ In affirming the Louisiana Supreme Court, Justice Henry B. Brown articulated to what later became known as the separate but equal doctrine: “if one race be inferior to the other socially, the [C]onstitution of the United States cannot put them upon the same plane.”¹¹⁶ In its decision, the Court “[sanctioned] a regime of blatant racial inequality for blacks under the deceptive rationale of ‘separate but equal.’”¹¹⁷ As Juan Perea notes, through its holding in *Plessy*, the Court “reinforced domestic white supremacy by giving constitutional sanction to state decisions to segregate by race.”¹¹⁸ The Supreme Court’s decisions in *Ping* and *Plessy* provide insight into the holdings of the early *Insular Cases*.¹¹⁹ The Supreme Court bench that rendered decisions for the *Insular Cases*¹²⁰ also included justices who upheld the Chinese Exclusion Act and promoted the separate but equal doctrine.¹²¹

The *Ping* and *Plessy* cases indicate further that the Court affirmed Congress’s plenary power to determine constitutional rights on the basis of race.¹²² “The Court’s deference to Congress in determining citizenship on the basis of race, and to the states in allowing racial segregation, allowed majoritarian racism to control the outcomes in determinations of citizenship and participation in social and political life.”¹²³

2. The *Insular Cases* defined the political status and the power of Congress over the Territories

At the close of the Spanish American War, the United States acquired the territories of Guam, Puerto Rico, and the Philippines.¹²⁴ In

¹¹⁴ See PEREA, *supra* note 110, at 155.

¹¹⁵ See *Plessy*, 163 U.S. at 541.

¹¹⁶ *Id.* at 552.

¹¹⁷ PEREA, *supra* note 110, at 154.

¹¹⁸ *Id.* at 155.

¹¹⁹ *Id.* at 153.

¹²⁰ See generally Nathan Muchnick, *The Insular Citizens: America's Lost Electorate v. Stare Decisis*, 38 CARDOZO L. REV. 797, viii n.14. (2016) (“Additionally, in order to place the *Insular Cases* on the historical timeline of the Supreme Court’s constitutional jurisprudence, it is worth recognizing that the decisions were written by the same Court that created the “separate but equal doctrine.””).

¹²¹ See *Plessy*, 163 U.S. at 551-52, *overruled by* *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954).

¹²² See *id.*; *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889).

¹²³ PEREA, *supra* note 110, at 155.

¹²⁴ See SPARROW, *supra* note 38, at 4.

contrast to the previous annexations of Louisiana, Florida, and the Mexican Cession, the 1899 Treaty of Paris did not designate the newly acquired as incorporated¹²⁵ territories.¹²⁶ Instead, the treaty provided, “the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress.”¹²⁷ Because the treaty failed to address incorporation, the burden fell upon the Supreme Court to determine not only the political status of the territories, but also to what extent Congress could control them.¹²⁸

Downes v. Bidwell is arguably one of the most fundamental and complex *Insular Cases*.¹²⁹ “In *Downes v. Bidwell* the Supreme Court ruled that Congress could, through its plenary authority, govern territory of the United States contrary to constitutional provisions – in this case the uniformity clause of taxes, imposts, and duties.”¹³⁰ In *Downes*, the Supreme Court considered whether Congress, under the Foraker Act, could impose tariffs on trade with Puerto Rico, a newly acquired territory.¹³¹ The Foraker Act “temporarily provid[ed] a civil government and revenues for the island of Porto Rico.”¹³² With a narrow majority (5-4), the Supreme Court recognized that Congress had the authority to impose duties on products brought from Puerto Rico to the States.¹³³ However, the holding in *Downes* had broader implications. Holding that the Foraker Act was constitutional,

¹²⁵ See *id.* (“The United States’ island territories in the Caribbean Sea and the Pacific Ocean were “unincorporated” territories that were to receive only unspecified “fundamental” constitutional protections, whereas the “incorporated” territories of continental North America were a part of the Union and enjoyed full protections of the U.S. Constitution.”).

¹²⁶ See *id.* at 40.

¹²⁷ PEREA, *supra* note 110, at 156 (citing Treaty of Peace Between the United States of America and the Kingdom of Spain (Treaty of Paris), reprinted in Charles I Bevans, *Eleven Treaties and Other International Agreements of the United States of America 1776-1949* (1974), at 615-19).

¹²⁸ See PEREA, *supra* note 110, at 156.

¹²⁹ See SPARROW, *supra* note 38, at 80, 87 (citing *Downes v. Bidwell*, 182 U.S. 244, 247-48 (1901)). Although *Downes v. Bidwell* was the forefront of the *Insular Cases*, *De Lima v. Bidwell*, 182 U.S. 1 (1901), one of the first *Insular Cases*, remains quite significant as it was one of the first *Insular Cases* that questioned the new political status of Puerto Rico. In *De Lima*, the plaintiff sued a collector in New York to recover duties for the importation of sugar from Puerto Rico. The Supreme Court held that Puerto Rico was no longer a foreign country, but a territory of the United States ceded by Spain. See *De Lima v. Bidwell*, 182 U.S. 1, 175 (1901); see also Kōmives, *supra* note 39, at 130.

¹³⁰ See SPARROW, *supra* note 38, at 139.

¹³¹ See 182 U.S. 244, 247-48.

¹³² See *id.*; see also Foraker Act, Pub. L. No. 56-191, § 4, 31 Stat. 77, 81-82, 84 (1900).

¹³³ See *Downes*, 182 U.S. at 287; see also SPARROW, *supra* note 38, at 87.

the Supreme Court recognized Congress' authority over the territories, thus permitting a tax on imports from Puerto Rico.¹³⁴ Although Justice Henry Brown authored the majority opinion of *Downes*, it is Justice Edward D. White's concurring opinion that remains the rule of the *Insular Cases*.¹³⁵ "[T]he opinion in *Downes* by Justice White . . . proposed what was to be dubbed the 'incorporation doctrine,' and would eventually prevail as the rule of the *Insular Cases*."¹³⁶

Justice White's opinion in *Downes* recognized the power of the treaty clause.¹³⁷ A treaty is unable to incorporate a territory without Congress' express or implied consent.¹³⁸ If the treaty contained certain conditions that favor incorporation, then Congress would not reject the treaty.¹³⁹ If the treaty does not contain any conditions for incorporation, then it "does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family."¹⁴⁰ Puerto Rico "was foreign to the United States in a domestic sense, because the island [had] not been incorporated into the United States"¹⁴¹ Justice White's theory of the incorporation doctrine "establishes that, unless a territory is incorporated (generally thought of as being on the way to statehood), then not all provisions of the United States Constitution are applicable to the

¹³⁴ See *Downes*, 182 U.S. at 287; see also Kõmives, *supra* note 39, at 130.

¹³⁵ See PEREA, *supra* note 110, at 159 ("Justice White's concurring opinion, which ultimately became the controlling view, expresses similar concerns about the proper races for citizenship and political participation, and offers a stronger solution, placing greater discretion in Congress to decide the rights of Puerto Ricans.").

¹³⁶ See Torruella, *supra* note 103, at 308.

¹³⁷ See U.S. CONST. art. II, § 2, cl. 2:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

¹³⁸ SPARROW, *supra* note 38, at 92.

¹³⁹ See *Downes*, 182 U.S. at 339 (White, J. concurring).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 341-42.

territory.”¹⁴² Only those rights declared as fundamental¹⁴³ would apply to the unincorporated territories.¹⁴⁴

The racist views that permeated the Supreme Court in *Plessy* were also apparent in *Downes*.¹⁴⁵ The incorporation doctrine is an example of the Court’s “ideological commitment to an Anglo-Saxon conception of United States citizenship.”¹⁴⁶ The Court viewed that the insistence of annexing a territory of an alien race would be “fatal to the development . . . [of] the American Empire fatal or detrimental to the American Empire.”¹⁴⁷ To prevent any fatal development, the Court placed the power of incorporation into the hands of Congress.¹⁴⁸ Thus, an unincorporated territory fell to the mercy of a legislative body that can determine the civil and political rights of the territorial inhabitants.¹⁴⁹

In a dissenting opinion, Justice John M. Harlan opposed Congress’ control over the territories as a subjected colony.¹⁵⁰ Justice Harlan focused on the flaw of the incorporation doctrine: “[Congress’] failure to give due weight to the fact that the Constitution ‘speaks . . . to all peoples, whether of States or territories, who are subject to the authority of the United States.’”¹⁵¹ Justice Harlan’s dissent calls into question the power of the federal government.¹⁵² In his view:

The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces, —the people inhabiting them to enjoy only such rights as Congress chooses to accord to them, — is wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution.¹⁵³

¹⁴² Hannah M.T. Gutierrez, *Guam's Future Political Status: An Argument for Free Association with U.S. Citizenship*, 4 ASIAN-PAC. L. & POL’Y J. 122, 133 (2003) (arguing that Guam’s quest towards self-governance should entail free association with the United States); see also Torruella, *supra* note 103, at 309.

¹⁴³ See *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922); See also *supra* text accompanying note 43.

¹⁴⁴ See Gutierrez, *supra* note 142, at 133.

¹⁴⁵ See PEREA, *supra* note 110, at 153-54.

¹⁴⁶ See *id.* at 159.

¹⁴⁷ See SPARROW, *supra* note 38, at 90.

¹⁴⁸ See *id.*

¹⁴⁹ See PEREA, *supra* note 110, at 159.

¹⁵⁰ KERR, *supra* note 49, at 90; see also SPARROW, *supra* note 38, at 97.

¹⁵¹ See Torruella, *supra* note 103, at 310.

¹⁵² See *id.*

¹⁵³ See *Downes v. Bidwell*, 182 U.S. 244, 369 (1901) (Harlan, J. dissenting).

In summary, “taken together, *De Lima* and *Downes* represent the notion that pursuant to plenary power under the Territorial Clause, Congress could define the area as it pleased.”¹⁵⁴ Justice Harlan’s dissenting opinion foreshadowed the potential issues whenever territorial inhabitants would encounter a fundamental rights violation.

Years after their holdings, the *Insular Cases* still prevent territorial citizens from full enjoyment of all the rights of American citizens.¹⁵⁵ Once territorial residents became American citizens, only certain fundamental constitutional protections were given. The Court’s deference to Congress, regarding territorial citizens’ constitutional rights, facilitates imperialistic values. What if a territory remained unincorporated? As suggested by Justice White, incorporation would allow territorial citizens to enter the “American Family” thus granting them all rights and privileges.¹⁵⁶ Thus, since Guam is an unincorporated territory, Congress may not extend all constitutional protections so long as it has a rational basis for that action.¹⁵⁷

In *Segovia*, the court relied on the *Insular Cases* in rendering its decision.¹⁵⁸ The *Insular Cases* firmly established that until Congress has incorporated the territories, “Congress may treat territories differently than states provided it has a rational basis for that treatment.”¹⁵⁹ Although the right to vote is a fundamental right, which warrants a higher level of scrutiny than rational basis, i.e. strict scrutiny, the district court held this does not apply to the territories.¹⁶⁰ In their appellate brief, *Segovia* argued that the court improperly expanded the *Insular Cases*.¹⁶¹ *Segovia* further asserted that the *Insular Cases* “established a race-based doctrine of ‘separate and unequal’ status for residents of overseas United States territories.”¹⁶² Although the court relied upon the *Insular Cases* to render its decision, the flawed statutory language of the UOCAVA further perpetuated an injustice by denying the participation in presidential elections to Guam’s veterans.

¹⁵⁴ Kōmives, *supra* note 39, at 131.

¹⁵⁵ See *Att’y Gen. of Guam v. United States*, 738 F.2d 1017, 1020 (9th Cir. 1984).

¹⁵⁶ See *Downes*, 182 U.S. at 339 (White, J. concurring).

¹⁵⁷ See *Segovia v. Bd. of Election Comm’rs for Chi.*, 201 F. Supp. 3d 924, 945 (N.D. Ill. 2016).

¹⁵⁸ See *id.* at 938 (citing *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922)).

¹⁵⁹ See *id.* at 944 (citing *Harris v. Rosario* 446 U.S. 651 (1980)).

¹⁶⁰ See *id.*

¹⁶¹ See Brief of Appellants at 29, *Luis Segovia v. United States*, No. 16-4240 (7th Cir. Apr. 12, 2017) (“No court had ever held that the *Insular Cases* compel the conclusion that the right to vote is not a ‘fundamental right’ for the over 4 million citizens living in the Territories.”).

¹⁶² *Id.*

B. *UOCAVA Sought to Protect Voting Rights of All American Citizens*

Ensuring military personnel were extended voting rights has been an area of concern as early as the Civil War.¹⁶³ In the 1868 presidential election, absentee voting was deployed for Union soldiers who were scattered throughout the nation.¹⁶⁴ Republicans favoring President Abraham Lincoln's re-election bid sought these absentee votes.¹⁶⁵ Throughout this nation's conflicts, whether foreign or domestic, voting rights of military personnel and overseas voters were further expanded.¹⁶⁶

It was not until 1975, when President Ford signed the Overseas Citizens Voting Rights Act ("OCVRA") that overseas citizens were granted the right to vote.¹⁶⁷ The OCVRA allowed U.S citizens living abroad to cast an absentee ballot even if they no longer fulfilled their previous domicile's residency requirements.¹⁶⁸ Both political parties sought these voters and "began courting overseas and military voters more systematically, and the military appointed voting assistance officers all around the globe to help deployed troops vote."¹⁶⁹ The predecessor to UOCAVA, OCVRA's legislative purpose reveals the original legislative intent was to incorporate all American citizens.¹⁷⁰

1. OCVRA's legislative purpose intended to enfranchise all American overseas citizens and military personnel

The purpose of the OCVRA was stated in House Report No. 94-649: "[t]he primary purpose of the bill is to assure the right of otherwise qualified private U.S. citizens residing outside the United States to vote in federal

¹⁶³ See Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act, 2016 WL 1274761.

¹⁶⁴ See generally Steven F. Huefner, *Lessons from Improvements in Military and Overseas Voting*, 47 U. RICH. L. REV. 833, 837 (2013) (discussing the history of the OCVRA and the UOCAVA); see also Kalt, *supra* note 52, at 447-48.

¹⁶⁵ See Huefner, *Lessons from Improvements in Military and Overseas Voting*, at 837. In World War II, "Congress took up legislation that would become the Soldier Voting Act of 1942, the first federal guarantee of a right to vote for American military, which applied only to federal elections and only during wartime at." *Id.* at 839. Then in the 1960's, the Voting Rights Act of 1965, and its amendment in 1968, further enfranchised overseas and military voters.

¹⁶⁶ See *id.*

¹⁶⁷ Overseas Citizens Voting Rights Act of 1975, Pub. L. No. 94-203, 89 Stat. 1142 (1976).

¹⁶⁸ See *id.*; see also Kalt, *supra* note 52, at 447-48.

¹⁶⁹ See Huefner, *supra* note 164, at 841.

¹⁷⁰ 132 CONG. REC. H5973-03 (Aug. 12, 1986) (statement of Rep. Swift), 132 Cong Rec H 5973-03, at WL 783576 (WEST).

elections.”¹⁷¹ The right to vote was viewed as an inherent right and privilege of national citizenship.¹⁷² According to the House Report, Congress was concerned with voter participation for the entire nation.¹⁷³ Although the interests between overseas citizens and those citizens within the boundaries of the United States may be different, the House Administration Committee recognized that each would share common national interests, including “[f]ederal taxation, defense expenditures (for example, U.S. troops stationed overseas), inflation, and the integrity and competence of our National Government.”¹⁷⁴ Furthermore, the Committee noted that even if the interests of the overseas citizens and in-state citizens do not overlap, each citizen is deserving of constitutional protection of this right to vote.¹⁷⁵

The opponents of the OCVRA claimed that the Act would be unconstitutional in eliminating residency requirements.¹⁷⁶ This minority view concluded that “Congress may not, consistent with the Constitution, extend the right to vote in all federal elections to U.S. citizens who are not residents of any state.”¹⁷⁷ The minority’s position was that the Act’s perceived public purpose to enfranchise all American citizens was not a compelling reason to disregard state voter qualifications.¹⁷⁸ The minority required a further justification other than the principle “that the right to vote is a cherished [c]onstitutional right which may be protected by appropriate Congressional enactments.”¹⁷⁹ Although the minority view rested upon requiring additional justification, the majority view highlighted the legislative purpose: to enfranchise all American citizens.¹⁸⁰ As discussed *infra* Part V, the minority view represents the possible backlash in allowing Guam veterans the right to vote.¹⁸¹

In 1986, Congress enacted UOCAVA, which was built from the early voting rights acts of OCVRA and the Federal Voting Assistance Act of

¹⁷¹ H.R. REP. NO. 94-649 at 1 (1975) *as reprinted in* 1975 U.S.C.C.A.N. 23589.

¹⁷² *See id.*

¹⁷³ *See id.*

¹⁷⁴ *Id.* at 2.

¹⁷⁵ *See* H.R. REP. 94-649 at 7; 132 CONG. REC. H5973-03 (Aug. 12, 1986) (statement of Rep. Swift), 132 Cong Rec H 5973-03, at WL 783576; *see also* Alan Gura, *Ex-Patriates and Patriots: A Constitutional Examination of the Uniformed and Overseas Citizens Absentee Voting Act*, 6 TEX. REV. L. & POL. 179, 187 (2001).

¹⁷⁶ H.R. REP. NO. 94-649 at 13 (1975) *as reprinted in* 1975 U.S.C.C.A.N. 2358, 2369.

¹⁷⁷ *See id.*

¹⁷⁸ *See id.*

¹⁷⁹ *Id.*

¹⁸⁰ *See id.*

¹⁸¹ *See infra* discussion in Part V regarding Benny’s Bill.

1955.¹⁸² Congress sought to continue existing protections for military personnel and overseas citizen voters as well as abolish any conflicting provisions.¹⁸³ Specifically, UOCAVA ensured that active duty members of the U.S. military, their dependents, and U.S. citizens living abroad had the right to vote by absentee ballot in federal elections.¹⁸⁴ Overseas citizens affected by UOCAVA may cast an absentee ballot in their home state or the state in which they were last domiciled.¹⁸⁵

The legislative purpose of the UOCAVA was to “facilitate absentee voting by United States citizens, both military and civilian, who are overseas.”¹⁸⁶ In the Committee Reports, the Chairman of the Subcommittee of Elections, Mr. Al Swift¹⁸⁷ from Washington, stated:

Our fellow citizens who are serving overseas to preserve, protect and defend the basic rights we all share—whether they are in uniform or in one of many important civilian positions—deserve no less. They deserve to be able to vote. This bill will protect a fundamental right they retain as American citizens, wherever in the world they might be.¹⁸⁸

As Chairman Swift revealed, Congress sought to incorporate the military personnel who have fought to defend the rights of U.S. citizens.¹⁸⁹ The Committee wanted to ensure voting rights protection of all American citizens, “wherever in the world they might be.”¹⁹⁰

The current framework of the UOCAVA bars some territorial veterans’ right to vote through its definitions.¹⁹¹ As stated by the U.S. District Court for the Northern District of Illinois, the UOCAVA’s definition of “State” prevents former Illinois residents who now reside in Guam to cast

¹⁸² See Huefner, *supra* note 164, at 842.

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ H.R. REP. NO. 99-765 at 5 (1986) as reprinted in 1986 U.S.C.C.A.N. 2009, 2009.

¹⁸⁷ Rep. Allan Byron Swift was elected as a “Democrat to the Ninety-sixth and to the seven succeeding Congresses (January 3, 1979-January 3, 1995).” *Biographical Directory of the United States Congress*, Nov. 21, 2017, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S001115>.

¹⁸⁸ 132 CONG. REC. H5973-03 (Aug. 12, 1986) (statement of Rep. Swift), 132 Cong Rec H 5973-03, at WL 783576.

¹⁸⁹ See *id.*

¹⁹⁰ *Id.*

¹⁹¹ 52 U.S.C.A. § 20310 (West 1986).

absentee ballots.¹⁹² If the UOCAVA's definition of "State" did not include Guam, Puerto Rico and the United States Virgin Islands ("USVI"), these territories would be viewed as foreign countries.¹⁹³ Thus, the individual plaintiffs would then be defined as "overseas voters."¹⁹⁴ If they were defined as "overseas voters," they would fall under the protection of the UOCAVA, thus ensuring their voter protection.¹⁹⁵ In that instance, Illinois would have to allow these former Illinois to cast Illinois absentee ballots in federal elections.¹⁹⁶ However, due to the UOCAVA's definition of "State," Guam Type 1 veterans like Segovia are precluded from voter participation upon establishing Guam residency. Such a predicament is contrary to the legislative intent of OCVRA to protect a fundamental right for American citizen military personnel.¹⁹⁷

2. Cases after UOCAVA's enactment reveal inherent flaws

Although the UOCAVA was enacted to protect the voting rights of overseas citizens, the statute did not address when American citizens would travel and reside in the territories.¹⁹⁸ Thus, it was left to the courts to decide whether these citizens who travel to the territories may retain their right to vote in presidential elections. As seen in the cases of *Igartua De La Rosa v. United States* and *Romeu v. Cohen*, the First Circuit and Second Circuit Courts' holdings contradicts the original legislative intent of the UOCAVA and OCVRA to enfranchise all American citizens.¹⁹⁹

Although not the first case to question territorial voting rights,²⁰⁰ *Igartua* was one of the first cases in which the plaintiffs argued that UOCAVA violated the due process and equal protection rights of territorial inhabitants.²⁰¹ In *Igartua*, plaintiffs once participated in presidential

¹⁹² *See id.*

¹⁹³ *See id.*

¹⁹⁴ *See id.*

¹⁹⁵ *See id.*

¹⁹⁶ *See Segovia v. Bd. of Elec. Comm'rs for Chi.*, 201 F. Supp. 3d 924, 937 (N.D. Ill. 2016).

¹⁹⁷ 132 CONG. REC. H5973-03 (Aug. 12, 1986) (statement of Rep. Swift), 132 Cong Rec H 5973-03, at WL 783576.

¹⁹⁸ 52 U.S.C.A. § 20310 (West 1986).

¹⁹⁹ Kalt, *supra* note 52, at 493.

²⁰⁰ *See Att'y Gen. of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984) (holding that citizens of Guam were not deprived of their constitutional rights by prohibiting the voting for President); *see also Sanchez v. United States*, 376 F. Supp. 239, 241-42 (D.P.R. 1974) (holding that citizenship does not guarantee a right to vote).

²⁰¹ 32 F.3d 8, 9 (1st Cir. 1994).

elections while residing within their former state.²⁰² The plaintiffs alleged that UOCAVA illegally discriminates against citizens who now reside in Puerto Rico and those who live overseas.²⁰³ Rejecting their claim, the First Circuit Court of Appeals held the Act “does not guarantee that a citizen moving to Puerto Rico will be eligible to vote in a presidential election; this limitation is not a consequence of the Act but of the constitutional requirements discussed above.”²⁰⁴ Furthermore, the First Circuit Court of Appeals held “the Act does not distinguish between those who reside overseas and those who take up residence in Puerto Rico, but between those who reside overseas and those who move anywhere within the United States.”²⁰⁵

Like *Igartua*, in *Romeu*, the plaintiff was a former New York resident now residing in Puerto Rico.²⁰⁶ The Second Circuit Court of Appeals held “that the UOCAVA's distinction between former residents of States now living outside the United States and former residents of States now living in the U.S. territories is not subject to strict scrutiny.”²⁰⁷ The Second Circuit Court of Appeals further held that “Congress may distinguish between those U.S. citizens formerly residing in a State who live outside the U.S., and those who live in the U.S. territories.”²⁰⁸ *Romeu* argued that UOCAVA infringed upon his equal protection and his right to travel.²⁰⁹ Regarding *Romeu*'s equal protection claim, the court noted the UOCAVA treats all American citizens in the same manner: “had *Romeu* left New York to become a resident of Florida, he would similarly not have been permitted to exercise the right created by the UOCAVA to vote in the federal elections conducted in New York.”²¹⁰ Acknowledging that a citizen will incur certain losses in changing their residence, the Second Circuit Court of Appeals concluded, “such consequences of the citizen's choice do not constitute an unconstitutional interference with the right to travel.”²¹¹

²⁰² *See id.*

²⁰³ *See id.* at 10.

²⁰⁴ *Id.* at 11; Pursuant to Article II, the electors are chosen by each state. Only citizens residing in the states can vote for these electors. Thus, since Puerto Rico is not a state that chooses its electors, the First Circuit argued that this hinders the plaintiff's right to vote, not the UOCAVA.

²⁰⁵ *See id.*

²⁰⁶ *Romeu v. Cohen*, 265 F.3d 118, 120 (2d Cir. 2001).

²⁰⁷ *Id.* at 124.

²⁰⁸ *Id.*

²⁰⁹ *See id.*

²¹⁰ *See id.* at 125.

²¹¹ *See id.*

Collectively, *Igartua* and *Romeu* represent U.S. judicial decisions holding that the UOCAVA does not distinguish between territorial residents and overseas citizens, nor does it hinder one's right to travel to a territory.²¹² These cases support the proposition that the UOCAVA does not protect voting rights of citizens who may travel to the territories.²¹³ As a result, these former state residents become disenfranchised because they are not entitled to voter participation in presidential elections.²¹⁴ The U.S. District Court for the Northern District of Illinois relied upon *Igartua* and *Romeu* to establish a similar holding in *Segovia*.²¹⁵ Basing its holding on the *Insular Cases* and the statutory flaws of the UOCAVA, the *Segovia* judgment should be reversed as the UOCAVA violates Guam's veterans' due process and equal protection rights.²¹⁶

IV. UOCAVA VIOLATES VETERANS' DUE PROCESS AND EQUAL PROTECTION RIGHTS.

If you can fight to defend the freedoms that the U.S. [f]lag represents, a person should be allowed to vote. Those who serve swear to support and defend the Constitution and therefore should be afforded all rights afforded by [it]. All veterans should be treated equally, to include the right to vote.²¹⁷

The right to vote is viewed as a fundamental right protected under the Fifth Amendment of the U.S. Constitution.²¹⁸ As evidenced by the passing of the Voting Rights Act of 1965, voting privileges were extended to include disenfranchised classes and tear down state and local barriers through the passing of constitutional amendments.²¹⁹ Guam veterans face a similar voting barrier like African Americans in the 1960's and remain a

²¹² *Id.* at 120; *Igartua De La Rosa v. United States*, 32 F.3d 8, 10 (1st Cir. 1994).

²¹³ *Romeu*, 265 F.3d at 120.

²¹⁴ *See id.*; *Igartua De La Rosa*, 32 F.3d at 10.

²¹⁵ *See Segovia v. Bd. of Elec. Comm'rs for Chi.*, 201 F. Supp. 3d 924, 944 (N.D. Ill. 2016) (first citing *Romeu*, 265 F.3d at 124; then citing *Igartua De La Rosa*, 32 F.3d at 10).

²¹⁶ *See Dunn v. Blumstein*, 405 U.S. 330, 334 (1972).

²¹⁷ Email Interview with Gregory Jacobs, *supra* note 75.

²¹⁸ *See Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969) (holding that "the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government").

²¹⁹ *See Armand Derfner, Development of the Franchise: 1957-1980, in VOTING RIGHTS IN AMERICA: CONTINUING THE QUEST FOR FULL PARTICIPATION* 91, 94 (1992) ("Thus by the early 1960s we find that Congress was passing voting rights laws; the courts were beginning to grope toward an understanding that there is a right to vote the Constitution must protect . . .").

disenfranchised class as they are not treated equally when voting for president.²²⁰

As discussed *supra* in Part III, the *Segovia* court's reliance upon imperialistic precedent and a flawed legislative act inevitably perpetuates an injustice to Guam's veterans. Although the court in *Segovia* found no constitutional violations with this scheme that disenfranchise servicemen and women, the UOCAVA nevertheless violates Guam's veterans' substantive due process and equal protection rights upon declaring residency in Guam.

A. UOCAVA Violates the Right to Travel

In their second motion for summary judgment, plaintiffs argued that the UOCAVA violated their substantive due process to interstate travel "by rewarding travel to American Samoa and the CNMI while deterring and punishing travel to Guam, Puerto Rico, and the USVI."²²¹ In denying their summary judgment motion, the district court applied the standards considered for the right to travel first articulated in *Saenz v. Roe*:

[1] the right of a citizen of one State to enter and leave another State [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and [3] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.²²²

An argument was similarly made in *Romeu* where plaintiff argued the UOCAVA impaired his right to the travel to Puerto Rico.²²³ The court noted: "such consequences of the citizen's choice do not constitute an unconstitutional interference with the right to travel."²²⁴ As the Second Circuit Court of Appeals articulated, a citizen who moves from their State of residence to the territories would "inevitably involve certain losses."²²⁵ The court further reasoned these losses would not physically bar a citizen's right to travel.²²⁶

Similarly, the *Segovia* court recognized: "[the] loss of the right to vote in federal elections was not caused by the UOCAVA or Illinois MOVE,

²²⁰ Email Interview with Gregory Jacobs, *supra* note 75.

²²¹ *See id.*; *see also* Brief of Appellants at 25, *Luis Segovia v. United States*, No. 16-4240 (7th Cir. Apr. 12, 2017).

²²² 526 U.S. 489, 500 (1999) (holding that a state law that restricts a new resident's welfare benefits to the same level from the state that previously resided).

²²³ *Romeu v. Cohen*, 265 F.3d 118, 126 (2d Cir. 2001).

²²⁴ *Id.* at 127.

²²⁵ *See id.* at 126.

²²⁶ *See id.*

but by their own decision to relocate.”²²⁷ Relying on *Califano v. Gautier Torres*, the *Segovia* court compared the exclusion of Supplemental Security Income (“SSI”) to that of a denial of a fundamental right to vote.²²⁸ The court held the doctrine of the right to travel should not be extended, as the newly arrived citizen will enjoy special treatment which would be superior to other territorial residents.²²⁹ The denial of this “special treatment” – to be allowed to vote in presidential elections while other territorial residents are barred – was not viewed as a constitutional violation.²³⁰ In summary, *Romeu* and *Segovia* collectively hold the UOCAVA does not violate the right to travel.²³¹ These holdings are erroneous because the UOCAVA arguably enacts a barrier which forces returning Guam veterans to consider whether to surrender their right to vote or their right to travel.²³²

Although the Constitution does not explicitly mention the right to travel, the Supreme Court has recognized the right to travel within the United States as a fundamental right.²³³ In *Dunn*, the Supreme Court declared a Tennessee state law unconstitutional that required a one-year residency requirement for voting eligibility.²³⁴ Citing an earlier decision in *Shapiro v. Thompson*, the Supreme Court held that “moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.”²³⁵ The Court applied strict scrutiny as articulated in *Shapiro*: “Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the *stricter standard* of whether it promotes a compelling state

²²⁷ *Segovia v. Bd. of Elec. Comm’rs for Chi.*, 201 F. Supp. 3d 924, 932 (N.D. Ill. 2016).

²²⁸ *See id.* (citing *Califano v. Gautier Torres*, 435 U.S. 1 (1978) (determining that excluding plaintiffs’ Supplemental Security Income benefits from Puerto Rico does not violate right to travel)).

²²⁹ *See id.*

²³⁰ *See id.*

²³¹ *See id.*; *see also* *Romeu v. Cohen*, 265 F.3d 118, 126 (2d Cir. 2001).

²³² *See Segovia*, 201 F. Supp. 3d at 932.

²³³ “[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.” *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (holding that state law that required a one-year residency requirement to vote as unconstitutional); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding that law that impose a one-year residency requirement in the state as a prerequisite to receive welfare is unconstitutional).

²³⁴ *See Dunn*, 405 U.S. at 334.

²³⁵ *See id.* at 339 (emphasis added) (citing *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969)), *overruled* in part by *Edelman v. Jordan*, 415 U.S. 651 (1974).

interest.”²³⁶ The Court, therefore, concluded that the State’s durational residency laws cannot force a person to choose between travel and the basic right to vote absent a compelling state interest.²³⁷ Like the plaintiff in *Dunn*, Guam veterans are affected in the same way – they are forced to choose between the right to vote or the right to travel.

Based on *Dunn*, the U.S. District Court for the Northern District of Illinois erred in ruling the UOCAVA did not violate their right to travel. Because the right to travel is a fundamental right, the district court should have applied a strict scrutiny standard.²³⁸ Guam Type 1 veterans are not given a choice in the denial of their rights. They are faced with the inevitable question: to surrender their rights as a full American citizen or to not travel to Guam. By surrendering their right to vote, a veteran would not be as willing to travel to Guam whether for familial reasons or to gain employment. Although a veteran may not be physically barred from entering the territory, the surrendering of a fundamental right may cause a veteran to be less willing to travel to Guam.

Furthermore, the right to travel and the right to vote are two fundamental rights that the UOCAVA sought to protect.²³⁹ As the case before the OCVRA’s enactment, any citizen who sought to reside outside the United States was faced with the difficult choice of choosing between the right to travel and the right to vote.²⁴⁰ To eliminate this scenario “the committee concluded that, in the same way the [Voting Rights Act] Amendments²⁴¹ permitted a citizen moving to a new state to vote in her last state of bona fide voting residence, UOCAVA could permit a citizen moving overseas to vote in her last state of bona fide voting residence.”²⁴² Thus, the passing of both the Voting Rights Act Amendments and UOCAVA meant to

²³⁶ *Shapiro*, 394 U.S. at 638, overruled in part by *Edelman v. Jordan*, 415 U.S. 651 (1974) (emphasis added).

²³⁷ *Dunn*, 405 U.S. at 342.

²³⁸ *Shapiro*, 394 U.S. at 634 (“[A]ny classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.”).

²³⁹ See 132 CONG. REC. H5973-03 (Aug. 12, 1986) (statement of Rep. Swift), 132 Cong Rec H 5973-03, at WL 783576; see also Cottle, *supra* note 21, at 332–34.

²⁴⁰ See Cottle, *supra* note 21, at 332–34.

²⁴¹ The Voting Rights Act (“VRA”) Amendments “abolished state durational residency requirements and established a uniform registration deadline of thirty days prior to a presidential election.” Cottle, *supra* note 21, at 332 (citing to 42 USC § 1973aa-1(c) (1988)). Cottle argues that the VRA Amendments prevent citizens from making a choice: to choose between the right to travel and their fundamental right to vote. See Cottle, *supra* note 21, at 333.

²⁴² Cottle, *supra* note 21, at 334.

“protect the citizens' inherent right to travel, without penalizing their right to vote.”²⁴³

Because the UOCAVA violates Guam’s veterans’ right to travel, the court erred in its decision. Forcing the veteran to choose between two fundamental rights is not only unconstitutional as held in *Dunn*, but also places a heavy burden upon the veterans’ travel to the territories.²⁴⁴ The same result would apply if one were to apply the same analysis that the court relied upon in *Saenz*.²⁴⁵ The veteran is not freely able to enter the territory as she is burdened with the loss of a fundamental right. In addition to the district court erring on this prong (UOCAVA), the second prong (the *Insular Cases*) equally shows how the district court rendered a mistake in its judgment.

B. *The Insular Cases Violate the Equal Protection Clause*

In their first motion for summary judgment, Segovia argued that his equal protection rights were violated because the state of Illinois permitted former Illinois residents of CNMI to cast absentee ballots, but did not extend that same right to former Illinois residents who moved to Guam.²⁴⁶

The *Segovia* court did not apply a strict scrutiny standard based on the *Insular Cases*.²⁴⁷ Because Guam is not fully incorporated into the United States, Congress can still assert its plenary power over the territory through the Territorial Clause of the Constitution.²⁴⁸ In *Downes*, Justice White echoed the incorporation doctrine whereby if the territory remained unincorporated then Congress may decide which provisions of the Constitution would apply to territorial residents.²⁴⁹ The *Segovia* court made reference to the incorporation doctrine by stating, “the Constitution does not apply in full to acquired territory until such time as the territory is incorporated into, or made a part of the United States by Congress.”²⁵⁰

Although constitutional safeguards exist, not all provisions of the Constitution apply to the residents of the insular territories.²⁵¹ Thus,

²⁴³ Cottle, *supra* note 21, at 334.

²⁴⁴ See 405 U.S. 330, 338 (1972).

²⁴⁵ See 526 U.S. 489, 500 (1999).

²⁴⁶ See *Segovia v. Bd. of Elec. Comm'rs for Chi.*, 201 F. Supp. 3d 924, 937 (N.D. Ill. 2016).

²⁴⁷ See *id.* at 942.

²⁴⁸ See U.S. Constitution art. IV, § 3 cl.2. (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”).

²⁴⁹ See Gutierrez, *supra* note 142, at 133.

²⁵⁰ See *Segovia*, 201 F. Supp. 3d at 927.

²⁵¹ See *id.*

“Congress may treat territories differently than states provided it has a rational basis for that treatment.”²⁵² The U.S. District Court for the Northern District of Illinois acknowledged that a fundamental right to vote does not exist because the residents of the territories are unable to participate in presidential elections.²⁵³ The court further justified its rational basis review by adhering to the incorporation doctrine as dictated by Justice White.²⁵⁴ In their brief to the Seventh Circuit Court of Appeals, Segovia equally argued that the “*Insular Cases* are inextricably linked to the racial assumptions that animated the long-discredited decision in *Plessy v. Ferguson* and the era of Manifest Destiny – and should not be extended even an inch beyond the decisions’ core holdings.”²⁵⁵ Appellants further argue that the court effectually expanded the discriminatory holdings of the *Insular Cases*.²⁵⁶

The court justifies applying rational basis by the exclusion of CNMI from the definition of “State” and the product of “historical timing.”²⁵⁷ CNMI does not fall under the definition of “State.”²⁵⁸ Thus, a former resident of Illinois living in CNMI is deemed an “overseas voter” even though she is residing within the United States.²⁵⁹ As a result, the *Segovia* court held that a “rational reason supports the UOCAVA’s exclusion of the CNMI . . . from its definition of the territorial limits of the United States.”²⁶⁰ *Segovia* discussed the history of CNMI’s relationship with the United States government, and how the CNMI sought to enter a “closer and more lasting relationship with the United States.”²⁶¹ The history of Guam’s relationship with the United States is notably absent. The opinion does not mention the occupation by Japan during WWII, nor the long-fought road towards citizenship that culminated in 1950.²⁶² The exclusion of CNMI from the definition of State was the crux of plaintiff’s equal protection argument.²⁶³

²⁵² *See id.*

²⁵³ *See id.* at 942.

²⁵⁴ *See Downes v. Bidwell*, 182 U.S. 244, 339 (1901) (White, J. concurring).

²⁵⁵ Brief of Appellants at 28, *Luis Segovia v. United States*, No. 16-4240 (7th Cir. Apr. 12, 2017).

²⁵⁶ *See id.* at 25.

²⁵⁷ *See Segovia*, 201 F. Supp. 3d at 946.

²⁵⁸ 52 U.S.C.A. § 20310 (West 1986).

²⁵⁹ *See id.*

²⁶⁰ *See Segovia*, 201 F. Supp. 3d at 945.

²⁶¹ *Id.* at 945.

²⁶² *See Gutierrez, supra* note 142, at 130 (discussing how the people of Guam fought hard for citizenship to secure more rights such as right to property. Obtaining US citizenship was viewed as one way to prevent the military from seizing and obtaining Chamorro lands).

²⁶³ *See Segovia*, 201 F. Supp. 3d. at 932.

The court justified this exclusion of historical timing by citing to CNMI's unique relationship with the United States.²⁶⁴ The OCVRA of 1975 did not include CNMI as part of the definition of the United States because it was not at that time a United States Territory.²⁶⁵ Yet, the opinion states that the deliberate choice of Congress to exclude CNMI from UOCAVA is the product of historical timing.²⁶⁶ As such, it was "not a deliberate choice by Congress, [as] the so-called 'historical timing' supports the UOCAVA's constitutionality."²⁶⁷ Although the court justified its rational basis review, the case should have been reviewed the scheme under strict scrutiny.

Strict scrutiny should have been the appropriate standard as the right to vote is a fundamental right.²⁶⁸ The Supreme Court has held "the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."²⁶⁹ At one time, Type 1 veterans did have a right to vote.²⁷⁰ While returning Guam Type 1 veterans are denied the right to vote, former Illinois residents in CNMI are able to retain their right to vote. Treating both these groups differently violates the very foundation of equal protection. On its face, the UOCAVA has a discriminatory impact on former Illinois residents residing on Guam and the CNMI. The U.S. Supreme Court has held that "if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest."²⁷¹ Thus, the court should have applied a strict scrutiny as the appropriate standard whenever a fundamental right is violated.²⁷²

The *Insular Cases* justified the court's decision in rejecting plaintiff's equal protection arguments. Justice White's controlling opinion in *Downes* implemented the incorporation doctrine, by which not all constitutional provisions apply for U.S. citizens residing in unincorporated territories.²⁷³ Because Guam is an unincorporated territory, Congress may

²⁶⁴ See *id.* at 945.

²⁶⁵ See *id.*

²⁶⁶ See *id.*

²⁶⁷ See *id.* at 946.

²⁶⁸ See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

²⁶⁹ *Id.*

²⁷⁰ Email Interview with Gregory Jacobs, *supra* note 75; Email Interview with Franklin Leon Guerrero, *supra* note 56; Email Interview with Lieutenant Colonel John Guerrero, *supra* note 82; Email Interview with Leonard Stohr, *supra* note 9.

²⁷¹ See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969).

²⁷² See *id.*

²⁷³ See *Downes v. Bidwell*, 182 U.S. 244, 339 (1901) (White, J. concurring).

treat the territories differently if there is a rational basis for that treatment.²⁷⁴ Furthermore, because voting rights are not extended to territories, plaintiffs' strict scrutiny arguments were also rejected. Lastly, the UOCAVA violates Guam veterans' right to travel to the territories. Veterans wishing to return to Guam are forced to choose between the right to travel or the right to vote. Such a predicament is in strict violation of veterans' substantive due process right to travel as dictated by the U.S. Supreme Court in *Dunn*.²⁷⁵ Relying upon a flawed statutory scheme, the court improperly rejected the plaintiffs' right to travel argument and should have applied strict scrutiny as the appropriate standard.

If the Seventh Circuit Court of Appeals is unable to provide the appropriate remedy, what is the next step in resolving this issue? If the Seventh Circuit Court of Appeals decides that Congress is the only entity that can provide relief, what steps can be taken to petition Congress to rectify the missteps of the UOCAVA? Part V discusses possible solutions, and proposes an amendment that will enfranchise Guam's veterans.

V. POSSIBLE SOLUTIONS TO THE CURRENT PROBLEM – AMENDING THE UOCAVA TO INCLUDE GUAM VETERANS

It's ironic that the Veterans who are protecting the American citizen's right to vote for President, they themselves may be precluded from voting for President because of where they call home (e.g., resident of Guam). Hard to change the political climate if you are treated as a second-class American citizen and not allowed to vote in Congress.²⁷⁶

Veterans are unable to change the political climate if they are unable to vote in Congress.²⁷⁷ This section calls for a solution so that the veterans on Guam may find a voice within the federal government. "[T]he judicial posture commonly expounded, to the effect that these are issues that must be resolved through political means, is flawed ab initio²⁷⁸ because . . . no effective political means exist to correct their colonial condition."²⁷⁹ Thus, how can veterans solve the issues that plague their domicile if they are not granted the political means to do so?

²⁷⁴ See *Segovia v. Bd. of Elec. Comm'rs*, 201 F.Supp.3d 924, 927 (N.D. Ill. 2016). Rational basis review considers "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993).

²⁷⁵ See *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972).

²⁷⁶ Email Interview with Franklin Leon Guerrero, *supra* note 56.

²⁷⁷ *Id.*

²⁷⁸ *Ab Initio*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("From the beginning").

²⁷⁹ Torruella, *supra* note 103, at 347.

This section argues that the following solutions could allow Guam veterans to vote for presidential elections: 1) amending the Constitution as proposed by Neil Weare, Segovia's attorney,²⁸⁰ 2) changing the Electoral College as applied in Judge Leval's suggested framework;²⁸¹ and 3) amending the statutory language of UOCAVA so that it adheres to the original legislative intent. These proposed solutions may finally grant the relief that Guam veterans seek.

While the first two solutions are potential answers to the issue of territorial voting rights, it may fall short to address the problem. Amending the Constitution to incorporate the voting rights of the insular territories is consistent with this article's themes and will directly affect Guam's veterans. Likewise, the second solution: changing the Electoral College, will also grant the inhabitants of the insular territories the ability to democratically participate in presidential elections. However, one potential problem for the first two solutions would be for the states and even the respective insular territories to mutually agree to such a change. If an insular territory prefers decolonization over voting rights would the first two solutions still be effective? Thus, I argue that the third solution, amending the statutory language of the UOCAVA, would be the best solution. Not only would it grant voting rights to the Type 1 and 2 veterans, but can potentially open the door for all U.S. citizens residing in the insular territories.

A. *Constitutional Amendment*

A constitutional amendment is the fallback position whenever a territorial voting rights issue is brought before a court of law.²⁸² The court would generally state that the type of relief that the respective plaintiffs are seeking cannot be granted by the judiciary, but only through congressional action.²⁸³

Attorney Neil Weare proposes a solution that would enfranchise residents in the insular territories. Weare's Voting Rights Amendment consists of five sections.²⁸⁴ In section one of the proposed amendment, he argues that his proposal "provides full participation in presidential elections for Americans who reside in non-state areas."²⁸⁵ Weare writes in section one

²⁸⁰ Neil Weare, *Equally American: Amending the Constitution to Provide Voting Rights in U.S. Territories and the District of Columbia*, 46 STETSON L. REV. 259 (2017).

²⁸¹ See *Romeu v. Cohen*, 265 F.3d 118, 129-30 (2d Cir. 2001).

²⁸² See *Att'y Gen. of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984) ("A constitutional amendment would be required to permit plaintiffs to vote in presidential elections.").

²⁸³ See *id.*

²⁸⁴ Weare, *supra* note 280, at 280. Only the first three sections will be discussed as sections four and five are procedural sections outlining the powers of the Constitution.

²⁸⁵ *Id.*

that each territory should have: “a number of electors of President and Vice President equal to the whole number of Representatives to the United States House of Representatives to which it would be entitled if it were a State.”²⁸⁶ Although this would be similar to the passing of the Twenty Third Amendment, Weare distinguishes the two amendments: “[t]he basis for the difference is that the population of the Territories is either very much smaller than the smallest State or very much larger. Providing three electors for small Territories like Guam or the U.S. Virgin Islands is hard to justify on the basis of proportional representation.”²⁸⁷ As Weare notes, granting three electors to the territories may reveal issues of unfairness due to the differences in size of the various territories.²⁸⁸ Weare writes that if Puerto Rico were granted three electors, it would “unfairly dilute the vote of its residents, since it has a population larger than almost half the States.”²⁸⁹

In sections two and three, Weare discusses his proposed representation in the Senate and the House of Representatives.²⁹⁰ In the House, “each of the non-state jurisdictions are treated as though it were a State, meaning that small Territories and the District of Columbia would receive one voting Representative and Puerto Rico would receive five or six Representatives.”²⁹¹ Weare places a heavy emphasis on the importance of the insular territories having representation in the Senate.²⁹² The Senate would serve a vital role that would affect the economic and political interests of the territories.²⁹³

The Senate alone may ratify treaties. It is also the role of the Senate to provide advice and consent to the appointment of federal judges, ambassadors, and all other ‘Officers of the United States.’ The Senate also has the sole responsibility to try the impeachment of the President, federal judges, and all federal officers. Finally, the Senate chooses the Vice President in the event no candidate receives a majority of the electoral votes.²⁹⁴

As Weare indicates, a Senator representing the interests of the District of Columbia and the Territories will be able to “serve as a check

²⁸⁶ Weare, *supra* note 280, at 280-81.

²⁸⁷ *Id.* at 280.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 280-81.

²⁹⁰ *Id.* at 282-83.

²⁹¹ *Id.* at 282.

²⁹² *Id.*

²⁹³ *Id.* at 284.

²⁹⁴ *Id.*

against Congress using its plenary authority in a manner detrimental to the interests of the citizens who reside in these areas.”²⁹⁵ Allowing the insular territories to have representation in both the House of Representatives and Senate will place them on equal footing with the rest of the United States.²⁹⁶

Weare’s proposed Voting Rights Amendment is a solution that directly addresses the issue of territorial voting rights. By granting equal representation in both the House and the Senate, the inhabitants of the Territories may finally have a voice in the decisions that would affect their respective islands. Though his proposed solution may provide a favorable outcome, the road leading up to this goal may be arduous. The citizens of the different insular territories must mutually agree with this proposed solution. While some territories may be willing to become incorporated, others may seek decolonization.²⁹⁷ For this solution to be realized, all U.S. territories will need to collectively agree on their respective political status with the United States. While this process plays out, Guam veterans will continue to be deprived of their right to vote for President.

B. *Changing the Electoral College*

Another proposal that may aid Guam veterans would be a possible change to the Electoral College. Specifically, as proposed by Judge Pierre Leval of the Second Circuit Court of Appeals, Congress may impose certain conditions or requirements that would permit states to accept the presidential vote of U.S. citizens residing in the U.S. territories.²⁹⁸

Although the Second Circuit Court of Appeals in *Romeu* held that the UOCAVA did not violate Romeu’s right to travel or equal protection, Judge Leval stated, “[t]he writer, speaking for himself alone and not for the court, adds a few observations on the problem.”²⁹⁹ In the opening paragraphs, Judge Leval acknowledged the resentment felt in the territories upon being excluded from participating in presidential elections.³⁰⁰ He then proposed that Congress may impose a requirement “on the States . . . that each accept the presidential votes of certain U.S. citizens who are nonresidents of the State residing in the U.S. territories.”³⁰¹ Furthermore, Judge Leval suggested that this requirement could be modeled after the UOCAVA “by requiring States to accept the votes of U.S. citizens now

²⁹⁵ *See id.* at 285.

²⁹⁶ *Id.*

²⁹⁷ *See* Gutierrez, *supra* note 142, at 124 (discussing how the people of Guam created a plebiscite for self-determination in order to end the island’s colonial status).

²⁹⁸ *See* *Romeu v. Cohen*, 265 F.3d 118, 127-28 (2d Cir. 2001).

²⁹⁹ *Id.*

³⁰⁰ *See id.*

³⁰¹ *Id.* at 129.

residing in the territories who were formerly residents of the State.”³⁰² Additionally, this requirement could be met if:

Congress might permit every voting citizen residing in a territory to vote for the office of President by requiring every State that chooses its electors by popular vote (which all States do) to include in that State’s popular vote that State’s pro rata share of the votes cast by U.S. citizens in the territories.³⁰³

Judge Leval continues his explanation of the requirement in footnote seven of the opinion by offering an example of how this framework could apply in New York.³⁰⁴

If U.S. citizens in the territories cast 1.3 million presidential votes, 54 percent for candidate X, and 46 percent for candidate Y, a State the size of New York . . . would be allocated 85,800 votes from the territories, 46,332 for X and 39,468 for Y, adding a net total of 6864 votes in favor of X.³⁰⁵

Judge Leval continued to offer further insights in the footnote by stating that this is just one of many ways that could resolve this issue.³⁰⁶

Although this solution may grant voting rights to the territories, it still poses several issues that may not ultimately give the relief that Guam veterans seek. One of the first hurdles this amendment would need to overcome is determining which states would receive the popular vote of the territories. Judge Leval proposed to use the territorial populations as an indicator of which votes would be allocated to the State.³⁰⁷ Such allocation may be fiercely debated, as a state may not be willing to include that respective territories’ vote. States and territories share not only geographical differences; political ideologies will certainly be different. For example, following Judge Leval’s scheme, if Congress would require Texas to receive the island of Guam’s popular vote. The people of Guam may be more concerned with militarization of the island and foreign relations with North Korea.³⁰⁸ Territorial residents also may continue to feel disenfranchised by

³⁰² *Id.*

³⁰³ *Id.* at 130.

³⁰⁴ *Id.* n.7.

³⁰⁵ *Id.* n.7.

³⁰⁶ *Id.* (“[A]nother way to incorporate territorial voters would be to “allocate territorial votes according to a State’s proportion of the total electoral rather than according to a State’s proportion of the total population.”).

³⁰⁷ *See id.*

³⁰⁸ *See* Associated Press, *US Moves Part of THAAD Missile Defense to S. Korea*, PAC. DAILY NEWS (Mar. 7, 2017), <http://www.guampdn.com/story/news/2017/03/06/us-moves-parts-thaad-missile-defense-skorea/98834926/> (discussing in Guam local

having their votes proportionally diluted into the fifty states. A better solution is to grant voting rights to veterans by amending the UOCAVA to give Guam veterans a voice in presidential elections.

C. Proposed Additions and Amendments to the UOCAVA: Benny's Bill

Several changes should be made to the UOCAVA to enable Guam's veterans to have their right to vote protected. One such amendment would be removing Guam from the definition of 'State' under the Act. The court in *Segovia* noted, "if the UOCAVA's definition of 'state' excluded Puerto Rico, Guam and the U.S. Virgin Islands, the individual plaintiffs would be qualified "overseas voters under the UOCAVA."³⁰⁹ Because Guam was included in the definition of "State," it is not legally classified as a foreign country for the purposes of UOCAVA.³¹⁰ If Guam is defined as a foreign country, any U.S. residents relocating to Guam retain their right to vote.³¹¹ These residents would be classified as "overseas voters" thus granting them the protection of the UOCAVA.³¹²

Declaring Guam as a foreign country may provide a possible solution for current Guam veterans and residents. However, arguing that Guam should be excluded from the UOCAVA's definition of "State" will only place more pressure on the determination of Guam's political status. Such pressure is partly due to a recent Federal District Court of Guam decision. In February 2017, the Federal District Court of Guam held in *Davis v. Guam* that the plebiscite to decide on Guam's future political status must also include voters who are not defined as a Native Inhabitant of Guam.³¹³ This holding has been met with much criticism.³¹⁴ The proposed

newspaper concerns regarding N. Korea missiles); *see also* Will Ripley, *North Korea Revives Guam Threat Ahead of US-South Korea Drills*, (Nov. 19, 2017), <http://www.cnn.com/2017/10/13/asia/north-korea-guam-threat/index.html>.

³⁰⁹ *Segovia v. Bd. of Elec. Comm'rs for Chi.*, 201 F.Supp.3d 924, 937 (N.D. Ill. 2016).

³¹⁰ *See* 52 U.S.C.A. § 20310 (West 1986).

³¹¹ *See Segovia*, 201 F.Supp.3d at 937.

³¹² *See id.*

³¹³ *See Davis v. Guam*, No. CV 11-00035, 2017 WL 930825, at *1 (D. Guam Mar. 8, 2017) (holding that the plebiscite statute violates the Fourteenth Amendment: "The U.S. Constitution does not permit for the government to exclude otherwise qualified voters in participating in an election where public issues are decided simply because those otherwise qualified voters do not have the correct ancestry or bloodline."); *see also Davis*, No. CV 11-00035, 2017 WL 930825, at *14.

³¹⁴ *See* Jasmine Stole and Jerick Sablan, *Judge: Plebiscite law Unconstitutional; AG may appeal*, PAC. DAILY News, Mar. 8, 2017, <http://www.guampdn.com/story/news/2017/03/08/judge-arnold-davis-plebiscite-law-unconstitutional/98888880/> (discussing the various reactions of the Davis case from Gov. Calvo to other local politicians).

additions and amendments this article suggests may provide the best opportunity to address territorial voting rights. Furthermore, other additions must be made to this new amendment to avoid issues of vagueness or ambiguity.³¹⁵

The following is proposed § 20312, referred to as Benny's Bill,³¹⁶ in honor of CMDR Benny Fegurgur:

§ 20312. Territories

(a) Voting

(1) An overseas voter who establishes residency in the United States Territories, and who is qualified to vote in the last place which the person was domiciled, shall cast an absentee ballot for presidential elections to his or her last domicile.

(2) A veteran, as defined in § 20310(5)(D),³¹⁷ who resides in the Territories, shall be permitted to cast an absentee ballot for only presidential elections and within the domicile(s) where they would have been qualified to vote. If the veteran did not complete the necessary voting requirements in the last place in which he or she would be qualified to vote, he or she is permitted to complete such requirements subject to the following conditions:

(A) Once a veteran has declared intent to participate in the domicile where he or she would be qualified to vote, he or she must fulfill absentee voting requirements in accordance with State and Federal law. A veteran must not claim absentee voting privileges in multiple domiciles.

(B) Upon such declaration, the veteran must register with the domicile's election commission as an "overseas voter."

(C) A veteran must provide documentation to show and verify:

(i) Previous residency in the domicile

(ii) A U.S. citizen

³¹⁵ See ANN SEIDMAN, ROBERT SEIDMAN, & NALIN ABEYESEKERE, *LEGISLATIVE DRAFTING FOR DEMOCRATIC SOCIAL CHANGE: A MANUAL FOR DRAFTERS* 259 (2001).

³¹⁶ Name adopted from CMDR Benny A. Fegurgur who served 25 years in the U.S. Navy. CMDR Fegurgur is my inspiration to advocate for the voting rights of the territories and to correct this injustice.

³¹⁷ This definition will be added to § 20310.

(D) Documentation, as stated in (2)(C)(i) may include, but is not limited to:

- (i) Permanent Change of Station (PCS)³¹⁸
- (ii) DOD form 214³¹⁹
- (iii) U.S. Passport
- (iv) Utility bill with name and address
- (v) Copy of active duty paycheck with name and address
- (vi) State or Federal government documents with name and address.
- (vii) Any other documentation that a State chooses to accept to establish residency.

(b) Definitions.

In this section:

(1) Overseas voter

(A) The term “overseas voter” has the meaning given such term in section 20310(5) of this title.

(2) Territory

The term “territory” means--

- (A) Puerto Rico;
- (B) Guam;
- (C) American Samoa;
- (D) the Commonwealth of the Northern Mariana Islands; or
- (E) the United States Virgin Islands.³²⁰

(3) Veteran

(A) The term “veteran” means a person who served

³¹⁸ Telephone Interview with Commander Benny A. Fegurgur, *supra* note 5 (discussing how the PCS states where the active duty service member will be deployed or stationed).

³¹⁹ *Id.* (discussing how the DD or DOD form 214 shows that the active duty personnel is released from service).

³²⁰ 48 U.S.C.A. § 2104 (West 2016) (providing the definition for “territory” so as to provide guidance for the oversight Board of Management and Stability).

in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.³²¹

Benny's Bill also proposes the following amendments to the current § 20310 of the UOCAVA:

(5) "overseas voter" means –

(B) a person who resides outside the United States or within its territories and is qualified to vote in the last place which the person was domiciled. ~~before leaving the United States~~

(D) a veteran who resides outside the United States or within its Territories and is qualified to vote in the last place in which the person was domiciled

(E) "State" means a State of the United States, and the District of Columbia³²². ~~the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa~~

The terms "territory" and "veteran" will also be added to § 20310 as defined above in §§ 20312(b)(2)³²³ and (b)(3).³²⁴ Using identical words for the same concept avoids vagueness or ambiguity.³²⁵ By using the same definition for the term "veteran," the amended legislation will adhere to the cardinal-drafting rule.³²⁶ To ensure that all veterans are enfranchised under this bill, the definition of "veteran" is adopted from 38 USCA § 101: Veteran benefits.³²⁷ Likewise, in following the cardinal drafting rule, the term "territory" was also adopted from another legislative act, 48 USCA § 2104.³²⁸

³²¹ 38 U.S.C.A. § 101 (West 2008) (providing the definition for "veterans" so as to receive veteran benefits).

³²² While this author supports granting voting right to D.C. residents as well, since D.C. is a federal district rather than an unincorporated territory, a different legal analysis is required.

³²³ See 48 U.S.C.A. § 2104 (West 2016).

³²⁴ See 38 U.S.C.A. § 101 (West 2008).

³²⁵ See SEIDMAN & ABYESEKERE, *supra* note 315, at 328 ("In a bill amending an existing Act, a drafter should always use the same words used in the existing Act, so that the entire amended legislation adheres to that cardinal rule.").

³²⁶ *Id.* ("A cardinal drafting rule enjoins a drafter *always* to use the same word for the same concept, and different words for different concepts.").

³²⁷ See 38 U.S.C.A. § 101 (West 2008).

³²⁸ See 48 U.S.C.A. § 2104 (West 2016).

The purpose of Benny's Bill is to permit both types of veterans (1 & 2) to participate in presidential elections while residing in the territories. In writing Benny's Bill, it is my hope that this will create a voice for the inhabitants of the insular territories.

1. Proposed Subsection 20312(a)(1)

Benny's Bill is divided into two main parts: § 20312(a)(1) and § 20312(a)(2). The first part, § 20312(a)(1), seeks to include Type 1 veterans; Guam veterans that were qualified to vote in their last domicile but were denied this right upon declaring residency in the territories:

(1) An overseas voter who establishes residency in the United States Territories, and who is qualified to vote in the last place which the overseas voter was domiciled, shall cast an absentee ballot for presidential elections to his or her last domicile.

As previously stated, § 20310 will include the definition of "veteran" under the meaning of "overseas voter." Therefore, under Benny's Bill, any reference to an "overseas voter" will also reference a veteran because a "veteran" is encapsulated within the term "overseas voter." Type 1 veterans will be able to maintain their voting privileges. However, the most fundamental change in § 20310 would include § 20310(5)(B):

(5) "overseas voter" means –

(B) a person who resides outside the United States or within United States territories and is qualified to vote in the last place which the person was domiciled. ~~before leaving the United States~~

By adding the phrase: "or within United States territories" and deleting the phrase "before leaving the United States," the overseas voter meaning is more broadly defined. The "overseas voter" can now reside within the territories and still maintain voter participation in the last domicile where he or she was last qualified to vote. By purposely drafting the term "overseas voter" instead of "veteran" in § 20312(a)(1), former residents of states now residing on Guam may continue to participate in presidential elections. Thus, not only Type 1 veterans are enfranchised by this proposed subsection, but also all of Guam's citizens who had a right to vote in their previous domicile.

2. Proposed Subsection 20312(a)(2)

The second part of Benny's Bill seeks to include the Type 2 veteran. However, the proposed subsection may be the most contested part of Benny's Bill. Such controversy is articulated in the book *Legislative Drafting for Democratic Social Change*:

As a central purpose, most democratic constitutions aim to

ensure the continuance of government's democratic form. Every definition of democracy includes the requirement of free, competitive elections. *Unless the drafter takes care, a bill that affects the right to vote or election procedures can fall foul of one of these provisions.*³²⁹

Extending the voting franchise to Type 2 veterans runs the risk of gravely affecting the election procedures of various states. The proposed § 20312(a)(2) amendment may be construed to eliminate state voter requirements. As discussed *supra* in Part III, the minority view of the OCVRA required a more compelling reason to disregard state voter qualifications.³³⁰ “It is our conclusion that Congress may not, consistent with the Constitution, extend the right to vote in all federal elections to U.S. citizens who are not residents of any state.”³³¹ The proposed subsection is drafted in such a way to address concerns of the OCVRA's minority view.

The second subsection of Benny's Bill, § 20312(a)(2), states:

(2) A veteran, as defined in § 20310(5)(D), who resides in the Territories, shall be permitted to cast an absentee ballot for only presidential elections and within the domicile(s) where the veteran would have been qualified to vote. If the veteran did not complete the necessary voting requirements in the last place in which he or she would be qualified to vote, he or she is permitted to complete such requirements subject to the following conditions...

As the language suggests, only veterans are included in § 20312(a)(2). The term “overseas voter” would not be as applicable here as § 20312(a)(1) addressed the issue of overseas voters residing in the territories.³³² § 20312(a)(2) aims to include Type 2 veterans due to their mobile nature while serving in the military.³³³ During their time of service, a veteran likely served in several duty stations across the fifty U.S. states.³³⁴ It is thus highly likely that a veteran was domiciled in a state that would permit him or her to participate in presidential elections due to his or her

³²⁹ SEIDMAN & ABEYESEKERE, *supra* note 315, at 286 (emphasis added).

³³⁰ H.R. REP. NO. 94-649 at 13 (1975) as reprinted in 1975 U.S.C.C.A.N. 2358, 2369.

³³¹ *Id.*

³³² Additionally, if the term “overseas voter” was implemented here, this would still not enfranchise all territorial citizens. The citizen must have resided in a place where they could have voted, but did not. If the territorial citizen never left Guam nor resided in a place where they could have voted, then the proposed amendment would not be applicable.

³³³ Email Interview with Franklin Leon Guerrero, *supra* note 56.

³³⁴ *See id.*

duty station being located in that respective state. For example, a Type 2 veteran residing in San Diego, California, a place where he is qualified to vote, would be able to vote upon completing the California voting requirements even though he did not change his Guam residency status. If he were to utilize this proposed subsection, he would need to complete the conditions stated in § 20312(a)(2)(A)-(D):

(A) Once a veteran has declared intent to participate in the domicile where he or she would be qualified to vote, he or she must fulfill absentee voting requirements in accordance with State and Federal law. A veteran must not claim absentee voting privileges in multiple domiciles.

(B) Upon such declaration, the veteran must register with the domicile's election commission as an "overseas voter."

(C) A veteran must provide documentation to show and verify:

- (i) Previous residency in the domicile
- (ii) U.S. citizenship

(D) Documentation, as stated in (2)(C)(i) may include, but is not limited to:

- (i) Permanent Change of Station (PCS)
- (ii) DOD form 214
- (iii) U.S. Passport
- (iv) Utility bill with name and address
- (v) Copy of active duty paycheck with name and address
- (vi) State or Federal government documents providing name and address
- (vii) Any other documentation that a State chooses to accept to establish residency.

Under § 20312(a)(2)(A), the veteran must first declare intent to participate in California's presidential elections. This can be clearly shown by proceeding to § 20312(a)(2)(B). Under § 20312(a)(2)(B), the veteran must register with the state election office as other absentee voters must similarly register.³³⁵ Using California as an example, all "overseas voters" must complete an online voter registration application or Federal Post Card

³³⁵ CAL. SECRETARY OF STATE MIL. & OVERSEAS VOTERS (2016), <http://www.sos.ca.gov/elections/voter-registration/military-overseas-voters>.

Application.³³⁶ The Type 2 veteran will have to complete the same application as other “overseas voters.” However, these ballots will slightly differ as Benny’s Bill will only affect presidential elections instead of the respective state’s local and congressional elections.

Since the process will be the same for both Type 2 veterans and overseas voters, a state’s election office should be able to accept these new voters without changing state residency requirements. The purpose of this is to address the minority view’s concern over the abolishment of state residency requirements. Under § 20312(a)(2)(C), a veteran must show that he or she once resided in that respective state.

Lastly, § 20312(a)(2)(D) outlines the forms of documentation that Type 2 veterans may use to verify residency status such as U.S. passport and a utility bill with name and address. However, despite the different forms of documentation from § 20312(a)(2)(D)(i)-(vii), a PCS may be the most reliable source as it provides the active duty orders of where the veteran was stationed.³³⁷ If the proposed amendment is accepted, it will adhere to the original legislative intent of the UOCAVA: to ensure voter protection for those who fought and defended the nation.³³⁸

Benny’s Bill will only affect veterans and former residents of states now residing in the territories. Thus, if a Guam citizen is neither a veteran nor a former resident of a state, he or she will still be unable to participate in presidential elections. Although Benny’s Bill may not enfranchise all of Guam’s citizens, it is offered as the proverbial *foot in the door*. Highlighting the injustice that a veteran is denied his or her right to vote may raise public awareness. The fresh perspective in the form of Benny’s Bill must be heard to effect change in the hearts and minds of those in power.

VI. CONCLUSION

When is one class more American than the other? You are either an American or not an American. Yet, we are being treated like ‘Half an American’. Our privileges are not given yet we fight for our country.³³⁹

Guam has one of the highest veteran populations among the Pacific Island territories.³⁴⁰ Yet, the *Insular Cases* and the current construction of UOCAVA prevent veterans from participating in presidential elections.³⁴¹

³³⁶ See *id.*

³³⁷ Telephone Interview with Commander Benny A. Fegurgur, *supra* note 5.

³³⁸ 132 CONG. REC. H5973-03 (Aug. 12, 1986) (statement of Rep. Swift), 132 Cong Rec H 5973-03, at WL 783576.

³³⁹ Email Interview with Benny A. Fegurgur, *supra* note 1.

³⁴⁰ See CENSUS BUREAU, *supra* note 65.

³⁴¹ See 52 U.S.C.A. § 20310 (West 1986); see also *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).

The *Insular Cases* justified the district court's decision in rejecting plaintiff's equal protection arguments.³⁴² As discussed in Part III, Justice White's theory of incorporation maintained that if the territory remained unincorporated, then not all the provisions of the U.S. Constitution would apply to citizens residing in the territories.³⁴³ Because Guam is an unincorporated territory, the *Segovia* court held that Congress may treat the territories differently so long as there is a rational basis for such treatment.³⁴⁴ Lastly, the UOCAVA violates Guam's veterans' right to travel to the territories because it forces veterans to choose between the right to travel or the right to vote. Such a predicament is in strict violation of veterans' substantive due process right to travel as dictated by the Supreme Court in *Dunn*.³⁴⁵ As discussed, UOCAVA violates the veterans' right to travel by placing a high cost on the consequences of their decision to move to Guam.

Benny's Bill will enfranchise Guam's veterans and restore the voting rights that were taken from Type 1 veterans. Additionally, by purposely using "overseas voters" instead of "veterans," other former state residents on Guam will be able to vote as well. Lastly, the second part of Benny's Bill sets a standard that will grant voting rights to the Type 2 veterans. Until this bill is passed, the veterans of Guam will continue to suffer the injustice of a country that has forgotten them.

The dead do not speak. If this is true, then are the veterans of Guam dead in the eyes of America? Their voices have been silenced. Their rights have been violated. As one veteran suggested, it is like being treated like "half an American." How much longer will the veterans and the people of Guam endure this status of "half an American"? This injustice cannot be delayed any longer. A justice delayed, is a justice denied.

³⁴² *Segovia v. Bd. of Election Comm's for Chi.*, 201 F. Supp. 3d 924, 950 (N.D. Ill. 2016).

³⁴³ *See Downes*, 182 U.S. at 339 (White, J. concurring).

³⁴⁴ *See Segovia*, 201 F. Supp. 3d at 943.

³⁴⁵ *See Dunn v. Blumstein*, 405 U.S. 330, 338 (1972).

APPENDIX

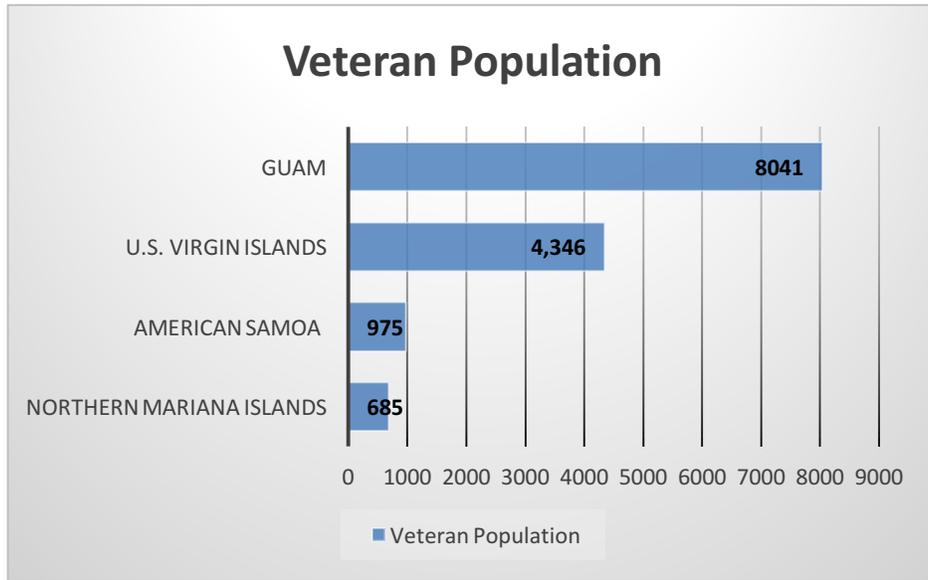


Figure 1: Veteran Population in Guam, U.S. Virgin Islands, American Samoa and The Northern Marianas Islands ³⁴⁶

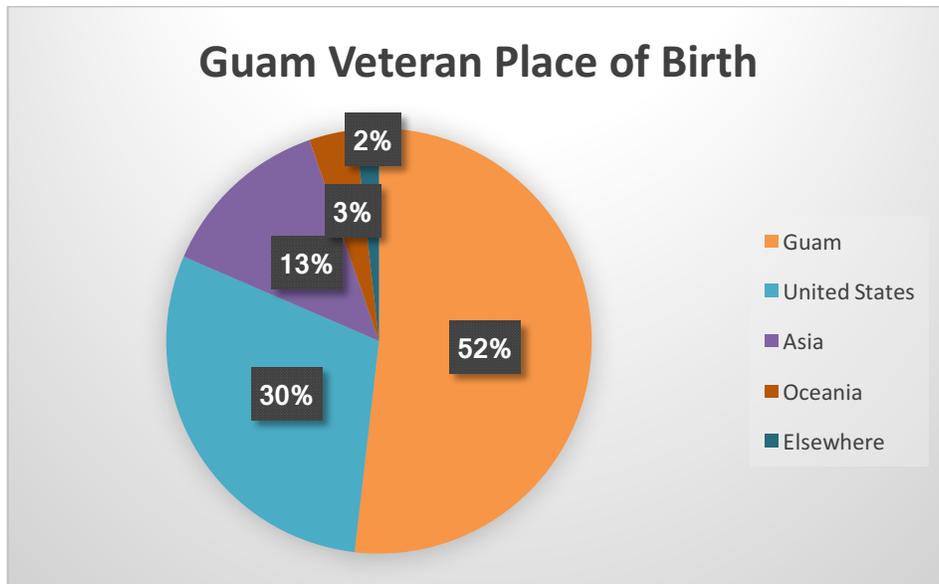


Figure 2: Guam Veteran Place of Birth ³⁴⁷

³⁴⁶ See CENSUS BUREAU, *supra* note 65.

³⁴⁷ See CENSUS BUREAU, *supra* note 65.