STATEMENT OF
THE HONORABLE PILAR C. LUJAN
MEMBER OF THE GUAM COMMISSION ON
SELF-DETERMINATION
&
THE 22ND GUAM LEGISLATURE
Before
THE SUBCOMMITTEE ON INSULAR
AND
INTERNATIONAL AFFAIRS
COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

Regarding

HOUSE CONCURRENT RESOLUTION 94

August 3, 1993

INTRODUCTION

Hafa Adai, Mr. Chairman and Members of the Subcommittee. I am Pilar Cruz Lujan. I serve as a Member of the 22nd Guam Legislature and Guam's Commission of Self-Determination. The people of Guam and their leaders welcome this long overdue series of hearings to determine the manner in which U.N. Charter provisions on self-determination are to be implemented in the context of U.S. law and policy towards Guam and other insular areas.

Too few Americans understand that the native people of Guam never have been afforded an opportunity to engage in an act of self-determination which meets basic international standards currently applicable to Guam. Nor do many of our fellow Americans know that there exist no mechanisms under current U.S. policy for the native people of Guam to exercise the inherent right of self-determination which the U.S. has agreed to respect in accordance with those international standards.

Put simply, under international law and the unambiguous requirements of treaties to which the U.S. is a party, Guam has yet to be decolonized. Respecting the right of self-determination is the only means by which Guam ultimately can be decolonized, it is the only way the U.S. can fulfill its treaty obligations, and ensuring the right of self-determination is the single most critical step required in order for Guam to move from a colonial status to being truly self-governing.

As discussed below and in the companion statement by my colleague Senator Manibusan, the requirement that Guam's self-determination process be one which respects the rights of the native people of our island is not something we invented. It is embodied in both U.S. and international law. I am submitting with this statement a legal analysis which the Commission has had prepared to support our views in this regard, and I request that it be made a part of the record of this hearing along with this statement.

Senator Manibusan and I come here today representing a Guam that is unified in its aspirations. Our primary purpose here today is to persuade the U.S. Congress and the Clinton Administration that it is in the best interests of the United States to take the steps necessary to enable the Chamorro people to engage in a free and fully informed act of self-determination. This will bring an end to the era of U.S. colonialism in Guam, and enable us to begin the new century on the basis of a relationship with the U.S. which does not require in perpetuity U.N. oversight pursuant to Article 73 of the Charter.

These are not rhetorical points. Inability to exercise the right available to us under U.S. and international law is a reality with which we must live each day. Rights which can not be exercised are an affront to the values which bind this nation together. As Americans we cannot rest until our dignity as a people and America's promise of democracy for all its citizens both have been redeemed.

Finally, by way of introduction, through our political status initiative, which is based upon the proposed Guam Commonwealth Act, the people of Guam also seek to institute a more democratic form of self-government. The process for doing so must enable us, for the first time, to give consent to the laws and the form of government under which we live. This is the first and most fundamental principle upon which our nation was founded. Of critical importance to us in this context is the requirement that our political and legal relations with the federal government be created through mutual consent, and that changes in the relationship be made by mutual consent.

WHY CAN'T GUAM AND THE FEDERAL GOVERNMENT BECOME PARTNERS IN THE DECOLONIZATION PROCESS?

Although the question of self-determination for Guam's native people is distinct from that of greater self-government, approval of the Guam Commonwealth Act will create the framework for both of these fundamental issues to be addressed and for Guam to be decolonized. The outcome of the process will be a political status for Guam which preserves the rights of the Chamorro people to engage ultimately in a legitimate act of self-determination, and begins by establishing a self-governing Guam which has a political relationship with the U.S. based upon mutual agreement. The result which this process will produce is decolonization.

We have always believed that resolving these fundamental issues is in the best interest of both the United States and Guam. In the closing days of the last Administration, however, we sensed impatience on the part of the federal government with the self-determination process.

Believe me, Mr. Chairman, our people understand how frustrating the lack of progress has become. We realize that just as we find it increasingly frustrating, this era of change creates stress within the federal government as well. By seeking to ensure that resolution of Guam's status issue is included in the agenda of the Clinton Administration and the 103rd Congress for change, we know that we are continuing to challenge the status quo at a time when events in Puerto Rico, the CNMI and Palau also are demanding attention and action by the federal government.

We make no apologies for being resolute and determined, and we are committed to seeing the process through to completion. The requirement for self-determination will not just go away, and neither will we. While that may present challenges to the federal government, it also creates opportunities, and in the end we have a common goal of resolving the self-determination and political status issues and achieving decolonization of Guam. We all need to stop and remind ourselves of the important objectives we share at the same time we seek to end disagreement on how to achieve them.

THE SELF-DETERMINATION AND DECOLONIZATION PROCESS GUAM HAS PROPOSED IS IN THE NATIONAL INTEREST OF THE UNITED STATES

Change is painful, but it also is liberating. If we can break the impasse on a few fundamental issues we all will be emancipated from the worn out political ideas and legal doctrines devised to maintain the vestiges of a colonial regime the administration of which the U.S. was never morally or historically well-suited to undertake.

During a century that saw most other anachronisms of the colonial era swept away, the U.S. territorial "empire" has withered but not been allowed to die. Attempts to rely on existing insular policy as we enter the next century will produce only more contradictions between American values and actual practices of our government.

During the Cold War the people of Guam were able to endure the lack of a definitive self-determination process as one part of the important role we played in support of America in the struggle against international communism. Now, in the post-Cold War era, we want to provide leadership among the U.S. insular areas by working with the federal government to find a way out of the awkward position of leading the global movement to promote democratic reform while resisting democratic reforms for its own insular areas.

In this sense, Mr. Chairman, your remarks of June 13 were especially profound. Too few federal officials recognize that it is in the best interests of the United States to deliver, as a matter of honor and simple fairness, on the promise of self-determination. It also is in the U.S. national interest for the federal government to join us in pioneering new political, legal and economic relationships between the federal government and the insular areas. Instead of debating about who is to blame for those aspects of the status quo with which none of us are satisfied, we need to work together to create a new paradigm for U.S. relations with its territories which accommodates self-determination while sustaining our mutual interests as we approach the turn of the century and beyond.

Guam does not seek confrontation with federal authorities, but rather seeks to evoke the genius of the American political system -- not merely to grudgingly accommodate but to encourage self-determination for our people and the evolution of our island into a self-governing, decolonized polity.

The people of Guam and their elected leaders have not proposed that self-determination be achieved, or that fundamental legal and political reforms be undertaken, out of defiance or ingratitude, but because we believe existing legal and political doctrines applicable to Guam need to be reformed to allow positive change. We now are at a crossroads, and it is imperative that we begin a new dialogue about Guam's proposal for an unprecedented but promising new framework for self-

determination and political relations between the federal government and a self-governing Guam.

That is why we are encouraged by the decision of the Secretary of Interior to support designation of a negotiator who can speak authoritatively for the federal government on these issues. The stage is now set for discussions in which both governments are prepared to talk openly and honestly about the real choices, without feeling threatened by the need to predicate those discussion on, among other things, U.S. international obligations toward Guam arising from its treaty obligations and U.S. law.

GIVEN THE HISTORY OF OUR RELATIONSHIP, THE U.S. SHOULD BE THE CHAMPION OF SELF-DETERMINATION AND DECOLONIZATION FOR GUAM

The treaty-based legal obligations of the U.S. relating to Guam arise from the Treaty of Paris, in which the U.S. agreed that "[the] civil status of native inhabitants of the territories hereby ceded to the United States shall be determined by Congress." Exercising its discretion under the Territorial Clause, the Congress has passed numerous measures relating to the political, economic and social status of the native people (the Chamorro people), including the grant of U.S. citizenship, and enactment of the Organic Act for Guam in 1950.

However, one of the most definitive measures Congress has taken with respect to the civil status of the native inhabitants of Guam was approval of the U.N. Charter. Under the U.N. Charter the U.S. undertook as a "sacred trust the obligation...to develop self-government, to take due account of the political aspirations of the peoples..." in the territories. In this manner, then, has the United States defined the commitment it made to the native inhabitants of Guam under the Treaty of Paris.

While Congress has discretion over the U.S. insular areas under the Territorial Clause, it must exercise that discretion pursuant to the Treaty of Paris and the U.N. Charter in a manner which protects the rights of the native peoples of Guam and encourages self-determination. As we have said, Guam will not be considered decolonized until the rights of the native people to self-determination are provided for and respected.

As the attached legal analysis explains, the international practice of nations with respect to decolonization has developed within a political framework grounded in treaties and U.N. resolutions which include Article 73 of the U.N. Charter, General Assembly Resolution 1541, the 1970 Declaration on Friendly Relations, the International Covenant on Civil and Political Rights, and the Plan of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

The U.S. record for complying with the clear standards by which its performance as Administering Power for Guam will be judged by the community of nations is not without serious flaws -- especially with respect to taking measures to ensure that immigration, military land and other matters are managed in a manner which protects the right of the native people to self-determination. Understanding these standards and this history provides important insights into the reasonable and positive proposals Guam has made for managing the self-determination process from this point forward.

While the steps required to decolonize Guam are fairly clear under U.S. and international law, too often in the past attempts by Guam to introduce international standards in our dialogue with the federal government were viewed as somehow inappropriate or even impertinent. I want to associate myself with the remarks of Senator Manibusan welcoming the finding of the Congressional Research Service in a recent memorandum of law that the U.S. does have obligations under Article 73 of the U.N. Charter toward those U.S. territories which remain on the U.N. list of non-self governing areas.

We also are pleased to report that recent discussions between OTIA, the State Department and Guam have produced better understanding of the relevance of Guam's status as a non-self-governing area on the question of self-determination and U.S. policy toward Guam generally. This includes establishing that Guam's participation in U.N. decolonization proceedings is not inconsistent with U.S. law and policy, as some had suggested in the past.

We now expect continued progress in reducing the perceived tension between the goals of domestic policy with which Interior -- as the lead federal agency on insular matters -- is familiar, and the international policy matters which arise under applicable law, and which also are a logical part of OTIA's mandate, in cooperation with the State Department and other agencies having international policy responsibilities.

Thus, this hearing is extremely timely for us. In order for us to assist the Subcommittee in its work and take full advantage of this opportunity to create a record in support of our aspirations, please allow me to submit the following specific information relating to H. Con. Res. 94 and its implications for Guam.

COMMENTS ON THE PROPOSED RESOLUTION

Although the original version of the resolution introduced by Representative Serrano relates to Puerto Rico, we hope this Subcommittee will report to the full Committee, and that the full Committee will report to the House, a version which will address the right of self-determination as it relates to the people of each of the

U.S. territories. In Guam's case this is critical because we have not yet achieved self-determination in a manner which satisfies the obligations of the U.S. to the native peoples of Guam under the Treaty of Paris and the U.N. Charter.

Again, Guam remains on the U.N. list of non-self governing areas which have not yet been decolonized, as that term is used and understood in the context of international law and standards recognized by both the U.S. and the United Nations. But decolonization can be achieved in a manner consistent with the U.S. Constitution if the latitude the Supreme Court has given to the political branches of the government under the Territorial Clause in the Insular Cases is used to recognize and implement a form of self-determination and self-government that is consistent with the freely expressed wishes of the native people of Guam, taking into account the unique conditions in each territory.

THE PARTICULAR REQUIREMENTS FOR SELF-DETERMINATION IN GUAM

More so than in any other U.S. insular area, in Guam it is not easy to identify who the "self" is in self-determination. Frankly, we have not been as successful as we had hoped to be generating an understanding here in Washington of the advantages to Guam and the U.S. of a self-determination process through which the rights of Guam's indigenous people are respected.

We need to do a better job of explaining that the need to afford Guam's native population an opportunity to give consent to the political status results we are pursuing is not an infringement on the rights of other U.S. citizens. It is a right of indigenous people protected by U.S. law and policy, and by international law. Again, I am attaching to my testimony the Commission's legal analysis which supports this view.

The requirement for a self-determination process which respects the rights of the native people of Guam should not be controversial. It is a matter of simple fairness as well as a practice that has become universal among countries which observe the standards which civilized countries have adopted since the Atlantic Charter first renounced territorial aggrandizement inconsistent with freely expressed wishes of the people concerned.

Without casting blame or ignoring the historical circumstances which produced the status quo, the fact is that the United States has not yet taken the steps necessary to protect the rights that the Chamorro people have under U.S. and international law. This was acknowledged in the First Report of the Federal Task Force on Guam, which stated that

"...others among Guam's current residents have had a choice [of self-determination]: Statesiders, Asians, Micronesians from the former Trust Territory,

and other residents have acted voluntarily to come to Guam knowing of Guam's status. Guam's neighbors in the Pacific --- the people of the Freely Associated States, and the people of the Northern Marianas -- were afforded a chance to vote on whether they approve the terms of their relationship with the United States. But the Chamorro people of Guam have been given no such opportunity -- not in 1899, when Guam was ceded to the United States by Spain, not in 1950 when the Organic Act was passed and the people of Guam became citizens of the United States, nor at any other time."

We intend to strengthen the multicultural alliance in support of the rights of indigenous people in Guam. We know there is strong support for this element of Guam's self-determination process among all ethnic and social groups in Guam who have come to understand the issue. We want military families in Guam on a temporary basis and long-time residents from all over the world alike to recognize that their own interests will be served by ensuring that the rights of our Chamorro people are not swept aside.

Respecting the rights of indigenous people does not need to diminish the rights of others, and vindicating those rights in the long run is a vindication of the rights of every American.

SELF-DETERMINATION FOR THE PEOPLE OF GUAM:

A LEGAL ANALYSIS

GUAM COMMONWEALTH

PRESENTED IN CONJUNCTION WITH THE STATEMENT OF
THE HONORABLE PILAR C. LUJAN
MEMBER OF
THE 22ND GUAM LEGISLATURE

&

THE TERRITORY OF GUAM'S
COMMISSION ON SELF-DETERMINATION

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HOUSE CONCURRENT RESOLUTION 94

August 3, 1993

Prepared by: Barry J. Israel, Esq.
Howard L. Hills, Esq.
Stroock & Stroock & Lavan
1150 17th Street, N.W.
Washington, DC 20036
Counsel to the Commission
on Self-Determination

I. INTRODUCTION

This paper discusses existing United States policy towards the territories in general and the native people of Guam in particular. To date, United States policy has refused to accept the possibility that the native people of Guam could be the beneficiaries of rights uniquely applied to them. In both its first and second reports, the interagency Task Force on Guam Commonwealth took the position that any provision of the draft Commonwealth Act which singles out native people for unique rights and privileges must be rejected as an infringement upon one or more of the Fifth, Fourteenth or Fifteenth Amendments.

The Task Force's constitutional analysis may have appeal on the surface, but it fails to take into account an uncontradicted series of Supreme Court and Courts of Appeals decisions concerning the Congress' power over the unincorporated territories. Most critically of all, the Task Force's approach gratuitously restricts the policy options of the political leadership in the Executive Branch and Congress, and seeks primarily to justify the status quo at the expense of constructive change and reform.[1/]

The policy positions expressed in the two Task Force reports have been driven primarily by opposition of the Justice Department in the past toward the concept of group rights and affirmative action programs which depend, in part, upon the recognition of group rights. We disagree fundamentally with the basic proposition that the rights of racially or culturally diverse groups cannot be specially recognized, particularly in unincorporated territories, and in the context of measures which will

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1/ The doctrine of unincorporated versus incorporated territories was established in the early 1900s in a line of cases now referred to as the Insular Cases. Downes v. Bidwell, 182 U.S. 244 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Dooley v. United States, 182 U.S. 222 (1901); DeLima v. Bidwell, 182 U.S. 1 (1901). This doctrine was developed judicially to deal specifically with the territories taken by the United States from Spain after the Spanish-American War. Those territories were the Philippines, Puerto Rico, the Virgin Islands and Guam. In the absence of executive or legislative policy dispositive of their political status, the unincorporated territory doctrine was created judicially to deal with these territories, which were not viewed as automatically destined for Statehood as were the territories in the western half of the North American continent. The ethnic composition and cultural heritage of the territorial inhabitants made settlement and incorporation of these areas in the same manner as the continental territories impractical and politically awkward. Since the "Manifest Destiny" model of territorial incorporation, involving removal of the native peoples to reservations to make way for Euro-American settlement, apparently was not deemed politically correct at the turn of the century, the Court simply created a legal "reservation" for the territories by inventing the doctrine of unincorporated territories. While we no longer may be motivated by the same cultural views of native peoples, the Insular Cases remain good law today, Torres v. Puerto Rico, 442 U.S. 465 (1979), and we need to recognize that this constitutional doctrine which has survived into our times provides flexibility to institute positive political change.

resolve Guam's political status and ultimately end Guam's status as a non-self-governing territory under U.S. administration. Moreover, we believe that the analytical approach reflected in the Task Force reports is one which is applicable to States or municipalities when acting on their own initiative and has nothing whatsoever to do with congressional action in the unincorporated territories. Again, this is particularly true in the context of Guam's political status process.

We are convinced that fundamental change in United States policy toward its territories is impossible without first reassessing the powers, rights and obligations of the United States toward the unincorporated territories. The Constitution and applicable treaty obligations have been interpreted in the past to inhibit a greater voice by the people of the territories in their own self-government. Meaningful self-government is an illusion if existing policies do not change.

We believe that the policy of the United States regarding its powers, rights and obligations in the territories has become internally inconsistent. The basis for United States administration of all its territory (whether a national park in California or the island of Guam) is the Territorial Clause (also called the Territories Clause) found in Article IV, Section 3, Clause 2 of the United States Constitution. Under Clause 2, "[t]he 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." Application of the Territorial Clause to the territories has, again and again, been defended and justified as providing the constitutional basis for the unique treatment given to the territories in many respects. At the same time, however, it is argued that the discretion Congress has under the Territorial Clause is of no avail in overcoming constitutional questions which have been raised relating to the unique treatment Guam seeks in its Commonwealth proposal.

The Issue analyzed in the paper is whether United States law (including the Constitution, laws and treaty obligations) permits Congress to treat the people of the unincorporated territories specially, both in the context of their unique political status as defined by the Insular Cases, and in light of U.S. obligations with respect to its non-self-governing areas. While this question can be raised in connection with virtually every section of the draft Commonwealth Act, we intend to focus the discussion on the heart of the Commonwealth proposal, Chamorro Self-Determination, set forth in Title I, Section 102 of the draft Act, and Mutual Consent set forth in Title I, Section 103.

II. CONGRESS' POWER OVER THE TERRITORIES

The analysis begins with reference to a well-established constitutional legal principle -- Congress has extraordinary powers to deal with the territories. The Supreme Court has consistently interpreted Congress' power under the Territorial Clause broadly and long ago concluded that "Congress, in the government of the Territories . . . has plenary power, save as controlled by the provisions of the Constitution." Binns v. United States, 194 U.S. 486, 491 (1904). Justice White, in Downes v. Bidwell, 182 U.S. 244 (1901) (generally viewed as the seminal opinion on the status of territories) described the breadth of Congress' power over unincorporated territories:

> The Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States . . . and to change such local governments at its discretion.

Downes, 182 U.S. at 289-290.

The Supreme Court explained further its view that Congress has the broadest possible authority over the territories in Dorr v. United States, 195 U.S. 138 (1904):

> Congress has unquestionably full power to govern it [the territories], . . . and while Congress will be expected to recognize the principle of self-government to such extent as may seem wise, its discretion alone can constitute the measure by which the participation of the people can be determined.

Dorr, 195 U.S. at 148 (emphasis added).

The Courts, therefore, have been exceedingly hesitant to interfere with Congress' power over the territories. As the Ninth Circuit has said, courts "must be cautious in restricting Congress' power" in the territories. Wabol v. Villacrusis, 958 F.2d 1450, 1460 (9th Cir. 1992).[2/]

[2/] The Congressional Research Service agrees that Congress has broad powers toward the territories, limited only by those constitutional restrictions which are applicable to it. In an opinion prepared at the request of former Congressman, the Honorable Robert Lagomarsino, dated December 4, 1991, concerning Puerto Rico's political status, CRS concluded that in the political status area "Congress has discretion to act. It may, subject only to constitutional constraints that may inhibit its actions, choose to accord recognition to a wide variety of rights that Puerto Rico or others may seek. It may creatively provide for new and different relationships between the United States and any territory. And it may treat bilaterally with the Government or the people of Puerto Rico in the establishment of governmental institutions and forms."

The starkest description of the scope of Congress' authority over the unincorporated territories is found in three separate rulings by the United States Court of Appeals for the Ninth Circuit addressing the political status of Guam. Beginning in 1982, the Ninth Circuit stated in People v. Okada, 694 F.2d 565 (9th Cir. 1982) that

> Congress has the power to legislate directly for Guam, or to establish a government for Guam subject to congressional control. Except as Congress may determine, Guam has no inherent right to govern itself.

Okada, 694 F.2d at 568 (emphasis added.)

Three years later, the Ninth Circuit expanded on this theme in Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1286 (9th Cir. 1985), holding that Guam "enjoy[s] only such powers as may be delegated to it by Congress." As such, "the government of Guam is an instrumentality of the federal government over which the federal government exercises plenary control." Id. at 1289.

The Ninth Circuit's most recent and clearest declaration on this theme came in Ngiraingas v. Sanchez, 858 F.2d 1368, 1370-71 (9th Cir. 1988) when Guam was analogized to a Federal agency:

> Admittedly the analogy between Guam and an administrative agency such as the Federal Trade Commission is counter intuitive. Guam seems more like a state or municipality than a run-of-the-mill federal agency. After all, Guam elects government officials, its citizens participate politically. . . But there are also very significant differences, differences we deem conclusive. . . . Guam marches squarely to the beat of the federal drummer; the federal government bestows on Guam its powers and, unlike the states, which retain their sovereignty by virtue of the Constitution, Guam's sovereignty is entirely a creation of federal statute.

Ngiraingas, 858 F.2d at 1370-71 (emphasis added).

The threshold question quite obviously is, what limitations exist on Congress' power? As the Court stated in Binns, 194 U.S. at 491, the Congress has "plenary power, save as controlled by the provisions of the Constitution" (emphasis added). What are these limitations? The Territorial Clause gives to Congress discretionary power to provide to the people of an unincorporated territory or Commonwealth whatever individual rights or degree of self-government Congress determines appropriate. If Congress determines that the native people of Guam are entitled to extraordinary rights or that the Commonwealth Government is to have broad, internal self-governing powers, the Territorial Clause permits this. As set forth below, the only certain limitations on Congress are those prohibitions set forth in the Constitution which specifically limit Congress' power, such as the bar against ex post facto laws and bills of attainder.

III. SELF-DETERMINATION FOR THE NATIVE PEOPLE OF GUAM

Section 102(a) of the draft Commonwealth Act provides the mechanism for the people of Guam to exercise their inherent right of self-determination. As set forth in a bracketed agreement signed on October 2, 1991, the Congress directs that the Commonwealth Constitution shall establish a procedure for a plebiscite on future political status. Those who will be eligible to vote are those who Congress decided were eligible for citizenship in 1950 -- those who were born on Guam prior to the granting of citizenship and their descendants.[3/]

Section 102(c) provides for a recognition by the United States that the Chamorro culture is endangered as a result of the 500-year history of colonialism in Guam and the unfettered immigration permitted over the last 30 years. In recognition, the Congress directs the adoption of programs (1) to revitalize the Chamorro culture and (2) enhance the economic, social, educational and job opportunities of the Chamorro people. In addition, it authorizes Guam to implement similar programs. This provision recognizes Congress' budget limitations and transfers some of the burden to Guam to assist in remedying past discriminatory practices.

A. UNITED STATES HISTORICAL AND INTERNATIONAL TREATY OBLIGATIONS TOWARD THE NATIVE PEOPLE OF GUAM

A compelling historical basis exists for this right to exercise self-determination. In its First Report on H.R. 98 released in August of 1989, the Task Force recognized that

> others among Guam's current residents have had a choice [of self-determination]: Statesiders, Asians, Micronesians from the former Trust Territory, and other residents have acted voluntarily to come to Guam knowing of Guam's status. Guam's neighbors in the Pacific -- the people of the Freely Associated States, and the people of the Northern Marianas -- were afforded a chance to vote on whether they approve the terms of their relationship with the United States. But the Chamorro people of Guam have been given no such opportunity -- not in 1899 when Guam was ceded to the United States by Spain, not in 1950 when the Organic

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[3/] 8 U.S.C. 1407(a). This self-determination vote by the Native People of Guam should not be confused with the ratification process planned for Commonwealth or for the Commonwealth Constitution. Under procedures proposed in Title XII, all eligible voters on Guam will be entitled to vote to approve or disapprove the Commonwealth Act as passed by Congress. Thereafter all these same eligible voters will be entitled to vote for electors to a constitutional convention. They will also be entitled to vote for the Constitution which may contain a procedure for the vote.

Act was passed and the people of Guam became citizens of the United States, nor at any other time.

First Report at 9 (emphasis added).

With this compelling statement, the Task Force sounded a clarion call for self-determination, recognizing that the native people of Guam have had no meaningful role in their own governance since they were colonized in the 1500s. First, they lived under three centuries of Spanish rule, during which time their population was reduced from 100,000 to 5,000 by the turn of the 18th century. In 1898, Spain ceded the island of Guam to the United States in the Treaty of Paris, which ended the Spanish-American War. With the island came responsibility for the native people of Guam. As a part of its obligations under the Treaty of Paris, the United States agreed that "[t]he civil and political status of native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." 30 Stat. 1759.[4/] The United States, therefore, undertook as a treaty obligation responsibility for the political status of the native people of Guam, the Chamorros.

After 1898, Guam was ruled by a military Governor and largely left alone, giving the native population the opportunity to reestablish itself. By 1940, the Chamorro population had risen to approximately 20,000, out of a total island population of 22,290, or over 90% of the local population. The other 9% was made up of Statesiders (referred to as "whites" in census documents) (3.5%), Filipinos (2.6%), and others (3.4%).

In 1941, Guam was attacked by Japan and occupied by yet another colonial power, until liberated by American forces in July 1944.

After the cessation of hostilities, the people of Guam -- while liberated from Japanese tyranny -- remained under what was recognized by international law as a colonial arrangement. Thus, when the U.N. Charter was implemented in the post-war era, the U.S. accepted inclusion of Guam on the U.N. list of non-self-governing areas. Although the Congress adopted an Organic Act for Guam which served in place of a local constitution, 48 U.S.C.A. §§1421 et seq., the native Guamanians (then numbering approximately 27,000, see, note following 48 U.S.C.A. §1421) were offered no meaningful role in their political affairs.[5/] The Organic Act did provide for a locally

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[4/] See Examining Board v. Flores de Otero, 426 U.S. 572, 586 n. 16 (noting the "broad" powers vested in Congress by the Territorial Clause, and pointing specifically to the authority granted Congress by the Treaty of Paris).

[5/] At the same time, Congress also granted citizenship to the residents of Guam. 8 U.S.C. 1407 (a). This citizenship, however, was limited to a class of residents which generally were those persons and their descendants who were inhabitants of Guam on April 11, 1899 -- in other words, the Chamorro people. This is essentially the same

(continued...)

elected legislature and local court system, but the Executive was a governor appointed by the United States, and Congress reserved the power to override any legislation adopted by the locally elected legislature. 48 U.S.C.A. §1423i. Furthermore, the United States District Court for Guam served as an appellate court for appeals from the local court system.

Perhaps the most onerous example of the ongoing colonial regime was a restriction on travel to and from Guam. The United States established a military security zone encompassing the entirety of Guam. No person, whether Chamorro or non-Chamorro, was permitted to enter or exit Guam without military approval. Families were divided and the people of Guam became prisoners on their own island, or exiles from it -- if circumstances found them elsewhere. Importantly, however, these travel restrictions did provide some limitation on immigration into Guam, except for temporary military, United States Government personnel, and contract laborers. The local Chamorro population was not diluted significantly during this period. These restrictions were finally lifted by President Kennedy in 1962 as part of a review of United States policy toward Guam and the Trust Territories of the Pacific Islands.

At the time of liberation, the vast majority of Guam's permanent population was native Guamanian. By 1946 the Navy reported a native population of 22,689, with a total island population of 23,136, excluding military. By 1950, however, the total population of Guam was permitted to expand to 59,498, with 27,124 Chamorros (45.6%), 7,258 Filipinos (12.2%) and 22,290 "whites" (38.5%). It is believed that the vast majority of Filipinos and Statesiders on the island during the late 1940s and 1950s were brought there by the United States Government as a part of Guam's development as a military facility.[6/] This population was transient and offered no immediate threat to the native population's ultimate ability to control internal island affairs.

By the mid-1960s, however, a new kind of immigration pattern was beginning to emerge.[7/] After travel restrictions were lifted by the military and especially after the

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[5/](...continued)
class of persons named in Section 102(a) of the draft Act as those who would be eligible to participate in a future and final act of self-determination.

[6/] 84.2% of those immigrating to Guam between reoccupation (1944) and 1950 were males who came either for military assignments or as part of the imported labor force.

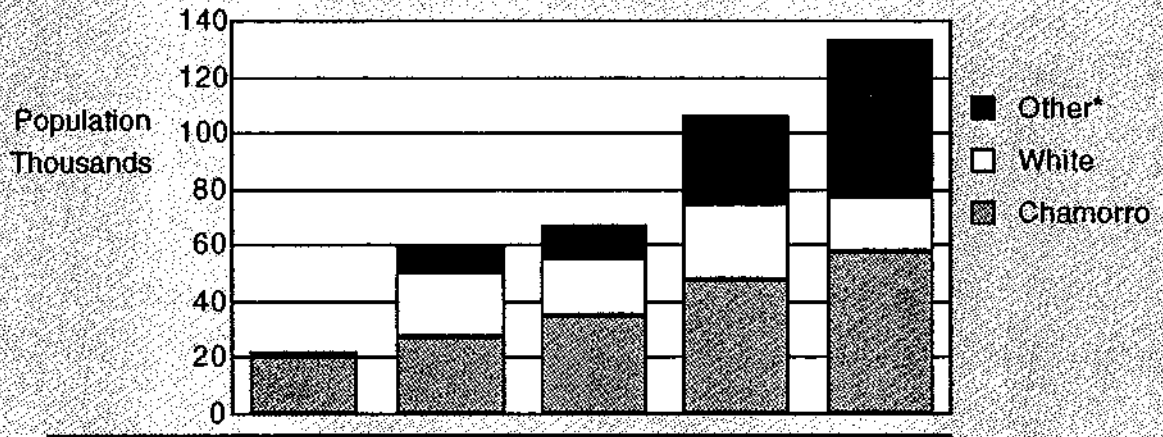
[7/] In 1952, the Immigration and Nationality Act designated Guam as a part of the United States for Immigration purposes. Immigration and Nationality Act of 1952, sec. 403, 66 Stat. 280. In addition, the U.S. Board of Immigration Appeals held that certain nonimmigrant alien workers admitted prior to December, 1952, were entitled to permanent U.S. residency under the 1917 Immigration Act. As a result, by February,
(continued...)

end of the Vietnam war, United States law and policy encouraged massive immigration, principally from Southeast Asia. As United States law on immigration changed to a country-quota system, Asians had unprecedented access to the United States. Because Congress had designated Guam as a part of the United States for permanent residency purposes, Guam, with its close proximity to Asia, became a magnet for immigrants, especially from the troubled Philippines. These immigrants are far less transient than their U.S. mainland predecessors, as the following Table demonstrates.

2/(...continued)
1962, 1,700 Filipino workers were able to obtain permanent residency on Guam. Another 200 nonresident aliens were also admitted by 1962 and an additional 1,458 aliens were admitted by 1967, all of whom had entered Guam with military permission.

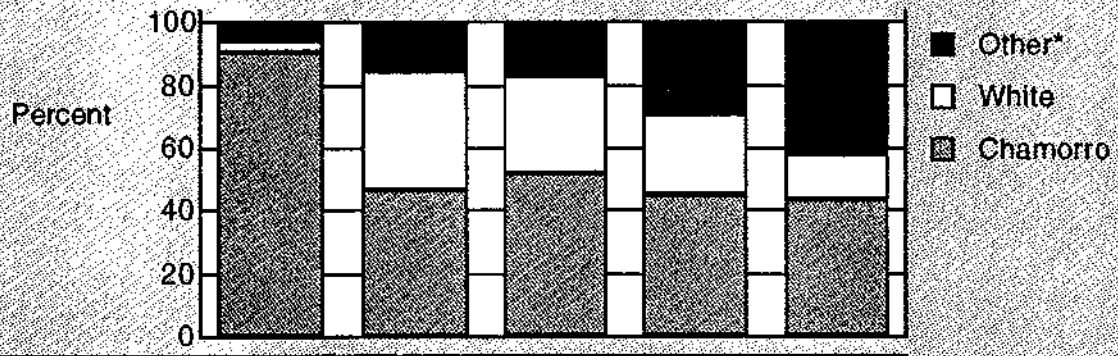
Guam Population Ethnicity Mix 1940-1990 ‡

Numerical Distribution



Year	1940	1950	1960	1980	1990
Chamorro	20,173	27,124	34,726	47,825	57,641
White	780	22,920	20,724	26,901	19,160
Other*	1,337	9,454	11,558	31,253	56,306
TOTAL	22,290	59,498	67,008	105,979	133,107

Percentage Distribution



Year	1940	1950	1960	1980	1990
Chamorro	90.5%	46.1%	51.8%	45.1%	43.3%
White	3.5%	37.9%	30.9%	25.4%	14.4%
Other*	6.0%	16.1%	17.2%	29.5%	42.3%

‡Source: U.S. Bureau of Census Decennial Reports, 1990.

**Philippino and other immigrants primarily from Asia.*

This Table shows conclusively that the transient population from the mainland United States decreased in real numbers during this period, and more importantly, as a total percentage of the population. But the Filipino and "Other" populations grew from 15.9% of the population in 1950 to 42.3% of the population by the 1990 census, or only 1% less than the native population -- which had been diluted a further 2.3% in this same period.

The policy which permitted this significant influx of immigrants is directly responsible for the Chamorro self-determination proposal. If the United States had not treated Guam as a destination at which U.S. citizenship could be attained by aliens, the proposal would be unnecessary. Because we cannot roll back this history, the United States has an obligation to provide the native people of Guam with an opportunity to exercise self-determination, undiluted by the voice of those who have been permitted to immigrate.

B. The International Legal Framework

This responsibility to allow for true self-determination stems from the ratification of the Treaty of Paris, whereby Congress accepted responsibility for the political rights of the native inhabitants of Guam. This responsibility was later amplified in the ratification of the United Nations Charter.[8/] Specifically, Article 73 of the Charter states:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost . . . the well-being of the inhabitants of these territories, and, to this end . . . to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory . . . .

8/ The political branches of the U.S. Government exercised their plenary authority under the treaty making power by entering into the United Nations Charter in 1945. It is important to keep in mind that the Charter is a treaty obligation, and thus has the force of Federal law under the Constitution. In this context, the political branches decided to make international standards applicable to the territories, including Guam. That exercise of authority now constitutes part of the framework, under the Insular Cases, within which the U.S. administers Guam, and is perfectly consistent with the Territorial Clause. Thus, the U.N. Charter and the Insular Cases can be seen, not at odds with one another, but as fully consistent within overall constitutional and statutory framework.

U.N. Charter, Article 73 (emphasis added).

Guam is included on the United Nation's list of non-self-govering territories. By accepting Guam's inclusion on the United Nations list of non-self-governing territories, and by reporting annually to the United Nations under Article 73(e) of the U.N. Charter, the United States accepts that it considers Guam to be a non-self-governing territory, thus recognizing its obligations under the Charter.[9/]

To whom does self-determination apply? The first serious effort to enunciate the applicable principles was undertaken by the fifteenth General Assembly in the annex to Resolution 1541 of December 15, 1960. It attempts to sit forth the test for determining whether a territory is non-self governing within the meaning of Article 73(e) of the Charter. Under Principle IV of the resolution, non-self governing status exists prima facie "in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it." Once that test has been met, Principle V states, "other elements may then be brought into consideration," including those "of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption" that the territory is non-self-governing.[10/] It further declared that all Members should take immediate steps "to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire . . . ."[11/]

The 1970 Declaration on Friendly Relations elaborated the Charter "principle of equal rights and self-determination of people" by reiterating the duty to end colonialism and to permit each colonial territory to assume a "political status freely determined by" the inhabitants. More broadly, the declaration attributes to "all peoples" -- not merely the inhabitants of colonies -- "the right freely to determine, without external interference, their political status."[12/]

9/ Article 73(e) states, in pertinent part, that Nations administering non-self-governing territories must "transmit regularly to the Secretary-General for information purposes . . . statistical and other information . . . relating to the . . . conditions in the territories for which they are responsible."

10/ GA Res. 1541, 15 UN FAOR Supp. (No. 16), supra note 31, at 29.

11/ Id. at para. 5.

12/ Annex to GA Res. 2625, supra note 31, principle 4.

The broad concept of a universal right to self-determination is further enunciated in Article I of the International Covenant on Civil and Political Rights.[13/] This treaty, ratified or acceded to by 113 states as of November 1991, and approved by the United States Senate on April 2, 1992, states categorically: "All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

To implement further the decolonization process, in 1980, the General Assembly adopted a resolution entitled "Plan of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples." U.N.G.A. Res. 35/118 (1980). This resolution was overwhelmingly approved by a vote of 120-6, with 20 abstentions. As a part of this plan, colonial powers were directed to

> adopt the necessary measures to discourage or prevent the systematic influx of outside immigrants and settlers into Territories under colonial domination, which disrupts the demographic composition of those Territories and may constitute a major obstacle to the genuine exercise of the right to self-determination . . . by the people of those Territories.

Id., Annex, para. 8.

The United States never implemented measures designed to prevent the dilution of the native Guamanian population through immigration. In fact the opposite happened, and United States immigration policies applicable to the mainland were extended to Guam, permitting the massive influx of new Guam residents. This immigration policy is inconsistent with the United States' obligations to a non-self-governing unincorporated territory, and provides all the basis Congress needs under every relevant decision to establish a rational basis for the authorization of self-determination for the native people of Guam.[14/]

[13/] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNITS 171, reprinted in 6 ILM 368 (1967) (entered into force Mar. 23, 1976) [hereinafter ICCPR]. The same principle is stated in Article 1 of the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNITS 3, reprinted in 6 ILM 360 (1967) (entered into force Jan. 3, 1976).

[14/] Califano v. Torres, 435 U.S. 1 (1978), and Harris v. Rosario, 446 U.S. 651 (1980), support the proposition that Congress need only demonstrate a rational basis for its actions affecting an unincorporated territory: "Congress . . . may treat [an unincorporated territory] differently from States so long as there is a rational basis for its actions." Rosario at 651, 652.

IV. THE CONSTITUTIONALITY OF THE DRAFT COMMONWEALTH ACT

A. HISTORY OF PAST POLITICAL/LEGAL ANALYSES

For the last 500 years, decisions such as those which permitted massive immigration into Guam, diluting the native Guamanian population, have been made for the people of Guam by colonial administrators whose decisions were directed from distant capitals. More often than not these were political decisions made for the good of the colonial power, with only nominal reference to the political rights of the native people. Significantly, no Chamorro, while resident on Guam, has ever cast a vote for any of these decision-makers, for the persons who appoint them, or for those who approve their appointments.

The draft Commonwealth Act seeks to remedy the harmful effects of massive immigration through a variety of Congressional mandates directing that the native people of Guam be provided with a series of self-determination choices, as though their population had never been diluted.

The Task Force responded, not by assessing what powers the courts have said Congress has, nor by analyzing the United States' international treaty obligations toward Guam, but by characterizing Guam's proposal as a racially discriminatory voting scheme which violates the Fourteenth and Fifteenth Amendments to the Constitution. According to the Task Force, the limitation on voter eligibility to those born prior to August 1, 1950, and their descendants is merely a code word for a racial class because, although those eligible to vote could include some "born on Guam before August 1, 1950, who are not of Chamorro descent . . . their numbers, if any, would be so few as to be de minimis."[15/]

The Task Force's analysis is overly simplistic. The focus should not be on the racial classification, which in any event clearly is not invidious race-based discrimination. Rather, the focus should be on the positive, restorative function of the classification, and democratic reform in U.S. Insular policy pursuant to the Territorial Clause. In addition, the Task Force has ignored the actual origin of this classification (Congress itself), and its purpose -- to give meaning to the obligations Congress accepted in the Treaty of Paris and the United Nations Charter.

15/ Significantly, the Task Force is unable to offer any evidence that the voter qualification provision would in fact result in an exclusively Chamorro vote. It is described as "Chamorro Self-Determination" for ease of reference. In fact, the Task Force does not deny that non-Chamorros might qualify under the provision. Quite clearly non-Chamorros would qualify, thereby undermining the argument that this is solely a race-based classification.

Most importantly, the Task Force's constitutional analysis demonstrates a fundamental misunderstanding of the draft Act, Congress' power over the unincorporated territories derived from the Territorial Clause, and the Supreme Court's deference to the Congress when it exercises its Territorial Clause authority. The Task Force's analytical problem originates with its treatment of Section 102(a) as if it were an action being taken by a State to deprive one of its citizens a right or a vote based solely on racial considerations. If adopted, however, the section would be a directive by the Congress pursuant to the Territorial Clause made in the context of Guam's political status process. It would not be racially based. It would be based on the United States' commitment in the Treaty of Paris and the United Nations Charter to the native inhabitants of an unincorporated territory. It is also based on Congress' own action in 1950, defining who would be qualified for citizenship. No court has ever ruled that an act of Congress is barred either by the Fourteenth or Fifteenth Amendments when the Congress is acting pursuant to its Territorial Clause authority to determine the political rights of the native inhabitants of a territory.[16/]

In substantial part, the Task Force's objection to Chamorro self-determination is based on its view that a Chamorro-only vote constitutes a per se violation of the Fifteenth Amendment.[17/] According to the Task Force, "the Fifteenth Amendment specifically and absolutely prohibits limitations on the right to vote based on race or color." Second Report at 13. First, as explained below, this is the wrong threshold

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16/ In fact, the Supreme Court has been totally consistent in this regard. In both Rosario and Torres (note 10, supra) the Court upheld Congressional action despite clear equal protection issues, based on the broad authority given Congress under the Territorial Clause.

17/ The Supreme Court has not rejected all voting criteria involving racial considerations:

> In addition, many of our voting rights cases operate on the assumption that minorities have particular viewpoints and interests worthy of protection. We have held, for example, that in safeguarding the "'effective exercise of the electoral franchise'" by racial minorities, "[t]he permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment." Rather, a State . . . may "deliberately creat[e] or preserv[e] black majorities in particular districts in order to ensure that its reapportionment plan complies with §5"; "neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment."

Metro Broadcasting v. FCC, 497 U.S. 547, 583-84 (1990)(citations omitted).

issue. When the constitutionality of an Act of Congress is in question, whether in connection with the territories or anything else, the threshold question is always, does Congress have the power to take the action and, if so, is there a compelling state interest involved or does a rational basis exist for the decision?

The Task Force's restrictive analysis, which raises only the possibility that the provisions suffer from constitutional infirmities, is, in our view, erroneous. The Guam Commission on Self-Determination ("CSD") proposed that Congress explicitly authorize the Commonwealth to adopt these programs because the Supreme Court in Richmond v. Croson Co., 488 U.S. 469 (1989), has concluded that a political entity such as the city of Richmond could not employ racially-based, remedial programs, unless that entity had itself participated in the racial discrimination to be remedied. In the CSD's view, however, the Supreme Court has made it clear beyond debate that Congress itself could authorize a State or territory to undertake remedial action programs.

According to the Task Force, the Supreme Court has only authorized Congress itself "to enact tailored programs that use racially or ethnically discriminatory tests for remedial purposes" and only to direct "Federal agencies to adopt such programs." Second Report at 15. As a result, the Task Force concludes that these rulings do "not necessarily mean that the Congress may authorize any other entity to adopt such programs or that such programs would not be subject to the strict scrutiny review generally applicable to programs that use racial tests." Id.

B. THE APPROPRIATE CONSTITUTIONAL ANALYSIS

The constitutional analyses offered by the Task Force throughout its First and Second Reports generally suffer from a common analytical problem. In order to justify its reluctance to accept Guam's proposal for self-determination for the native people of Guam, the Task Force employs an analysis which must result in a finding of unconstitutionality. Whenever the Task Force finds that a proposal possibly discriminates between Chamorros and non-Chamorros, it looks solely to the Fourteenth or Fifteenth Amendments and concludes that if Guam were to take this action an equal protection or voting rights problem would arise.

In essence, what the Task Force does is apply an analysis that is used in connection with determining whether state-originated actions are constitutional. The Supreme Court has greatly restricted the ability of states to remedy past acts of discrimination. But the Court has been extremely reluctant to restrict Congress' authority, and it is for this reason that the CSD seeks language under which Congress authorizes the Commonwealth Government to take the remedial action.

The analytical approach the Supreme Court applies when assessing whether remedial measures adopted by the Congress are constitutionally acceptable is significantly different from that used by the Task Force. The Court does not employ a simplistic analysis of whether the Fourteenth or Fifteenth Amendments on their face prohibit the questioned action, but first asks, "are the objectives of the legislation within

the power of Congress?" and second, whether "the limited use of racial and ethnic criteria [is] a permissible means for Congress to carry out its objectives within the constraints of the Due Process Clause." Croson, 488 U.S. at 487; see also Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir. 1992), cert. denied, 1992 U.S. LEXIS 7798 (1992).[18/]

On March 16, 1992, ten months prior to the release of the Second Report, the Ninth Circuit employed exactly this analysis in Wabol v. Villacrusis, supra, 958 F.2d 1450. The Supreme Court denied a writ of certiorari on December 7, 1992. In Wabol, the Court was examining land ownership restrictions mandated by Congress in another unincorporated territory pursuant to the Covenant to Establish the Commonwealth of the Northern Mariana Islands (CNMI) in Political Union With the United States. Congress' directive, limiting the right to own property to native people, was implemented in the CNMI's Constitution. Section 805 of the CNMI Covenant directed the CNMI to impose restrictions limiting land ownership to "persons of Northern Marianas descent." Article XII, Section 4 of the CNMI Constitution defined "a person of Northern Marianas descent" as one

> who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Mariana Carolinian blood or combined thereof . . . For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 . . . .

To determine whether this obviously racially-based classification violated the Constitution, the Ninth Circuit adopted the same analysis employed by the Supreme Court in Fullilove, Croson and Metro Broadcasting. The threshold inquiry was whether Congress had the power to exclude particular provisions of the Constitution from application in the territories. To answer this question, the Ninth Circuit looked to Congress' Territorial Clause authority, and followed the Supreme Court's mandate that "the entire Constitution applies to a United States territory ex proprio vigore -- of its own force -- only if that territory is incorporated. Elsewhere, absent congressional

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[18/] The court applies exactly this same kind of analysis when dealing with Congress' power over the territories. In cases involving the territories, the courts look first at the Territorial Clause to determine whether Congress has the power it seeks to exercise, and then conducts an Insular Cases analysis to determine whether the territory is incorporated or unincorporated, since, if a territory is unincorporated the Constitution does not automatically apply. See Wabol, 958 F.2d at 1460 ("[W]e must be cautious in restricting Congress' power" in the territories.).

extension, only 'fundamental' constitutional rights apply in the territory." 958 F.2d at 1459.[19/]

According to the Ninth Circuit, the question further reduces to this: Is the right of equal access to long-term interests in Commonwealth real estate, resident in the equal protection clause, a fundamental one which is beyond Congress' power to exclude from operation in the territory under Article IV, section 3?

Id. at 1460.

The Ninth Circuit then reiterated its view that rights incorporated within the Fourteenth Amendment and applicable to the States were not necessarily incorporated into the Territorial Clause for application in the territories:

> What is fundamental for purposes of Fourteenth Amendment incorporation is that which "is necessary to an Anglo-American regime of ordered liberty." In contrast, "fundamental" within the territory clause are "'those . . . limitations in favor of personal rights' which are 'the basis of all free government.'"
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> * * *
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> In Atalig, we distinguished Fourteenth Amendment and territorial incorporation by reference to their distinct purposes. Whereas the former "serves to fix our basic federal structure[,] the latter is designed to limit the power of Congress to administer territories under Article IV of the Constitution." The incorporation analysis thus must be undertaken with an eye toward preserving Congress' ability to accommodate the unique social and cultural conditions and values of the particular territory. Moreover, we must be cautious in restricting Congress' power in this area.

Id. (Citations omitted, emphasis added).

The Ninth Circuit then reaffirmed its previous adoption of the standard used by Justice Harlan in his concurring opinion in Reid v. Covert, 354 U.S. 1, 75 (1955), "whether in [the territory] circumstances are such that [application of the constitutional provision] would be impractical and anomalous."

After finding that land is a scarce and precious resource and essential to the culture through its role in "creating family identity and contributing to the economic well-being of family members," 958 F.2d at 1461, the Ninth Circuit concluded that

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19/ At times the Task Force seems to be arguing that once a provision of the Constitution is applied to Guam it cannot be withdrawn by Congress. There is no legal foundation for any such assertion.

application of equal protection principles would indeed be impractical and anomalous. The factual predicate for this conclusion was that the provision was essential to the political status agreement between the United States and the CNMI, and its application would undermine the cultural and social identity of the people which the U.S. had agreed to protect under the U.N. Charter. The Ninth Circuit concluded, therefore, that "[t]he Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures. Its bold purpose was to protect minority rights, not to enforce homogeneity. Where land is so scarce, so precious, and so vulnerable to economic predation, it is understandable that the islanders' vision does not precisely coincide with mainland attitudes toward property and our commitment to the ideal of equal opportunity in its acquisition. We cannot say that this particular aspect of equality is fundamental in the international sense. It therefore does not apply ex proprio vigore."

Id. at 1462 (citation omitted).

The Task Force apparently did not assess whether Congress has the power Section 102(a) of the draft Commonwealth Act seeks to extend to it, or whether application of either the Fourteenth or Fifteenth Amendments would be "impractical or anomalous." What could be more anomalous than to use either of these two Amendments to take away for all time the native people's rights to self-determination, simply because United States' policy has permitted unfettered immigration into Guam, thereby diluting its native population?
Rather, the Task Force simply assumes that Congress does not have this power, or perhaps chooses to ignore Congress' powers under the Territorial Clause. If the Task Force had simply read the two decisions upon which it relies,[20/] and also read the Croson decision, it would have concluded, as has the CSD, that the Supreme Court, indeed, has explicitly authorized Congress to mandate states and municipalities to take racially or ethnically-based remedial actions.

In Croson, the Supreme Court, relying on its decision in Fullilove, stated unequivocally that "Congress could mandate state and local government compliance with the set-aside program under its §5 power to enforce the Fourteenth Amendment." 488 U.S. at 487.[21/]

Indeed, in Fullilove, the Court examined the breadth of Congress' powers and found explicitly that

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[20/] Fullilove v. Klutznick, 448 U.S. 448 (1980), and Metro Broadcasting, 497 U.S. 547.

[21/] The Court even cited with favor to a law journal article which concluded that "Congress may authorize, pursuant to section 5, state action that would be foreclosed to the states acting alone." Croson, 488 U.S. at 491.

> [i]t is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.

Fullilove, 448 U.S. at 483.

The Court expanded on this theme in Croson:

> Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.

Croson, 488 U.S. at 490.[22/]

Finally, the Court's decision in Metro Broadcasting gives utterly no support for the Task Force's reasoning that somehow the Court limited its decision to Congress authorizing only federal agencies. The Court's language is bold and direct. In assessing whether a remedial program employed by the FCC was constitutional, the Court stated flatly that "[i]t is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved -- indeed, mandated -- by Congress." Metro Broadcasting, 497 U.S. at 563. The Court went on to analyze its Fullilove and Croson decisions and nowhere indicated that its rule would have any less validity when it is Congress directing the states rather than the agencies.[23/]

V. CONGRESS HAS UNIQUELY BROAD POWERS TO DETERMINE THE POLITICAL RIGHTS OF THE PEOPLE RESIDING IN THE TERRITORIES

The Supreme Court has repeatedly held that determinations on the political rights of territorial inhabitants are within the absolute discretion of the Congress, including the right to vote. According to the Court, "it is clear that the Constitution was held not to extend ex proprio vigore to the inhabitants of [unincorporated territories]." Examining Board v. Flores, 426 U.S. 572, 600 n.30 (1976). Rather, only "fundamental" constitutional rights are guaranteed. The decision on which rights are

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[22/] Interestingly, the Court followed this statement with a reference to South Carolina v. Katzenback, 383 U.S. 301, 326 (1966), a case in which the Court had applied a similar interpretation of congressional power under the Fifteenth Amendment.

[23/] Even if this were not the case, the Ninth Circuit has essentially labeled Guam "an administrative agency," Ngiraingas, 858 F.2d at 1370, and thus Congress' power to authorize Guam to conduct a Chamorro-only vote cannot be seriously questioned.

fundamental has been made on a case by case basis, and the Supreme Court has been hesitant to list those rights which must be considered fundamental.[24/]

Moreover, the Court appears to have established a separate standard for those fundamental rights which limit Congress' powers and those rights which apply to the people of a territory for all other purposes. Justice White in Downes v. Bidwell made this distinction on fundamental rights when he referred in his opinion to a dissenting opinion in the Dred Scott case:

> To this [what is fundamental] I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an ex post facto law or bill of attainder; and so in respect to each of the other prohibitions in the Constitution.

Downes, 182 U.S. at 292.

The fundamental rights he was referring to were those direct limits on Congress explicitly set forth in the Constitution. When the Supreme Court's decisions on how and when the Constitution applies in the territories are reviewed carefully, the Supreme Court has applied no per se standard and, instead, has adopted what is essentially a situational test:

> [T]he Insular Cases do stand for an important proposition, one which seems to me a wise and necessary gloss on our Constitution. The proposition is . . . not that the Constitution "does not apply" overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place. . . . [T]here is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.

Reid, 354 U.S. at 74 (Harlan, J., concurring)(emphasis added).

Returning again to Justice White in Downes v. Bidwell,

24/ While it often surprises many, voting is not a fundamental right in our political system. It did not exist for much of the population prior to the Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments. As recently as 1982, the Supreme Court reaffirmed that voting per se is not a fundamental right in our system. Rivera-Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9 (1982).

> [i]n the case of the territories . . . when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, but whether the provision relied on is applicable . . . . And the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States.

Downes, 182 U.S. at 293 (emphasis added).

Most importantly, the Supreme Court has repeatedly deferred to Congress' special powers in regard to the political and voting rights of the people in the territories. Justice White concluded that

> [t]he Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States . . . to give to the inhabitants as respects the local governments such degree of representation as may be conducive to the public well-being, to deprive such territory of representative government if it is considered just to do so, and to change such local governments at its discretion.
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> * * *
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> There can also be no controversy as to the right of Congress to locally govern the island . . . and in so doing to accord only such degree of representative government as may be determined by that body.

Downes, 182 U.S. at 289-91, 298-99 (emphasis added).

The Supreme Court explained further its views on Congress' power to limit the political rights of the people of a territory in Dorr v. United States, 195 U.S. 138:

> Congress has unquestionably full power to govern [the territories], and the people, except as Congress shall provide for, are not of right entitled to participate in political authority, until the Territory becomes a State. Meantime they are in a condition of temporary pupilage and dependence; and while Congress will be expected to recognize the principle of self-government to such extent as may seem wise, its discretion alone can constitute the measure by which the participation of the people can be determined.

Dorr, 195 U.S. at 148 (emphasis added).[25/]

[25/] The Supreme Court's view that Congress can forge unique relationships with its (continued...)

The Supreme Court's most compelling discussion of the power of Congress vis-a-vis the political rights of the inhabitants of a territory is found in Murphy v. Ramsey, 114 U.S. 15 (1885). In that decision, the Court reviewed an Act of Congress which withdrew the right to vote in the territory of Utah from those who practiced polygamy. A challenge was made to the constitutional power of Congress to abridge the right of a class of voters. According to the Court,

> that question is, we think, no longer open to discussion. It has passed beyond the stage of controversy into final judgment . . . . [I]n ordaining government for the Territories, and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular Territory, and the qualification of those who shall administer it. It rests with Congress to say whether, in a given case, any of the people, resident in the Territory, shall participate in the election of its officers or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient. . . . [The] political rights [of the people] are franchises which they hold as privileges in the legislative discretion of the Congress of the United States.

Murphy, 114 U.S. at 44-45 (emphasis added).[26]

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[25] (...continued)
territories has not changed since the Insular Cases. In Examining Board v. Flores de Otero, 426 U.S. 572, 596 (1978), the Supreme Court, commenting on the nature of Puerto Rico's political status after its Commonwealth relationship was established, referred to the relationship between Puerto Rico and the United States as one that has "no parallel in our history." Similarly in Rodriquez v. Popular Democratic Party, 457 U.S. 1, 8 (1982), the Supreme Court declared that Puerto Rico, "like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'"

[26] This case was decided 17 years after the Fourteenth and Fifteenth Amendments were adopted. During discussions with the Justice Department representatives to the Task Force, the Ramsey decision was criticized as somehow no longer being valid. It remains good law, however, and has been cited by the Supreme Court, without criticism, as recently as 1977 in United States v. Wheeler, 435 U.S. 313, 319 (1977) ("It is true that Territories are subject to the ultimate control of Congress"). Moreover, the United States District Court for the District of Columbia in its opinion in Michel v. Anderson, 817 F.Supp. 126 (D.D.C. 1993), the case dealing with the challenge to the territories' delegates vote in the Committee of the Whole, cited to a portion of this same quotation from Ramsey as demonstrative of the scope of the Congress' power over the territories.

Moreover, in Downes, the Court specifically distinguished the voting right from other fundamental rights:

> We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them . . . the right to personal liberty and to individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage . . . and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence.

Downes, 182 U.S. at 282-83 (emphasis added).

Sound legal and political reasons exist for the Court's giving the Congress this broad authority. If this kind of flexibility were not to exist, Congress would never be able to make political status changes in the territories. If for instance, a territory were to seek independence, as did the Philippines, and Congress could not limit application of the Constitution, American citizens living in that territory would be able to block any change in government which impacted their rights under the United States Constitution.[27/] As the Court stated in Torres, 442 U.S. at 470,

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[27/] The Task Force's view of the limitations on Congress power to effect political status changes is also inconsistent with what some in the Senate itself believe. In 1990, the Senate Energy and Natural Resources Committee reported out S. 712, dealing with future political status for Puerto Rico. Under this bill, if an island-wide plebiscite had resulted in a preference for independence Puerto Rico was directed to organize a constitutional convention. The constitution which would result from this convention was required in the bill to preserve fundamental rights such as equal protection and due process. The bill also, however, restricted the vote on the convention delegates and actual constitution to a defined class of persons. They were: (1) persons born and residing in Puerto Rico; (2) all persons residing in Puerto Rico and one of whose parents was born in Puerto Rico; (3) all persons who at the time of the adoption of the Act had resided in Puerto Rico for a period of twenty years or more; (4) all persons who established their residence in Puerto Rico prior to attaining voting age and still reside in Puerto Rico; and (5) spouses of (1)-(4).

because the limitation on the application of the Constitution in unincorporated territories is based in part on the need to preserve Congress' ability to govern such possessions, and may be overruled by Congress, a legislative determination . . . is entitled to great weight.

VI. CONCLUSION

Congress accepted an obligation in the Treaty of Paris, and later the United Nations Charter, to protect the political rights of the native inhabitants of Guam. The Task Force in its First Report found that the Chamorro people, unlike all others on Guam, had been given no opportunity to exercise self-determination. The Chamorro population has been greatly diluted by the immigration policies of the United States, inconsistent with the United Nations policy relating to decolonization. The Chamorro people as a group are clearly disadvantaged on Guam and have had their social, political, educational and economic interests subordinated to those of others with greater political and financial influence. One-third of their land has been taken from them for military purposes. They do not vote for those in Washington making decisions on their behalf. They are United States citizens but do not have the same political rights as do other United States citizens. In fact, they are not even eligible for the same level of benefits under a variety of federal programs as are citizen-residents of the States. The list goes on.

The self-determination rights set forth in §102 are justified and Congress has the power not only to adopt remedial measures, but also to authorize the Commonwealth of Guam to do so in its place as part of a federal remedial program. The provision of these rights by the Congress is not barred by the Constitution. As the Ninth Circuit Court of Appeals stated in 1992, "the equal protection clause . . . was [not] intended to operate as a genocide pact for diverse cultures." Wabol, 958 F.2d at 1462.