“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'âse' 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).
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 you 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.


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).

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

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.\(^13\)

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\(^8\) 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.

Plaintiff Luis Segovia is a former Illinois resident who previously participated in Illinois elections. After years of service in the Army, he now resides in Guam, where he is no longer able to vote for President. Segovia argued that the Uniform and Overseas Citizens Absentee Voting Act (“UOCAVA”) violated his equal protection and due process rights by permitting former Illinois residents in the Commonwealth of the Northern Marianas Islands (“CNMI”) to cast absentee ballots, while denying those similarly situated former Illinois residents in Guam. 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.” Although Guam was

\[14\] See id.
\[15\] See id.
\[17\] 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.
included within the UOCAV A’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 UOCAV A.\(^{23}\) 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 UOCAV A’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 UOCAV A’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 UOCAV A’s definition of “State” due to its unique relationship\(^{31}\) with the United States.\(^{32}\)

\(^{23}\) 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.” Applying the three part test in *Saenz v. Roe*, 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.” 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.

The holding in *Segovia* is based, in part, on a line of decisions known as the *Insular Cases*. The *Insular Cases* are “a series of cases that directly address the political and constitutional status of the United States’ island territories.” 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.” Because Guam is an unincorporated territory, 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. “Citizens

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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.


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 UOCA V A’s maintenance of disparate treatment toward Guam veterans and all U.S. citizens residing in U.S. territories. 44 The current framework of the UOCA V A denies voting rights of Guam veterans by significantly hindering their right to travel. 45 The UOCA V A 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 UOCA V A should be amended to expressly include the right for veterans to travel to the insular territories 47 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

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42 Id. (citing Igaruta 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:

[the 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.


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.\textsuperscript{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 \textit{Insular Cases} and the UOCA VA. Part III of this article continues the Segovia analysis by discussing the \textit{Insular Cases} role in shaping the political status of the territories as well as Congress’ control.\textsuperscript{49} This part then delves into the history and legislative purpose of the UOCA VA. Lastly, Part III concludes by discussing the line of cases that show how the UOCA VA’s statutory language denies voting rights to American citizens who travel to the territories. Part IV will analyze how the \textit{Insular Cases} and the UOCA VA as applied in Segovia are outdated and unjust. Within this context, I argue that the UOCA VA violates Guam’s veterans’ substantive due process right to travel as articulated in the U.S Supreme Court case, \textit{Dunn v. Blumstein}.\textsuperscript{50}

Part IV will further discuss how the UOCA VA 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 \textit{Insular Cases}.

The secondary objective of this article is to present a new structure for the UOCA VA so that it adheres to the original legislative intent, to incorporate all American citizen voters.\textsuperscript{51} Part V will first explore the possible solutions that legal scholars and judges have proposed in solving territorial voting rights.\textsuperscript{52} This section concludes with a proposed amendment to the UOCA VA 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.\textsuperscript{53} Highlighting the injustice suffered by a veteran, who is denied a right to vote for President, may raise

\begin{itemize}
\item \textsuperscript{48} See Census Bureau infra note 65.
\item \textsuperscript{49} See James E. Kerr, \textit{The Insular Cases: The Role of the Judiciary in American Expansionism} 117 (1982).
\item \textsuperscript{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.”).
\item \textsuperscript{52} See Brian C. Kalt, \textit{Unconstitutional but Entrenched Putting UOCA VA 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 UOCA VA’s constitutional problems is to find a more constitutionally suitable way to enfranchise permanent expatriates).
\item \textsuperscript{53} Email Interview with Benny A. Fegurgur, \textit{supra} note 1.
\end{itemize}
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 WARRIORS

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.


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. Although the UOCAVA permits servicemen and women to cast absentee ballots, they can only be cast in Guam’s elections. 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. 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.” The Type 2 veterans embody this injustice: serving in the military and yet not being able to vote for their commander-in-chief. 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. 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).”

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. Thus, at least 30% of the island’s veterans were qualified to vote at one point of their lives. Such was the case for veteran Gregory Jacobs, who participated in his State’s elections in 2008 and 2012. After twenty-three

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66 See Att’y Gen. of Guam v. United States, 738 F.2d 1017, 1019 (9th Cir. 1984).
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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{78} “In the wars of Iraq and Afghanistan, Pacific Islanders have the highest rate per capita of casualties and deaths.”\textsuperscript{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.\textsuperscript{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!”\textsuperscript{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

\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} See America by the Numbers: Island of Warriors, supra note 54.
\textsuperscript{79} See id.
\textsuperscript{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.”

\textsuperscript{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.\textsuperscript{82}

One could argue this oath or service alone is not enough to warrant voter protection.\textsuperscript{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.\textsuperscript{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.\textsuperscript{85} Although Guam’s local politicians attempt to address these healthcare problems, many veterans are still underserved.\textsuperscript{86} “In 2015, Guam ranked third to last in per capita spending on medical care ($2,143) by the US Department of Veteran Affairs.”\textsuperscript{87} Post-traumatic stress disorder (“PTSD”) affects 1 in 5 Iraq Veterans.\textsuperscript{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.”\textsuperscript{89} In Guam, instead of going to a VA hospital, veterans may go to the Community Based Outpatient Clinic (“CBOC”).\textsuperscript{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.\textsuperscript{91} Some veterans wait weeks to months for an appointment.\textsuperscript{92} As a result, some

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


\textsuperscript{87} America by the Numbers: Island of Warriors, supra note 54.

\textsuperscript{88} See id.

\textsuperscript{89} Id.

\textsuperscript{90} See Email Interview with Benny A. Fegurgur, supra note 1.

\textsuperscript{91} America by the Numbers: Island of Warriors, supra note 54.

\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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 Calvo\textsuperscript{97} 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 19\textsuperscript{th} century sense, you can call [Guam] a colony.\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{94}Email Interview with Gregory Jacobs, supra note 75.

\textsuperscript{95}Id.

\textsuperscript{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.).


\textsuperscript{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. The justification to maintain Guam’s colonial status is attributed to the line of cases known as the \textit{Insular Cases}.

\section*{III. Historical Background: \textit{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.

The \textit{Segovia} decision fatally relies upon two prongs: the \textit{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. As this section will suggest, however, the line of cases preceding the UOCAVA’s enactment contradicts the original legislative purpose.

\subsection*{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 destiny values by claiming as spoils of war the territories of Cuba, Puerto Rico, the Philippines, and Guam. The implications of governing the territories became a fiercely debatable topic in both academic and political spheres. 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.”

\begin{itemize}
  \item[99] See id.
  \item[100] Email Interview with Marvin Manibusan, \textit{supra} note 58.
  \item[102] See generally Robert J. Miller, \textit{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).
  \item[103] See \textit{Sparrow}, \textit{supra} note 38, at 4; Juan R. Torruella, \textit{The Insular Cases: The Establishment of a Regime of Political Apartheid}, 29 U. PA. J. INT’L L. 283, 287 (2007) (arguing that the \textit{Insular Cases} represent an outdated or obsolete framework that is no longer consistent with current constitutional principles).
  \item[105] Id. at 291.
\end{itemize}
The Insular Cases are “a series of cases that directly addressed the political and constitutional status of the United States’ island territories.” The nine cases sanctioned an imperialistic precedent that is still relied upon in our common-law system. The Insular Cases justified the imperialistic values that America held during the early twentieth century. 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. “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.” 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.” Scholar Juan Perea suggests the opinion “focused on racial differences between whites and the Chinese and the difficulties these differences posed for whites.” These racial differences were also highlighted in Plessy v. Ferguson, where the Supreme Court reinforced...

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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.


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

112 Perea, supra note 110, at 153.

“domestic white supremacy.” Defendant Plessy, challenged a Louisiana law that provided for separate railway cars for whites and “colored races.” 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.” In its decision, the Court “[sanctioned] a regime of blatant racial inequality for blacks under the deceptive rationale of ‘separate but equal.’” 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.” The Supreme Court’s decisions in Ping and Plessy provide insight into the holdings of the early Insular Cases. The Supreme Court bench that rendered decisions for the Insular Cases also included justices who upheld the Chinese Exclusion Act and promoted the separate but equal doctrine.

The Ping and Plessy cases indicate further that the Court affirmed Congress’s plenary power to determine constitutional rights on the basis of race. “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.”

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. In

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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.””)
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 incorporated territories. 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.” 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.

Downes v. Bidwell is arguably one of the most fundamental and complex Insular Cases. “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.” In Downes, the Supreme Court considered whether Congress, under the Foraker Act, could impose tariffs on trade with Puerto Rico, a newly acquired territory. The Foraker Act “temporarily provid[ed] a civil government and revenues for the island of Porto Rico.” 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. 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.


128 See PEREA, supra note 110, at 156.

129 See SPARROW, supra note 38, at 38, 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 Kömives, 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 Kőmives, supra note 39, at 130.

135 See Perea, supra note110, 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.
Only those rights declared as fundamental would apply to the unincorporated territories. The racist views that permeated the Supreme Court in *Plessy* were also apparent in *Downes*. The incorporation doctrine is an example of the Court’s “ideological commitment to an Anglo-Saxon conception of United States citizenship.” 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.” To prevent any fatal development, the Court placed the power of incorporation into the hands of Congress. Thus, an unincorporated territory fell to the mercy of a legislative body that can determine the civil and political rights of the territorial inhabitants.

In a dissenting opinion, Justice John M. Harlan opposed Congress’ control over the territories as a subjected colony. 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.” Justice Harlan’s dissent calls into question the power of the federal government. 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.

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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.

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 UOCAV further perpetuated an injustice by denying the participation in presidential elections to Guam’s veterans.


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).


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. In the 1868 presidential election, absentee voting was deployed for Union soldiers who were scattered throughout the nation. Republicans favoring President Abraham Lincoln’s re-election bid sought these absentee votes. Throughout this nation’s conflicts, whether foreign or domestic, voting rights of military personnel and overseas voters were further expanded.

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. 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. 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.” The predecessor to UOCAVA, OCVRA’s legislative purpose reveals the original legislative intent was to incorporate all American citizens.

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

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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.*


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


The right to vote was viewed as an inherent right and privilege of national citizenship. According to the House Report, Congress was concerned with voter participation for the entire nation. 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.” 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.

The opponents of the OCVRA claimed that the Act would be unconstitutional in eliminating residency requirements. 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.” 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.

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.” Although the minority view rested upon requiring additional justification, the majority view highlighted the legislative purpose: to enfranchise all American citizens. As discussed infra Part V, the minority view represents the possible backlash in allowing Guam veterans the right to vote.

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

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172 See id.
173 See id.
174 Id. at 2.
177 See id.
178 See id.
179 Id.
180 See id.
181 See infra discussion in Part V regarding Benny’s Bill.
Congress sought to continue existing protections for military personnel and overseas citizen voters as well as abolish any conflicting provisions. 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. Overseas citizens affected by UOCAVA may cast an absentee ballot in their home state or the state in which they were last domiciled.

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

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

The current framework of the UOCAVA bars some territorial veterans’ right to vote through its definitions. 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 absentee ballots.

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182 See Huefner, supra note 164, at 842.
183 See id.
184 See id.
185 See id.
189 See id.
190 Id.
absentee ballots.\textsuperscript{192} If the UOCAVAs definition of “State” did not include Guam, Puerto Rico and the United States Virgin Islands (“USVI”), these territories would be viewed as foreign countries.\textsuperscript{193} Thus, the individual plaintiffs would then be defined as “overseas voters.”\textsuperscript{194} If they were defined as “overseas voters,” they would fall under the protection of the UOCAVA, thus ensuring their voter protection.\textsuperscript{195} In that instance, Illinois would have to allow these former Illinois to cast Illinois absentee ballots in federal elections.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{Igartua De La Rosa v. United States} and \textit{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.\textsuperscript{199} Although not the first case to question territorial voting rights,\textsuperscript{200} \textit{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.\textsuperscript{201} In \textit{Igartua}, plaintiffs once participated in presidential

\textsuperscript{192} See id.
\textsuperscript{193} See id.
\textsuperscript{194} See id.
\textsuperscript{195} See id.
\textsuperscript{198} 52 U.S.C.A. § 20310 (West 1986).
\textsuperscript{199} Kalt, supra note 52, at 493.
\textsuperscript{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).
\textsuperscript{201} 32 F.3d 8, 9 (1st Cir. 1994).
elections while residing within their former state.\textsuperscript{202} The plaintiffs alleged that UOCAVA illegally discriminates against citizens who now reside in Puerto Rico and those who live overseas.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{205}

Like Igartua, in Romeu, the plaintiff was a former New York resident now residing in Puerto Rico.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{208} Romeu argued that UOCAVA infringed upon his equal protection and his right to travel.\textsuperscript{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.”\textsuperscript{210} Acknowledging that a citizen will incur certain loses 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.”\textsuperscript{211}

\textsuperscript{202} See id.
\textsuperscript{203} See id. at 10.
\textsuperscript{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.
\textsuperscript{205} See id.
\textsuperscript{206} Romeu v. Cohen, 265 F.3d 118, 120 (2d Cir. 2001).
\textsuperscript{207} Id. at 124.
\textsuperscript{208} Id.
\textsuperscript{209} See id.
\textsuperscript{210} See id. at 125.
\textsuperscript{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. These cases support the proposition that the UOCAVA does not protect voting rights of citizens who may travel to the territories. As a result, these former state residents become disenfranchised because they are not entitled to voter participation in presidential elections. The U.S. District Court for the Northern District of Illinois relied upon Igartua and Romeu to establish a similar holding in Segovia. 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.

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

If you can fight to defend the freedoms that the U.S. flag represents, a person should be allowed to vote. Those who serve 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.

The right to vote is viewed as a fundamental right protected under the Fifth Amendment of the U.S. Constitution. 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. Guam veterans face a similar voting barrier like African Americans in the 1960’s and remain a

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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).
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 UOCAV A nevertheless violates Guam’s veterans’ substantive due process and equal protection rights upon declaring residency in Guam.

A. UOCAV A 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.” 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. 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. 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. In summary, *Romeu* and *Segovia* collectively hold the UOCA VA does not violate the right to travel. These holdings are erroneous because the UOCA VA arguably enacts a barrier which forces returning Guam veterans to consider whether to surrender their right to vote or their right to travel.

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. In *Dunn*, the Supreme Court declared a Tennessee state law unconstitutional that required a one-year residency requirement for voting eligibility. 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.” 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

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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.

interest.” 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. 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 UOCAV A 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. 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 UOCAV A sought to protect. 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. To eliminate this scenario “the committee concluded that, in the same way the [Voting Rights Act] Amendments permitted a citizen moving to a new state to vote in her last state of bona fide voting residence, UOCAV A could permit a citizen moving overseas to vote in her last state of bona fide voting residence.” Thus, the passing of both the Voting Rights Act Amendments and UOCAV A meant to

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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.”).


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.”

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. The same result would apply if one were to apply the same analysis that the court relied upon in Saenz. 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.

The Segovia court did not apply a strict scrutiny standard based on the Insular Cases. 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. 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. 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.”

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

243 Cottle, supra note 21, at 334.
244 See 405 U.S. 330, 338 (1972).
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.” 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. The court further justified its rational basis review by adhering to the incorporation doctrine as dictated by Justice White. 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.” Appellants further argue that the court effectually expanded the discriminatory holdings of the Insular Cases.

The court justifies applying rational basis by the exclusion of CNMI from the definition of “State” and the product of “historical timing.” CNMI does not fall under the definition of “State.” Thus, a former resident of Illinois living in CNMI is deemed an “overseas voter” even though she is residing within the United States. 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.” 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.” 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. The exclusion of CNMI from the definition of State was the crux of plaintiff’s equal protection argument.

252 See id.
253 See id. at 942.
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.
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. 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. Yet, the opinion states that the deliberate choice of Congress to exclude CNMI from UOCA V A is the product of historical timing. As such, it was “not a deliberate choice by Congress, [as] the so-called ‘historical timing’ supports the UOCA V A’s constitutionality.” 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. 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.” At one time, Type 1 veterans did have a right to vote. 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 UOCA V A 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.” Thus, the court should have applied a strict scrutiny as the appropriate standard whenever a fundamental right is violated.

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. Because Guam is an unincorporated territory, Congress may

264 See id. at 945.
265 See id.
266 See id.
267 See id at 946.
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.
272 See id.
treat the territories differently if there is a rational basis for that treatment.\textsuperscript{274} Furthermore, because voting rights are not extended to territories, plaintiffs’ strict scrutiny arguments were also rejected. Lastly, the UOCA V A 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.\textsuperscript{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 UOCA V A? Part V discusses possible solutions, and proposes an amendment that will enfranchise Guam’s veterans.

V. POSSIBLE SOLUTIONS TO THE CURRENT PROBLEM – AMENDING THE UOCA V A 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.\textsuperscript{276}

Veterans are unable to change the political climate if they are unable to vote in Congress.\textsuperscript{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 initio\textsuperscript{278} because . . . no effective political means exist to correct their colonial condition.”\textsuperscript{279} Thus, how can veterans solve the issues that plague their domicile if they are not granted the political means to do so?


\textsuperscript{275} See Dunn v. Blumstein, 405 U.S. 330, 338 (1972).

\textsuperscript{276} Email Interview with Franklin Leon Guerrero, supra note 56.

\textsuperscript{277} Id.

\textsuperscript{278} Ab Initio, BLACK’S LAW DICTIONARY (10th ed. 2014) (“From the beginning”).

\textsuperscript{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


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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{289}

In sections two and three, Weare discusses his proposed representation in the Senate and the House of Representatives.\textsuperscript{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.”\textsuperscript{291} Weare places a heavy emphasis on the importance of the insular territories having representation in the Senate.\textsuperscript{292} The Senate would serve a vital role that would affect the economic and political interests of the territories.\textsuperscript{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.\textsuperscript{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

\textsuperscript{286} Weare, supra note 280, at 280-81.
\textsuperscript{287} Id. at 280.
\textsuperscript{288} Id.
\textsuperscript{289} Id. at 280-81.
\textsuperscript{290} Id. at 282-83.
\textsuperscript{291} Id. at 282.
\textsuperscript{292} Id.
\textsuperscript{293} Id. at 284.
\textsuperscript{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).


299 Id.

300 See id.

301 Id. at 129.
residing in the territories who were formerly residents of the State."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{308} Territorial residents also may continue to feel disenfranchised by

\textsuperscript{302} Id.

\textsuperscript{303} Id. at 130.

\textsuperscript{304} Id. n.7.

\textsuperscript{305} Id. n.7.

\textsuperscript{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.”).

\textsuperscript{307} See id.

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

C. Proposed Additions and Amendments to the UOCAV: Benny’s Bill

Several changes should be made to the UOCAV 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 UOCAV’s definition of ‘state’ excluded Puerto Rico, Guam and the U.S. Virgin Islands, the individual plaintiffs would be qualified “overseas voters under the UOCAV.” Because Guam was included in the definition of “State,” it is not legally classified as a foreign country for the purposes of UOCAV. If Guam is defined as a foreign country, any U.S. residents relocating to Guam retain their right to vote. These residents would be classified as “overseas voters” thus granting them the protection of the UOCAV.

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 UOCAV’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. This holding has been met with much criticism. The proposed
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.  

The following is proposed § 20312, referred to as Benny’s Bill, 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), 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


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 214\(^{319}\)

(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.\textsuperscript{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 Columbia, 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)\textsuperscript{323} and (b)(3).\textsuperscript{324} Using identical words for the same concept avoids vagueness or ambiguity.\textsuperscript{325} By using the same definition for the term “veteran,” the amended legislation will adhere to the cardinal-drafting rule.\textsuperscript{326} To ensure that all veterans are enfranchised under this bill, the definition of “veteran” is adopted from 38 USCA § 101: Veteran benefits.\textsuperscript{327} Likewise, in following the cardinal drafting rule, the term “territory” was also adopted from another legislative act, 48 USCA § 2104.\textsuperscript{328}

\textsuperscript{321} 38 U.S.C.A. § 101 (West 2008) (providing the definition for “veterans” so as to receive veteran benefits).

\textsuperscript{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.

\textsuperscript{323} See 48 U.S.C.A. § 2104 (West 2016).

\textsuperscript{324} See 38 U.S.C.A. §101 (West 2008).

\textsuperscript{325} See \textsc{Seidman & Abeyesekere, 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.”).

\textsuperscript{326} Id. (“A cardinal drafting rule enjoins a drafter \textit{always} to use the same word for the same concept, and different words for different concepts.”).

\textsuperscript{327} See 38 U.S.C.A. §101 (West 2008).

\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{332} § 20312(a)(2) aims to include Type 2 veterans due to their mobile nature while serving in the military.\textsuperscript{333} During their time of service, a veteran likely served in several duty stations across the fifty U.S. states.\textsuperscript{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

\textsuperscript{329} SEIDMAN & ABYESEKERE, supra note 315, at 286 (emphasis added).


\textsuperscript{331} Id.

\textsuperscript{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.

\textsuperscript{333} Email Interview with Franklin Leon Guerrero, supra note 56.

\textsuperscript{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.\footnote{CAL. SECRETARY OF STATE MIL. & OVERSEAS VOTERS (2016), http://www.sos.ca.gov/elections/voter-registration/military-overseas-voters.} Using California as an example, all “overseas voters” must complete an online voter registration application or Federal Post Card
Application. 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. 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.

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 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.

Guam has one of the highest veteran populations among the Pacific Island territories. Yet, the Insular Cases and the current construction of UOCAVA prevent veterans from participating in presidential elections. See Census Bureau, supra note 65.

The *Insular Cases* justified the district court’s decision in rejecting plaintiff’s equal protection arguments. 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. 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. 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*. 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.

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

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

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

Figure 2: Guam Veteran Place of Birth

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346 See CENSUS BUREAU, supra note 65.

347 See CENSUS BUREAU, supra note 65.