



United States Virgin Islands Advisory Committee to the U.S. Commission on Civil Rights

The Status of Civil Rights in the U.S. Virgin Islands

December 2023

**United States Virgin Islands Advisory Committee to the
U.S. Commission on Civil Rights**

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This work is the product of the US Virgin Islands Advisory Committee to the United States Commission on Civil Rights. The report may rely on testimony, studies, and data generated from third parties. This report was reviewed by Commission staff only for legal sufficiency and procedural compliance with Commission policies. The views, findings, and recommendations expressed in this report are those of a majority of the US Virgin Islands Advisory Committee and do not necessarily represent the views of the Commission, nor do they represent the policies of the United States Government.

Letter of Transmittal

The US Virgin Islands Advisory Committee to the U.S. Commission on Civil Rights submits this report detailing civil rights implications of the legal and political status of the US Virgin Islands. The Committee submits this report as part of its responsibility to study and report on civil rights issues in the Territory. The contents of this report are primarily based on testimony presented to the Committee during virtual hearings on January 23, July 18, and September 21, 2023.

This report was adopted by a vote of 5 to 0 at a committee meeting held on November 11, 2023. The dissenting member(s) was/were provided an opportunity to prepare a dissenting statement. Any such statement(s) is/are hereby appended to the report.

Based on the findings of this report, the Committee offers to the Commission recommendations for addressing these issues of utmost importance. The Committee hopes that the information presented here aids the Commission in its continued work on this topic.

The Committee noted the parallel of its work to that of the founding mission of the Commission itself to study alleged deprivations of civil rights, including the right to vote. The report submitted investigated what is likely the largest group United States citizens (approximately 3.5 million) who are disenfranchised from their right to vote for the United States President. This disenfranchisement is based solely upon the zip code of these citizens, despite their having residence on United States soil and being otherwise fully eligible to vote in presidential elections. Indeed, the major political parties have recognized this right and permit those living in the USVI and other U.S. “territories” the right to cast ballots in primary elections for the U.S. presidency.

The disenfranchisement of these citizens is the antithesis of the fundamental nature of the right of a citizenry to vote in a democratic nation. It is contrary to the very notion of democracy itself and serves to create a second-tier citizenship in the United States “colonies.” At its core, this disenfranchisement renders those U.S. citizens living in the U.S.V.I. (and the other Territories) holding U.S. passports voiceless in a country that espouses the right to vote as “fundamental” and the basis for all authority given by the People to their government.

The Committee finds this result repugnant to the values upon which this nation was founded and to the Mission of this Commission of “advancing civil rights.”

The Committee greatly appreciates this Honorable Commission’s attention to the matters it has raised in this report and looks forward to continuing its work on behalf of the Commission through

further study, investigation, research and analysis of this issue of fundamental concern to the federal government and the public.

Pamela Colon

Chair, U.S. Virgin Islands Advisory Committee

Table of Contents

Policy Brief 11

Chapter One: Civil Rights in the U.S. Virgin Islands..... 22

 I. Civil Rights as Defined by the U.S. Commission on Civil Rights..... 22

 II. The Supremacy Clause and the Application of the Constitution to the U.S. Virgin Islands 23

 A. Sections of the Constitution that Apply to the Virgin Islands 23

 B. The Supremacy Clause...Part II 24

 III. Citizenship and Civil Rights in the U.S. Virgin Islands..... 26

 A. Citizenship 26

 B. Self – Determination 27

 C. Voting 28

 D. Representation..... 30

 E. Equal Access to Government Programs 30

 F. The Administration of Justice..... 31

 G. Diversity Jurisdiction 31

 H. Economic Concerns 32

Chapter Two: American Imperialism..... 33

 I. Founding of the United States of America 33

 A. The Northwest Ordinance..... 36

 II. The Insular Cases and the Application of the Constitution to the U.S. VIRGIN ISLANDS 38

 A. American Expansion and Social Darwinism 38

 III. Purchase of the U.S. VIRGIN ISLANDS 48

 IV. Current Status of the U.S. VIRGIN ISLANDS..... 51

 V. Conclusion..... 52

Findings 55

Recommendations 55

List of Figures

Figure 1: U.S. Virgin Islands: Sourced from CIA World Factbook 17

Figure 2: State Land Claims and Cessions 36

Figure 3 Northwest Territory of 1787 37

Figure 4: Danish Depiction of U.S. VIRGIN ISLANDS Sale 42

Figure 5: USA Depicted as Benefactor 42

Figure 6: Philippines First Bath in Civilization..... 43

Figure 7: U.S.A with Unexpected Newborn..... 43

Figure 8: Philippine Delegation to Paris Peace Talks 43

Figure 9: Philippine Leader Emilio Aguinaldo..... 43

Figure 10 New Territories as Uncivilized Children..... 44

Table of Authorities

Cases

- Afroyim v. Rusk*, 387 U.S. 253 (1967)
- Baker V. Carr*, 369 U.S. 186 (1962)
- Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)
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The U.S. Virgin Islands Advisory Committee to the United States Commission on Civil Rights would like to thank the following experts, luminaries in their respective fields, who appeared before the committee and provided the framework to explore the difficult questions posed in this study.

Dr. Carlyle Corbin (Testimony on January 23, 2023)

Dr. Corbin is an international advisor on global governance and former Minister of State for External Affairs of the U.S. Virgin Islands Government. He has served as United Nations (U.N.) expert on self-determination for over two decades, and as independent expert for the United Nations Development Program on U.N. missions to Bermuda, and to the Turks and Caicos Islands, respectively. He has also been constitutional advisory to the Anguilla Constitutional and Electoral Reform Committee, political advisor to several chairs of the U.N. Decolonization Committee, Secretary-General of the Inter-Virgin Islands Council between governments of the British and U.S. Virgin Islands, and Secretary-General of the Offshore Governors' Forum comprised of the governments of American Samoa, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.

Dr. Corbin has served as political advisory to the U.S. Virgin Islands' Fifth Constitutional Convention, and as a member of the U.S. Virgin Islands Political Status Commission. He has lectured extensively on governance and political development at Bermuda College, the University of the South Pacific, the University of Copenhagen, the University of Puerto Rico, and the University of the West Indies. He is the author of two United Nations studies on the participation of non-independent countries in the United Nations system, four books, and numerous scholarly articles on political and constitutional advancement. Appeared before the U.S. Virgin Islands Committee on January 23, 2023.

Neil Weare (Testimony on January 23, 2023)

Mr. Weare is a civil rights attorney and non-profit leader committed to achieving equal rights for Americans living in U.S. territories. Raised in the U.S. territory of Guam, Neil worked for Guam's non-voting Delegate Madeleine Bordallo prior to attending Yale Law School. In Spring 2020, he taught a Law of Territories seminar as a Visiting Lecturer in Law at Yale Law School. Outside of his territorial advocacy, he advises a wide range of non-profit organizations as an associate at Loeb & Loeb LLP and was previously an attorney at Trister, Ross, Schadler & Gold, PLLC.

Prior to founding Equally American, Neil was Litigation Counsel and Supreme Court Fellow at Constitutional Accountability Center. Neil clerked on the Alaska Supreme Court for Justice Morgan

Christen, now a Judge on the Ninth Circuit. He was also a Thomas Emerson Fellow at David Rosen & Associates in New Haven, Connecticut. As a law student, Neil successfully argued *CCJEF v. Rell*, a landmark case before the Connecticut Supreme Court recognizing a right to adequate education for Connecticut schoolchildren. His commentary has appeared in the *New York Times*, the *Washington Post*, *CNN.com*, *Slate.com*, and other media outlets. Appeared before the U.S. Virgin Islands Committee on January 23, 2023.

Judith Bourne (Testimony on July 18, 2023)

Ms. Bourne has practiced law in the US Virgin Islands for 46 years. She was one of the lawyers for the Save Long Bay Coalition which challenged the claims of the then Danish-owned West Indian Company to extensive rights in the harbor of Charlotte Amalie and took that issue to the United Nations Decolonization Committee beginning in 1984 and for several years thereafter. Those serial presentations were a factor in the Danish owners offering to sell the company to the VI Government, which purchase was accomplished by the Farrelly administration. This controversy presented her with the opportunity to bring her training at the NYU Law School's Center for International Studies, where she obtained an LL.M. in International Law, to the issues of self-determination and political status in the U.S. Virgin Islands and she has continued to be actively involved ever since. Appeared before the U.S. Virgin Islands Committee on July 18, 2023.

Dr. Malik Sekou (Testimony on September 21, 2023)

Dr. Sekou is a Political Science Professor at the University of the Virgin Islands. He is a longtime professor and department chair at the University of the Virgin Islands in history, political and social sciences. He has been elected to the V.I. Board of Education and has writings and commentary spanning topics such as law enforcement and the justice system, cost of living in the territory, and labor and immigration issues. He was twice a candidate for the V.I. Senate and was a longtime legislative analyst and researcher at the V.I. Legislature. Appeared before the U.S. Virgin Islands Committee on September 21, 2023.



U.S. Virgin Islands Advisory Committee to the United States Commission on Civil Rights

Civil Rights in the U.S. Virgin Islands

The Policy of the United States is that the five Territories of Puerto Rico, Guam, Northern Mariana Islands, American Samoa, and the U.S. Virgin Islands are “Unincorporated,” meaning while the residents of these Islands are U.S. Citizens, they are not afforded the full protections and privileges of the Constitution.

The most significant findings. For well over one hundred years, the development of civil rights law in the United States has taken steps to right the wrongs of racism, discrimination, and disenfranchisement. The U.S. Virgin Islands, as well as the other four territories, have been forgotten by Congress, the President, and the Supreme Court and remain frozen in a time when U.S. Citizens of color and women could not vote and had no say in the laws that governed their daily lives.

This report explores the current political and legal status of the U.S. Virgin Islands and the inequality suffered by the U.S. Citizens who reside there. It also contains an examination of the break in the long tradition of expansion and application of the Constitution to the territories.

Key Conclusions:

1. Citizens living in the U.S. Virgin Islands lack the self-determination, and equality protections guaranteed by the US Constitution that other citizens of the United States enjoy.
2. The international law requirements, as mandated by United Nations Treaty, requires the United States to bring the U.S. Virgin Islands to the full measure of self-government.
3. The millions of United States citizens living in the Territories share the following: None can vote for President, none are represented by a voting member of Congress, none can effectively participate in self-determination at any level of government, each has a lower status of citizenship compared to citizens living in the fifty states.

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The U.S. Virgin Islands Advisory Committee to the United States Commission on Civil Rights

Territory, Colony, or Possession? Political Status and Civil Rights Implications in the U.S. Virgin Islands

The United States Commission on Civil Rights (Commission) appointed the U.S. Virgin Islands Advisory Committee on July 22, 2022, pursuant to a request from Congress in the Fiscal Year 2021 House Appropriations Report.¹ This request from Congress, enacted more than 60 years after the Civil Rights Act, is indicative of the “forgotten” status of the territories that continue to be populated primarily by people of color. The U.S. Virgin Islands Advisory Committee along with other recently appointed Territorial Advisory Committees of Puerto Rico, Guam, Northern Mariana Islands, and American Samoa, join the 51 Advisory Committees that were created in the Civil Rights Act of 1957.² These Advisory Committees share the same description of duties, objectives, and scope of activities, including the duty to advise the Commission concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and *the effect of the laws and policies of the Federal government with respect to equal protection of the laws.*³

Of particular interest to the U.S. Virgin Islands advisory committee is the plenary power of Congress as interpreted by the Supreme Court’s jurisprudence over United States citizens domiciled in the U.S. Virgin Islands under the Constitution’s Territory Clause.⁴ This plenary power of Congress has been exercised since the founding of the country to both limit and deny the civil rights of certain groups of people who were, and are, lawful citizens or residents of the United

¹ H. Rept. No. 116-455, p. 138 (2021).

² Civil Rights Act of 1957, Pub. L. No. 85-315.

³ Charter for U.S. Comm. On Civ. Rights State Advisory Comms. § 3.

⁴ U.S. Const. art. IV § 3 (2).

States. In sum, the plenary power of Congress has been and continues to be used to make legal what would otherwise be forbidden by the Constitution.

Introduction

The United States of America acquired its present territories, and asserted absolute control over them, without first seeking the consent of the people inhabiting the lands.⁵ This has proven to be constitutionally problematic. As an initial matter, the concept of self-determination was central to the foundation of the country, and by the 1890's the nation was divided over the idea of imperial expansion.⁶ Moreover, legal scholarship was not clear if the Constitution followed the flag⁷. When Puerto Rico, Guam, and the Philippine Islands were annexed in 1898 the very meaning of the term "United States" was called into question, along with what it meant to be a citizen.⁸

By the time the U.S. Virgin Islands were purchased from Denmark in 1917, the Supreme Court had created the groundwork for a territorial system in several cases dealing with Puerto Rico, the most important of these cases is *Downes v Bidwell*.⁹ According to the Court, territories acquired by the United States fall into two categories: "incorporated" territories, which are "an integral part of the United States," full members of "the American family,"¹⁰ and likely candidates for eventual statehood¹¹; and "unincorporated" territories, which are held merely "appurtenant" to the United States, and seen as "foreign . . . in the domestic sense."¹²

The purchase of the U.S. Virgin Islands in 1917¹³ took the residents of the Islands from membership in the Danish Empire and replaced it with a lesser status in the United States based on the Supreme Court's doctrine of territorial incorporation¹⁴ developed in the Insular Cases. The U.S. Virgin

⁵ Treaty of Paris U.S. – Spain, Dec. 10, 1898, 30 Stat 1754. (The United States acquired Puerto Rico and Guam and purchased the Philippines for \$20 Million), Convention Between the United States and Denmark, ETC., U.S. – Den., Jan. 25, 1917, 39 Stat. 1706, Treaty Series No. 629. (The cession of the Danish West Indies to the United States), American Samoa acquired pursuant to a partition agreement with other imperial powers, and the Northern Mariana Islands pursuant to trusteeship after WWII sanctioned by the United Nations.

⁶ See Polster, J., *Stages of Engagement: U.S. Theatre and Performance 1898-1949*, Routledge, p.25(Statement of Senator George Hoar "This treaty will make us a vulgar, commonplace empire, controlling subject races and vassal states, in which one class must forever rule and other classes must forever obey.")

⁷ For a discussion on this concept See Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law*, Oxford Univ. Press, 2009.

⁸ See Christopher C. Langdell, *The Status of Our New Territories*, 12 Harv. L. Rev. 365, (1899); James B. Thayer, *Our New Possessions*, 12 Harv. L. Rev. 464, (1899); Carman Randolph, *Constitutional Aspects of Annexation*, 11 Harv. L. Rev. 1, (1899); and Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 Harv. L. Rev. 393, (1899).

⁹ 182 US 244 (1901).

¹⁰ *Id.* at 339, 342 (J. White concurring).

¹¹ See Frederick R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 Colum L Rev 823, 834 (1926) (arguing that Justice White thought incorporation implied a promise of ultimate statehood).

¹² *Downes*, 182 U.S. at 341-42 (White concurring).

¹³ Convention Between the United States and Denmark for the Secession of the Danish West Indies, U.S. – Den., Aug. 4, 1916, 39 Stat. 1706 (1917).

¹⁴ *Downes v. Bidwell*, 182 U.S. 244 (1901).

Islands is not considered part of the United States from a constitutional perspective and pursuant to these Supreme Court holdings, the U.S. Virgin Islands are considered an *unincorporated territory*¹⁵, which means persons born in the U.S. Virgin Islands are not *constitutionally* entitled to citizenship and only portions, as determined exclusively by the United States Congress, of the constitution apply to the people and the Islands.¹⁶

The U.S. Virgin Islands Advisory Committee undertakes the challenge of providing an overview to the Commission on the status of civil rights in the Islands with a sober awareness of the complexity of the issues involved. This document provides the necessary case law and broader historical and political developments as context critical to explaining how the U.S. Virgin Islands are currently organized. There are areas in this report that under normal circumstances would require greater discussion, the jurisprudence of the legitimacy (or non-legitimacy) of the Insular Cases alone has been explored in scores of law review articles.¹⁷ As the inaugural document from this committee, the committee's objective is to provide a baseline of knowledge for the Commission to consider in future discussions about the status of civil rights in the U.S. Virgin Islands. We have concluded that a meaningful appreciation of the foundational issues of civil rights in the U.S. Virgin Islands requires the separation of our perception of what such rights are from the historical and present reality of the political and legal status of the U.S. Virgin Islands and its citizens.

As the committee deliberated the topics associated with our mandate, several questions were posed:

1. What is the nature of a civil right, and where does that right emanate from?
2. Do civil rights follow the person, or do they attach to the place?
3. Is citizenship the same thing as civil rights?
4. Who has the primary responsibility over civil rights? Of citizenship? The Federal government or the States?

¹⁵ *Smith v. Gov. of the Virgin Islands*, 375 F.2d 714 (3d Cir. 1967).

¹⁶ U.S. Dept. of the Interior, Definitions of Insular Area Political Organizations, <https://www.doi.gov/oia/islands/politicatypes#:~:text=An%20unincorporated%20United%20States%20insular,Kingman%20Reef%2C%20Midway%20Atoll%2C%20the>.

¹⁷ For a discussion on the Court decisions in the Insular Cases see: Christina Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, *The Yale Law Journal*, 131:2449 (2022).

5. Does a U.S. citizen, living in the Virgin Islands, have the same civil rights as a U.S. citizen living in any of the 50 states?
6. Does a U.S. Citizen, living in the Virgin Islands, have the same civil rights as a U.S. Citizen living in a foreign country?

With no committee history to reference, the U.S. Virgin Islands committee relied upon U.S. Commission on Civil Rights institutional history to illuminate its path on this process. The committee referenced the inaugural report¹⁸ of the United States Commission on Civil Rights for guidance on how to evaluate the citizen and the civil rights constructs.

The Commission on Civil Rights

The United States Commission on Civil Rights (Commission) was created by the Civil Rights Act of 1957.¹⁹ When it was signed into law on September 9, 1957, The Civil Rights Act was the first piece of civil rights legislation since Reconstruction. Prior to the Commission on Civil Rights, there was no agency in the Federal government with authority to investigate general allegations of deprivation of civil rights, including the right to vote.²⁰

It is important to consider the circumstances that led to the passage of the Civil Rights Act of 1957, and the actions taken by the Commission to accomplish their initial charge, because as this record will show, many of those conditions exist in the United States Virgin Islands today.

The Commission was established just three years after the landmark *Brown v. Board of Education*²¹ ruling by the Supreme Court which effectively held racial segregation as a violation of the 14th Amendment's Equal Protection Clause.²² The Court repudiated their prior holding in *Plessy v. Ferguson*²³ and struck down the legal doctrine of *separate but equal*.

Due to the highly charged conflicts in America around race and civil rights, the President and Congress were looking to the Commission on Civil Rights to provide “knowledge and understanding of all of the complex problems involved.”²⁴

¹⁸ U.S. Comm on Civ. Rts., Report of the U.S. Commission on Civil Rights (1959).

¹⁹ Pub. L. No. 85-315, 85th Cong., Sept. 9, 1957.

²⁰ Statement of the Attorney General on the Proposed Civil Rights Legislation, before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, pp. 14-15, (Feb. 14, 1957).

²¹ 347 U.S. 483 (1954).

²² U.S. Const. amend. XIV, § 1.

²³ 163 U.S. 537 (1896).

²⁴ Ibid.

For context,²⁵

1. Large segments of racial and ethnic minorities were disenfranchised despite the protections of the 14th and 15th Amendments to the Constitution.
2. Black Americans could not travel the country freely.
3. Black Americans generally lacked self-determination at the local, state and federal levels.
4. American citizenship was on a lesser level for Blacks than it was for Whites in terms of educational and employment opportunities.
5. Laws were in place to safeguard equal treatment before the law, but systematic indifference meant most Black citizens did not receive equal opportunities.

The Commission was instructed to submit to the President and Congress a comprehensive report of its activities, findings, and recommendations. Sixty-four years ago, on September 9, 1959, the Commission issued its report to the President and Congress. The report was divided into five parts to address what the Commission felt were the exigent problems facing the country. Because of the complexity of the subject matter, which involved subtle problems of Constitutional interpretation along with delicate questions of federal-state relationships, the Commission began their study with a background on Civil Rights. The Commission posed two key questions:

1. What are civil rights in the United States?²⁶
2. What does it mean to be a citizen of the United States?²⁷

The Commission endeavored to answer these questions, in part, by reviewing “the history of America and the spirit of its laws in order to trace, and try to illuminate, the fundamental constitutional principles involved in civil rights.”²⁸

“The conflict between those who would extend the republican principle to all men and those who would limit it to some men or who would delay its application has produced a tension in the minds and hearts of Americans and in American laws that is still with us.”²⁹

²⁵ Report, supra note 18. (It is beyond the scope of this report to catalog the history of civil rights in the United States. The reader is directed to the Report by the Commission on Civil Rights which summarizes that history.

²⁶ Report of the U.S. Commission on Civil Rights, Part I, page 1 (1959).

²⁷ Ibid.

²⁸ Report of the United States Commission on Civil Rights, 8 (1959).

²⁹ Ibid. at 3.

The U.S. Virgin Islands Advisory Committee

The United States Virgin Islands of St. Thomas, St. Croix, and St. John are located east of Puerto Rico, between the Caribbean Sea and the North Atlantic Ocean.³⁰



Figure 1: U.S. Virgin Islands: Sourced from CIA World Factbook

The population of the U.S. Virgin Islands is 104, 917 (2023 est.).³¹ Eighty-one percent of the population identifies as Black or African American.³² Thirteen percent identify as white. The Islands, and their political and legal concerns, have largely been dismissed because they are a small and “remote.”³³ Overall, however, the combined population of the U.S. territories, who share

³⁰ *The World Factbook 2021*. Washington, DC: Central Intelligence Agency, 2021. <https://www.cia.gov/the-world-factbook/countries/virgin-islands/#geography>.

³¹ *Ibid.*

³² U.S. Census Bureau, U.S. Census 2020. <https://data.census.gov/table/DECENNIALDPV12020.DP1?g=040XX00US78&d=DECIA%20U.S.%20Virgin%20Islands%20Demographic%20Profile&tid=DECENNIALDPV12020.DP1>

³³ Daniel Immerwahr, *The Greater United States: Territory and Empire in U.S. History*, 40 *Diplomatic History* 373, (2016).

similar civil rights concerns with the Virgin Islanders, is nearly 4 million people.³⁴ That is a greater population than the five least-populated U.S. states combined.³⁵ Table 1 illustrates the total population of the five least-populated states compared to the combined population of the Territories.

Table 1: Population Comparison Between Territories and States

U.S. Territories Population		5 Least Populated States	
American Samoa	49,710	Wyoming	577,719
N. Mariana Islands	51,295	Vermont	643,503
Guam	169,330	Alaska	736,081
USVI	104,917	North Dakota	779,702
Puerto Rico	3,285,874	South Dakota	887,770
TOTAL	3,661,126	TOTAL	3,624,775

Source: Congressional Research Service, Admission of States to the Union: A Historical Reference Guide, R47747, Dec. 5, 2023.

What should be noted about the above comparison is that with the exception of American Samoa, inhabitants of the Territories are Citizens of the United States.³⁶ These citizens, unlike the citizens residing in the five least populated states, do not have an equal status in the United States. In fact, in the aggregate, the population of the territories is greater than 24 individual states.³⁷

³⁴ U.S. Census, 2020 Population.

³⁵ Ibid., See Also Neal Weare, testimony before the U.S. Virgin Islands Advisory Committee, briefing, virtual, Jan. 23, 2023, p.7 (hereafter cited as Jan. 23 Briefing). (Making the observation that “Those same states are represented by 10 Senators, 5 members of the House, and 15 electors for Pres.”).

³⁶ Natives of American Samoa are considered United States Nationals.

³⁷ Ibid.

Table 2: Population, Representation, Federal Electors

	State	Former Territory	Statehood Granted	Population (2023)	U.S. Reps	U.S. Senators	Federal Electors
1.	Alaska	Y	1959	736,081	1	2	3
2.	Arkansas	Y	1836	3,013,756	4	2	6
3.	Connecticut	N	Original 13	3,608,298	5	2	7
4.	Delaware	N	Original 13	990,837	1	2	3
5.	Dist of Columbia	N	N	678,972	0	0	3
6.	Hawaii	Y	1959	1,460,137	2	2	4
7.	Idaho	Y	1890	1,841,377	2	2	4
8.	Iowa	Y	1846	3,192,406	4	2	6
9.	Kansas	Y	1861	2,940,865	4	2	6
10.	Maine	N	1820	1,363,582	2	2	4
11.	Mississippi	Y	1817	2,963,914	4	2	6
12.	Montana	Y	1889	1,085,407	4	2	6
13.	Nebraska	Y	1867	1,963,333	3	2	5
14.	Nevada	Y	1864	3,108,462	4	2	6
15.	New Hampshire	N	Original 13	1,379,089	2	2	4
16.	New Mexico	Y	1912	2,120,220	3	2	5
17.	North Dakota	Y	1889	779,702	1	2	3
18.	Oklahoma*	Y	1907	3,963,516	5	2	7
19.	Oregon*	Y	1859	4,241,500	6	2	8
20.	Rhode Island	N	Original 13	1,098,163	2	2	4
21.	South Dakota	Y	1889	887,770	1	2	3
22.	Utah	Y	1896	3,275,252	4	2	6
23.	Vermont	N	1791	643,503	1	3	3
24.	West Virginia	N	1863	1,795,045	2	2	4
25.	Wyoming	Y	1890	577,719	1	2	3
	Territories Combined	Y	N	3,661,126	0	0	0

*The District of Columbia has a population of 678,972 and is not represented by a voting member in Congress. That population, added to the territories would include Oregon and Oklahoma on this list. Source: Congressional Research Service, Admission of States to the Union: A Historical Reference Guide, R47747, Dec. 5, 2023.

Each of the twenty-four states listed in Table 2 are represented by at least three members of Congress (two Senators and at least one Representative). Each state has at least three electors in the Electoral College. Conversely, the 3.6 million people living in the Territories have no voting members of Congress, and do not vote in the national election for President. This lack of representation and limitation on participation in the political process directly affects the civil rights of the citizens living in the Territories. The citizens of the Territories have no ability to influence the laws that regulate their lives. Imagine telling the citizens of Kansas or Iowa that they can no longer vote for President. What would be the fallout of mandating to the state legislatures of the 50 states that any proposed legislation must be approved by Congress?

Just as the U.S. Commission on Civil Rights was relied upon in 1957 to look into the soul of the nation to ask and answer hard questions about race relations and civil rights, this committee takes on a similar responsibility. The formation of this committee to report on the status of civil rights will provide the Commission with unique perspectives of the U.S. Virgin Islands as well as the problems shared by all five territories over the paradox of the American Empire which includes 21st Century colonialism. The paradoxical experiences shared by the territories were born with the “conception of empire”, but the policy of the federal government has consistently denied for another reason: “our conception of the United States.”³⁸

This report will identify a consistent pattern in the annexation of territory by the United States that was broken in 1898, and again in the purchase of the Virgin Islands in 1917, for reasons, based on a set of racist norms regarding the innate inferiority of the people that occupy those territories. The Supreme Court rulings in the Insular Cases, which paved the way for modern day colonialism in the United States, defy sound legal reasoning and are race-based and remain discriminatory.³⁹ The report will also show the historic struggle for *equality among men* (equal protection) by people of color, women, those with disabilities, and others throughout the history of this nation, persists and affects every citizen in the U.S. Virgin Islands today.

This report will show that the status of civil rights in the U.S. Virgin Islands is completely dependent on Congress, the same type of colonial relationship that was the impetus of the American Revolution. The record will reflect leading academic and legal thought that concludes

³⁸ Daniel Immerwahr, *The Greater United States: Territory and Empire in U.S. History*, 40 *Diplomatic History* 373, (2016).

³⁹ *U.S. v. Vaello-Madero*, 596 U.S. ____ (2022). Justice Gorsuch Concurrence, p.5. “The Insular Cases have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.”

the U.S. Virgin Islands, as an unincorporated territory, and the American citizens who live there, do not have civil rights based on a supreme constitution, but are instead governed by privileges granted by Congress.

Like the Commission in 1957, the U.S. Virgin Islands Advisory Committee must today endeavor to sift through the complexity of this subject matter. This inaugural Advisory Committee from the U.S. Virgin Islands believes the best strategy for its initial study is to follow the learned example of the Commission. Our duty to advise the Commission on matters in the U.S. Virgin Islands must begin with comparable questions that were posed by the Commission in 1959,

1. What are civil rights in the United States Virgin Islands?
2. What does it mean to be a citizen of the United States who resides in the U.S. Virgin Islands?

The Purpose and Methodology of This Study

The committee began its study with a slightly epistemic question: *What is the nature of a civil right, and where does that right emanate from?* These guiding questions will lead to the source of governmental authority over the people and the territory and raise more questions about the legitimacy of that authority. The purpose of the study is to inform the discussion about civil rights in the U.S. Virgin Islands by delineating the rights afforded to the citizens of the U.S. Virgin Islands in contrast to those granted to the citizens of the fifty states.

This committee will engage in a study in several parts, beginning with this report which examines the current political and legal status of the Islands. The Committee will show the Commission that the jurisprudence of the United States which initially included legalized slavery, and sanctioned discrimination, disenfranchisement, and exclusion of classes of people; evolved through a body of civil rights law intended to right the wrongs of the past. Much progress has been made, but the Commission will see the people of the U.S. Virgin Islands are trapped in the vestiges of the worst of the civil rights past.

Part One: The Political and Legal Status of the U.S. Virgin Islands

Chapter One: Civil Rights in the U.S. Virgin Islands

I. Civil Rights as Defined by the U.S. Commission on Civil Rights⁴⁰

In 1959, the majority of the Commissioners defined civil rights as “the rights of citizens, though under the Constitution many of them extend to all persons”⁴¹ and identified *the right to vote* and *equal protection of the laws* as being the immediate concerns of their mandate from Congress.⁴² They added that these rights are at the very foundation of the Republic and “they are implied in the original Constitution itself, in its very first words and in its provisions for representative government and the rule of law.”⁴³

A separate group of three Commissioners, in an “Exception Statement”, indicated that “the principle of equality was not made part of our fundamental law”⁴⁴ based on the Constitution, and posited that “Civil Rights” arose after the adoption of the 14th Amendment⁴⁵ in which “individual rights against state action with supplementary enforcement powers granted to the Federal Government.”⁴⁶ This group of Commissioners said “the right of the ballot is the best illustration”⁴⁷ of a civil right.

Although the two groups of Commissioners did not agree on an exact definition of Civil Rights, each of their working definitions referenced the same authority: *the Constitution* of the United States of America, as amended.

⁴⁰ There are many definitions of Civil Rights. The Committee has chosen to identify and work with the definitions used by the Commission in 1959 for continuity and clarity.

⁴¹ Report of the Commission, Supra note 18, at 1.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid. 2, at Exception note 3.

⁴⁵ U.S. Const. amend. XIV, § 1.

⁴⁶ Report of the Commission, Supra note 18, at 2, Exception note 7.

⁴⁷ Ibid.

II. The Supremacy Clause and the Application of the Constitution to the U.S. Virgin Islands

The supremacy clause⁴⁸ of the Constitution is commonly interpreted to mean that the Constitution is the supreme Law of the Land.⁴⁹ If the Constitution, as amended, is the source of Civil Rights in the United States of America, then the rights of citizens emanate from that document. The analysis of civil rights in the U.S. Virgin Islands therefore, becomes extraordinarily complex because unlike the citizens living in the 50 states (where the Constitution in full is considered the supreme law of the land), **the citizens living in the territories, including the U.S. Virgin Islands, are governed under the plenary power of Congress.**⁵⁰ This means that only *the most fundamental* constitutional rights extend to the territory of the Virgin Islands unless expressly granted by Congress.⁵¹

A. Sections of the Constitution that Apply to the Virgin Islands

The Revised Organic Act of 1954 Congress identified the following provisions of and amendments to the Constitution of the United States that were extended to the U.S. Virgin Islands⁵²:

1. **Article I, Section 9, clauses 2 and 3.**

- a. Section 9, clause 2: The privilege of the Writ of Habeas Corpus shall not be suspended unless in Cases of Rebellion or Invasion the public safety may require it.
- b. Section 9, clause 3: No Bill of Attainder or ex post facto law shall be passed.

2. **Article IV, Section 1 and Section 2, clause 1.**

- a. Section 1: Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.
- b. Section 2, clause 1: The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

3. **Article VI, clause 3.**

- a. Clause 3: Oath or Affirmation to support the Constitution.

4. **Amendments I to IX, inclusive.**

5. **Amendment XIII.**

⁴⁸ U.S. Const. art. VI, § 2

⁴⁹ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

⁵⁰ U.S. Const. 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.")

⁵¹ *Terr. Court of the Virgin Islands v. Richards*, 673 F. Supp. 152 (1987).

⁵² 48 U.S.C. 12 (1954).

6. **Amendment XIV, second sentence of Section 1.**

a. Section 1, second sentence: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, 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.

7. **Amendment XV.**

8. **Amendment XIX.**

9. The Organic Act provided “All offenses against the laws of the United States and the Virgin Islands which are prosecuted in the district court may be had by indictment by grand jury or by information; offenses against the Virgin Islands which are prosecuted in the district court shall continue to be prosecuted by information.”⁵³

B. The Supremacy Clause...Part II

In her testimony to the U.S. Virgin Islands Committee, Attorney Judith Bourne proffered an opinion on an overlooked aspect of the *Supreme law of the land*. She told the committee that the complete Supremacy Clause reads:

*This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme law of the land...*⁵⁴

This means, in other words, that the treaties made under authority of the United States have an equal status to the Constitution.⁵⁵ This fact has often been rendered meaningless by the federal courts that ignore international law in favor of U.S. jurisprudence. The Supreme Court has created judicial doctrines to self-impose limitations on their ability to enforce international law, such as declaring some treaty provisions as “**non-self-executing**,”⁵⁶ evoking the “**last-in-time**” rule,⁵⁷ declaring an issue to be a “**political question**,”⁵⁸ and deferring to an “**act of**

⁵³ Revised Organic Act of 1954, 68 Stat. 497.

⁵⁴ *Supra*, note 47.

⁵⁵ Judith Bourne, testimony before the U.S. Virgin Islands Advisory Committee, briefing, virtual, July 20, 2023, transcript, p. 3. (hereafter cited as July transcript).

⁵⁶ See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (declaring that the treaty in question was in the nature of a contract to perform a particular act and therefore required legislation to be enforceable in court.)

⁵⁷ See *Whitney v. Robertson*, 124 U.S. 190 (1888) (enforcing a later-enacted law exempting Hawaiian sugar from duties despite its conflict with an earlier treaty with the Dominican Republic).

⁵⁸ See *Baker v. Carr*, 369 U.S. 186, 210-13 (1962) (finding judicial deference to the “political branches” of government appropriate with respect to certain matters of foreign policy).

state.”⁵⁹Some would also include in this assessment the refusal of the federal government to allow itself to be held accountable for its errors under grounds of “sovereign immunity.”⁶⁰

These self-imposed limitations, external to the Constitution, are especially relevant to the U.S. Virgin Islands, as will be discussed below.

1. International Law

The United States was one of the earliest proponents of the basic principle that state sovereignty cannot override basic human rights or humanitarian law.⁶¹ As an example, the justification of the criminal trials after World War II was advocated by the United States on the grounds that the Axis leaders violated established international law “even when their conduct was in compliance with, or mandated by, domestic law.”⁶²By not evoking judicial deference to international law, the United States in effect violates Article 27 of the Vienna Convention on the Law of Treaties, namely that a “party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”⁶³

2. Treaties

The foregoing discussion on the supremacy clause and international law is not an exercise of legal analysis designed to incriminate the federal government as a bad actor. The facts are, however, that the United States is a signatory nation of the United Nations Charter⁶⁴, the International Covenant on Civil and Political Rights⁶⁵, and the Organization of American States Charter⁶⁶ among others. These treaties contain provisions that call for self-determination of non-self-governing peoples⁶⁷, including the freedom to pursue their economic development,⁶⁸ and identify representative democracy as indispensable.⁶⁹

⁵⁹ See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 400-01, 416-20 (1964); *Underhill v. Hernandez*, 168 U.S. 250, 252-54 (1897).

⁶⁰ See *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 444 (1834) (the first case recognizing sovereign immunity of the federal government); See also *Koehler v. United States*, 155 F. 3d 262, 267 (5th Cir. 1998) and *Brown v. United States*, 141 F. 3d 800, 803 (8th Cir. 1998) (both cases holding that unless the federal government explicitly waives immunity from a particular kind of suit, courts lack subject matter jurisdiction).

⁶¹ See Richard Falk, *Human Rights and State Sovereignty*, 11-12, P.195 (1981) and Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* 14-15, 24 (1999).

⁶² See Bradley Smith, *The Road to Nuremberg* 4 (1981) (“after we allow for the spirit of the age as well as for the legal background...the central fact is that the Nuremberg trial system was created almost exclusively in Washington by a group of American government officials.”)

⁶³ Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331, 339 (entered into force Jan. 27, 1980). Although not a signatory of the Convention, the United States recognizes the treaty as codifying the customary law of agreements between states.

⁶⁴ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

⁶⁵ International Covenant on Civil and Political Rights, Dec. 16, 1966, GA Resolution 2200A (XXI), TIAS 92-908.

⁶⁶ Charter of the Organization of American States, February 27, 1967, 2 UST 2394; 119 UNTS 3.

⁶⁷ *Supra* note 64.

⁶⁸ *Ibid.*, art. 1(1).

⁶⁹ *Supra* note 65.

Dr. Carlyle Corbin, United Nations expert on self-determination, told the U.S. Virgin Islands committee that the United States placed the U.S. Virgin Islands on the United Nations list of Non-Self-Governing territories in 1946.⁷⁰ The mandate, he said, under Article 73B of the UN Charter is to bring the territory (U.S. Virgin Islands) to *the full measure of self-government*.⁷¹

III. Citizenship and Civil Rights in the U.S. Virgin Islands

A. Citizenship

Citizen of a State and Citizen of the United States. Citizenship in the U.S. Virgin Islands is on a lesser footing than that of similarly situated citizens of the 50 states.

1. The Constitution of the United States uses the term *Citizen* in several articles, but the term was not defined until the 14th Amendment, whereby “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States...”⁷² The U.S. Virgin Islands is not considered a part of the United States for the purposes of the 14th Amendment, therefore the people born in the U.S. Virgin Islands are not eligible for birthright citizenship under the Constitution.⁷³
2. Citizenship was conferred upon the residents of the U.S. Virgin Islands in 1927 through the Act Conferring United States Citizenship on the Virgin Islands.⁷⁴ This was followed by an Act of June 28, 1932,⁷⁵ and by the Nationality Act of 1940⁷⁶, and finally the Immigration and Nationality Act of 1952 which provided that “anyone born after February 25, 1927, in the Virgin Islands acquired nationality and statutory citizenship at birth.”⁷⁷
3. There is an important distinction between Constitutional citizenship and statutory citizenship. The Supreme Court held in *Afroyim v. Rusk* that Congress has no general power

⁷⁰ Carlyle Corbin, testimony before the U.S. Virgin Islands Advisory Committee, virtual, Jan. 23, 2023, transcript, p.12 (hereafter cited as Jan. 23 Briefing).

⁷¹ *Ibid.*

⁷² *Supra*, note 36.

⁷³ Citizenship is derived either from the Fourteenth Amendment to the Constitution or from a specific statute that confers citizenship on the inhabitants of an area that, although not a state, is under the sovereignty of the United States. Such legislation has been enacted for the Virgin Islands (8 U.S.C. § 1406).

⁷⁴ 44 Stat. 1234 (1927).

⁷⁵ 47 Stat. 336 (1932).

⁷⁶ 54 Stat. 1137 (1940)

⁷⁷ 8 U.S.C. § 1406.

to revoke American citizenship from natural and naturalized citizens without consent.⁷⁸ Citizenship in the Territories, including the U.S. Virgin Islands, is awarded by statute⁷⁹ and is potentially revocable.

B. Self – Determination

Self-determination is guaranteed to the citizens of the 50 states through the Constitution:

1. The United States shall guarantee to every state in this Union a Republican form of government.⁸⁰
2. All legislative powers granted under the Constitution are vested in a Congress, composed of two chambers.⁸¹ A House of Representatives, apportioned based on population and elected by the people of the several states⁸²; and a Senate, composed of two Senators from each state elected by the people of the several states.⁸³
3. The executive power granted under the Constitution is vested in a President of the United States of America,⁸⁴ elected by Electors, equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress.⁸⁵ The Electors are appointed by the legislatures of the several states, who are directly elected by the people.
4. The Judicial power granted under the Constitution is vested in a Supreme Court, and inferior courts established by Congress.⁸⁶ Judges hold their offices under Good Behavior⁸⁷ and are appointed by the President with the advice and consent of the Senate.
5. The powers not delegated to the United States, nor prohibited by it to the states, are reserved to the States respectively, or to the people.⁸⁸

Additionally, at the time of the drafting of the Constitution in 1787, each of the individual member states of the Confederation had their own Constitution under a republican form of government. The legitimacy of the government is that its power is “extend[ed] to certain enumerated objects

⁷⁸ 387 U.S. 253 (1967)

⁷⁹ The Immigration and Naturalization Act of 1952, 8 U.S.C. § 1402 (2000).

⁸⁰ U.S. Const. art. IV § 4.

⁸¹ *Ibid.* art. I § 1.

⁸² *Ibid.* art. I § 2, cl. 1.

⁸³ *Ibid.* art. I § 3, cl. 1.

⁸⁴ *Ibid.* art. II § 1.

⁸⁵ *Ibid.* § 2.

⁸⁶ *Ibid.* art. III § 1.

⁸⁷ *Ibid.* § 2, cl. 1.

⁸⁸ U.S. Const. amend. X.

only and leaves to the several states a residuary and inviolable sovereignty over all other objects.”⁸⁹ James Madison, the architect of the Constitution, made the distinction in *Federalist* 39 in support of the ratification of a federal government, that under a national legislature, “*with indefinite supremacy over all persons and things*”, “*all local authority would be subordinate to the supreme, and may be controlled, directed, or abolished by it at pleasure.*”⁹⁰

The Constitution was meant to create a tiered system of government, deferring to state and municipal governments in their respective spheres, but supreme where specifically enumerated in the Constitution itself. The United States Virgin Islands has existed for over 106 years in a state worse than the “national legislature” warned against by Madison. The people of the Virgin Islands are subjects of the Congress, which by virtue of the Supreme Court’s interpretation of the Territory Clause of the Constitution, has indefinite supremacy over all persons and things in the U.S. Virgin Islands, and all local authority is subordinate to the Congress and may be controlled, directed, or abolished at its pleasure.

In the case of the U.S. Virgin Islands, the people do not even have a vote in the election of the national legislature, nor do they vote for the executive. The U.S. Citizens residing in the Islands have no self-determination because they do not have a say in the supreme bodies of government. Any privilege or immunity is subject to the favor of Congress. This reality represents the worst-case scenario as imagined by James Madison in 1787.

C. Voting

The Constitution left voter qualification to the States⁹¹, a key qualification was property ownership, and it is estimated that only between 10 and 20 percent of the total population qualified to vote in 1787.⁹² Between disenfranchised women, native Americans, non-English speakers, paupers, vagrants, Catholics, Jews, those legally disqualified, citizens between the ages of 18 and 21, and nearly 700,000 enslaved people⁹³, the vast majority of Americans were left out of the “consent of the governed” equation.

⁸⁹ James Madison, *Federalist No. 39, The Conformity of the Plan to Republican Principles*, p.293.

⁹⁰ *Ibid.*, emphasis added.

⁹¹ U.S. Const. art. II § 2, cl. 2.

⁹² Library of Congress, Elections, The Founders, and the Vote. <https://www.loc.gov/classroom-materials/elections/right-to-vote/the-founders-and-the-vote/>.

⁹³ U.S. Census Bureau, 1850 Census Compendium of the 7th Census, p.82. <https://www2.census.gov/library/publications/decennial/1850/1850c/1850c-04.pdf>.

Leaving the states with control over elections and most other civil rights led to abuses of power. By the mid 1800's, the Civil War, and the 13th Amendment⁹⁴ ended slavery, the 14th Amendment⁹⁵ secured civil rights from state aggression, and the 15th Amendment⁹⁶ made it the law of the land that citizens will not be denied the right to vote based on race, color, or previous condition of servitude. The history of reconstruction after the Civil War would be a report in itself, but it is important to note that at the end of reconstruction in 1876, Southern states passed laws and adopted state-constitutional amendments whose purpose and effect was to disenfranchise African American voters and to impose a rigid system of racial segregation known as Jim Crow, and Black Americans were denied the ballot through intimidation, violence, poll taxes, literacy tests, good-character tests, grandfather clauses, whites-only primaries, and outright fraud committed by white election officials.⁹⁷

Despite the Fifteenth Amendment, millions of American citizens were still unable to vote. Congress therefore enacted further legal protections like the Civil Rights Act of 1875, which were ultimately nullified by the Supreme Court.⁹⁸ It took Constitutional amendments to grant women the right to vote,⁹⁹ and to eliminate Poll Taxes.¹⁰⁰ To address the pervasive racist methods to disenfranchise voters, Congress passed the Civil Rights Act of 1964¹⁰¹ and the Voting Rights Act of 1965¹⁰². The Voting Rights Act introduced nationwide protections of the right to vote, requiring jurisdictions with a history of voter discrimination to obtain prior approval from a federal court of any change to their electoral laws or procedures.

The struggle to end voter discrimination appeared to be gaining ground until the Supreme Court gutted the law in *Shelby County v. Holder* in 2013. The Court invalidated the preclearance requirement, thus preventing the federal government from blocking discriminatory state election laws before they were enacted. In the immediate five years after the *Shelby* decision, 23 states introduced electoral laws that included voter ID laws, onerous restrictions on voter registration; the closure or relocation of polling stations that had served predominantly minority voters (with

⁹⁴ U.S. Const. amend. XIII, §1.

⁹⁵ U.S. Const. amend. XIV, §1.

⁹⁶ U.S. Const. amend. XV, §1.

⁹⁷ See generally, United States Commission on Civil Rights, Report of the United States Commission on Civil Rights (1959), Part II, Voting.

⁹⁸ *The Civil Rights Cases*, 109 U.S. 3 (1883).

⁹⁹ U.S. Const. amend. XIX.

¹⁰⁰ U.S. Const. amend. XXIV.

¹⁰¹ Pub. L. No. 88-352 (78 Stat. 241) 1964.

¹⁰² Pub. L. No. 89-110 (79 Stat. 437) 1965.

the effect of making voters travel longer distances or to wait in long lines to cast a ballot), the elimination or reduction of early voting periods, burdensome requirements for obtaining or submitting absentee ballots, the elimination or reduction of early voting periods, restrictions or outright bans on voter registration drives, the elimination of same-day voter registration, and the permanent disenfranchisement of convicted felons.¹⁰³

There has always been a movement to secure the franchise in the Virgin Islands.¹⁰⁴ To grant the right to vote would require a Constitutional Amendment like the Amendment granting the District of Columbia residents the right to vote in federal elections,¹⁰⁵ or by an Act of Congress. Based on the history of voter oppression against minority voters in the United States, it is not expected that a highly politicized and polarized Congress will be taking this matter up anytime soon.

D. Representation

The United States Virgin Islands are an Unincorporated Territory of the United States of America, and while the Organic Act of 1954¹⁰⁶ provided a “detailed frame of government for the Islands”, Congress “made it clear” that this “was not to be taken as an indication that it had destined the territory for statehood.”¹⁰⁷ Absent the grant of statehood, the federal system of government does not allow for representation in Congress nor a vote for the presidency.

E. Equal Access to Government Programs

The Committee concedes that there is a debate whether access to Government assistance programs is a Constitutional protection. Issues of due process, equal access, and freedom from discrimination are civil rights protections, however most allotments for government programs are funded through Congressional measures. As noted above, the US Virgin Islands is at a supreme disadvantage in securing its share of Government programs since it is not represented by a voting member in Congress.

As a result, Americans who live in U.S. territories lack both the political safeguards that constitutional law associates with the federalism of the American system and the fundamental rights jurisprudence that constitutional law provides for “discrete and insular minorities.” By placing territories outside the default arrangement of American

¹⁰³ See U. S. Comm. on Civil Rights, *Assessment of Minority Voting Rights Access in the United States*, Ch. 3, pp. 83-193. Annual Statutory Report, 2018.

¹⁰⁴ Donald Hoover, Foreign Affairs, *The Virgin Islands Under American Rule*, Vol.4, No 3, 1926. P.3.

¹⁰⁵ U.S. Const. amend. XXIII.

¹⁰⁶ 48 U.S.C. 12 (1954).

¹⁰⁷ *Smith v. Gov. of the Virgin Islands*, 375 F. 2d 714 (3rd Cir. 1967).

*public law, the federal government has built a dilapidated welfare state for Americans who happen to be territorial residents.*¹⁰⁸

Neil Weare told the Committee that there are impacts on veterans and others who have served the country when it comes to healthcare benefits and other programs because of the disparity in government spending.¹⁰⁹ Most Territories receive block grants instead of participating in SNAP (Supplemental Nutrition Assistance Program), like all other Americans.¹¹⁰ Medicaid is also funded by block grant in the Territories, unlike the rest of the country where funds are distributed as needed.¹¹¹ The major concern with block grants, aside from being funded at a lesser rate than what is provided to other Americans, is the lack of ability to respond quickly during an emergency, such as with a hurricane.

In sum, residents of the U.S. Virgin Islands do not qualify for SSI based solely on their location, and are provided with less healthcare and nutrition assistance based on a doctrine of Territorial Unincorporation¹¹² based on racist norms.

F. The Administration of Justice

The Supreme Court has deemed trial by jury in all criminal prosecutions as a remedial right which is not among the fundamental rights which Congress must secure to the inhabitants of the Virgin Islands¹¹³; however, Congress provided the right to a jury trial in criminal cases in the Revised Organic Act of 1954.¹¹⁴ As with other aspects of Constitutional protections, the right to a jury trial in the U.S. Virgin Islands is at the prerogative of Congress.

G. Diversity Jurisdiction

The U.S. Constitution extends the judicial power of the United States to controversies “between citizens of different states.”¹¹⁵ An early opinion of the Supreme Court held that “the citizens of the District of Columbia were not citizens of any state within the meaning of the Judiciary Act of

¹⁰⁸ Hammond, *Territorial Exceptionalism and the American Welfare State*, Michigan Law Review, 119:8 (2021).

¹⁰⁹ Weare, Jan. 23, 2023, briefing, p. 7.

¹¹⁰ Supra note 108, at 1671.

¹¹¹ Ibid. at 1672.

¹¹² See Infra note 196.

¹¹³ *Caron v. First Pa. Bank*, 16 V.I. 169(V.I. Terr. Ct. 1979). (The Seventh Amendment of the Constitution does not apply per se to the Virgin Islands and is applicable only by statute.) See also, *Gov. v. Bodle*, 427 F.2d 532 (3rd Cir. 1970).

¹¹⁴ Pub. L. No. 517 – 558 (1954).

¹¹⁵ U.S. Const. art. III, § 2.

1789¹¹⁶ for purposes of invoking diversity jurisdiction.”¹¹⁷ That ruling essentially blocked territorial citizens from bringing diversity suits in federal court.¹¹⁸ The Court faced the issue again in 1949, and while it did not overturn the precedent set in 1805, it upheld a recently enacted statute¹¹⁹ that extended the jurisdiction of the district courts to civil actions between citizens of different states or citizens of the District of Columbia or Territories.

The legal issues in this ruling stem from Congress’ authority under Article I of the Constitution and what some viewed as exceeding Congress’ authority under Article III of the Constitution. The relevance here is this is another example of the citizens of the U.S. Virgin Islands being classified as belonging to a State, but only when it is convenient for Congress.

H. Economic Concerns

In a 1993 case before the Supreme Court, the Territorial Clause was held to limit the authority of the United States Virgin Islands to regulate commerce. The Court reasoned “Congress has comprehensive powers to regulate territories under the Territorial Clause...and that Congress’ Commerce Clause powers are implicit in that clause. If the Virgin Islands were not subject to the dormant aspect of the Commerce Clause and could therefore pass laws that would interfere with interstate trade, then an unincorporated territory would have more power over commerce than the states possess.”¹²⁰

An attorney, familiar with the decolonization effort and intimate with Court rulings on matters involving the territories shared this with the committee,

Congress placed the USVI outside the US Customs Zone and created a Customs Zone solely for the USVI. Not only does this have economic implications (some beneficial, some harmful), it denies US citizens domiciled in the USVI the right to travel freely between States. Those departing from any port in the USVI must clear immigration and customs to leave. This is not a requirement to depart Puerto Rico as it is not outside the customs territory of the US.¹²¹ Further, importations into all other Territories, except the USVI, are not governed by the Tariff Act of 1930 and are under the customs

¹¹⁶ 1 Stat. 73 (1789).

¹¹⁷ James Pfander, *The Tidewater Problem: Article III and Constitutional Change*, 79 Notre Dame L. Rev. 1925, 1926 (2004), *See Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445 (1805).

¹¹⁸ *Ellzey*, 6 U.S. (2 Cranch), at 450.

¹¹⁹ 28 U.S.C. § 1332.

¹²⁰ *JDS Realty Corp. v. Government of the Virgin Islands*, 824 F.2d 256, 260 (3d Cir. 1987) vacated and remanded to consider mootness, 484 U.S. 999 (1988), VACATED, 852 F.2d 66 (3d Cir. 1988) (the Court of Appeals held that Commerce Clause powers were implicit in the Territory Clause, but that decision was vacated for other reasons.)

¹²¹ 19 C.F.R. § 7.2.

administration of the Territorial government. In contrast, the Secretary of the Treasury administers the customs laws of the USVI through the US Customs and Boarder Protection.

The tax status of the U.S. Virgin Islands is complicated and beyond the scope of this report. In sum, the tax laws applicable to the U.S. Virgin Islands are a mirror system with the U.S. tax code. The Territory cannot change this code or its application to the U.S. Virgin Islands. Only Congress can. So, while income tax paid by U.S. Virgin Islands residents stays in the Islands, it is still technically owed to the U.S. Internal Revenue Service. A Virgin Islander meets their obligation to pay taxes to the Internal Revenue Service by paying them to the Virgin Islands Bureau of Internal Revenue. However, that was not a choice made by the USVI, nor one that it could have unilaterally imposed. It was a decision of the United States Congress, once again demonstrating Congress' control over the U.S. Virgin Islands.

Section 28A of the Revised Organic Act of 1954, as amended, states that all taxes paid in the US for products produced in the USVI are supposed to be returned to the USVI government for its general fund. However, only 13% of the taxes the U.S. imposes on the rum produced in the U.S. Virgin Islands is returned to the Islands and even that amount is subject to approval with each Congressional budget and has fluctuated throughout the years.

Further, the United States has NEVER returned ANY tax it has collected on the petroleum products produced in the U.S. Virgin Islands and sold in the United States. This is particularly egregious to the residents of St. Croix who are forced to live and deal with the environmental and health hazards created by the existence of the oil refinery on that island since 1963 without the tax benefits that were due to the Territory under the Revised Organic Act. When litigated, the US Courts have concluded that Section 28A does not mean what it explicitly and unambiguously says and that Congress can control the flow of tax cover returned to the Territory, including no return of any taxes.¹²²

Chapter Two: American Imperialism

I. Founding of the United States of America

The effort to identify the political and legal status of the U.S. Virgin Islands must include a discussion of the founding of the United States of America itself. Some information on the birth

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of the nation and the initial considerations for territories will provide background context and will bring the issues presented in this paper into proper perspective.

The United States of America is a nation that was created during an anti-imperial revolt. Thirteen colonies of the British empire situated on the east coast of North America, suffering from “a long train of abuses and usurpations”¹²³ under “absolute tyranny over these states”¹²⁴, issued a joint declaration of independence on July 4, 1776, which held as self-evident and truths “that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness.”¹²⁵

The Declaration of Independence signaled the political birth of the United States. In that document, the former British colonies declared themselves “free and independent states absolved from all allegiance to the British crown.”¹²⁶ The colonial representatives claimed George III, the King of England, had established absolute tyranny over the states and listed, among others, the following facts as grievances against the King:

1. **Self-government** was the chief concern of the colonists, having passed legislation in their assemblies on governing their slaves, and requesting representatives be sent to British Parliament. George III refused to ratify the legislation.¹²⁷
2. Thomas Jefferson, inspired by the political philosophy of John Locke, identified the treatment of the colonies by the King’s governors as “**neglect**”, one of the valid reasons to dissolve a government according to Locke.¹²⁸
3. In another grievance regarding a lack of **self-government**, Jefferson references the lack of representation in the legislatures.¹²⁹
4. The majority of the colonies did not elect their own judges, as they were appointed by the King. Other colonies were deprived of indictment by grand jury and obstruction of the **administration of justice**.¹³⁰

¹²³ Declaration of Independence, para. 2 (U.S. 1776).

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ The Declaration of Independence para. 3 (U.S. 1776). (“He has refused his Assent to Laws, the most wholesome and necessary for the public good.”).

¹²⁸ Id. at para. 4. (“He has forbidden his Governors to pass Laws of immediate and pressing importance unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.”).

¹²⁹ Id. at para. 5. (“He has refused to pass other Laws for the accommodation of large districts of people unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.”).

¹³⁰ Id. at para 10-11. (“He has obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judiciary Powers. “) and (“He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.”).

5. All trade, internal and external, was controlled by the king.¹³¹
6. Perhaps the most well-known grievance listed in the Declaration was taxation without consent, or **representation**.¹³²

It should be noted that the Declaration of Independence was not as much a legal document as it was a justification for independence. Nothing in the document was prescriptive nor did it contain requests, orders, commands, etc. The language was decidedly non-prescriptive by communicating the message that the time for talk was over and the colonies were now independent states. The justification for this secession was the harm caused by the King against *the people*, and the consent of *the people* to form a new government.¹³³

The representatives of the colonies who drafted the document declared the “Right of the People to alter or abolish”¹³⁴ the despotism under the English King, stated that in order to secure the rights of man, “Governments are instituted among Men, *deriving their just powers from the consent of the governed*.”¹³⁵

So profound was this idea that the legitimacy of government emanated from the *consent of the governed* that it is contained in the four most important documents in the founding of this nation: The Declaration of Independence, The Articles of Confederation¹³⁶, The Northwest Ordinance¹³⁷, and the Constitution of the United States¹³⁸. These four documents are to this day listed as the organic laws¹³⁹ of the nation in the initial pages of the United States Code.¹⁴⁰

The lofty ideas espoused in those documents were belied by the paradox, of course, in the institution of slavery and the discrete minority of Americans who qualified to vote, work, and own land.

The newly independent states joined in confederation in 1778, the articles of which claimed each State as sovereign, free, and independent.¹⁴¹ Interestingly, in stark contrast to the language in the

¹³¹ Id. at para. 18. ("For cutting off our Trade with all parts of the world".)

¹³² Id. at para. 19. ("For imposing taxes on us without our consent.").

¹³³ Id. at para. 2.

¹³⁴ Ibid.

¹³⁵ Ibid. Emphasis added.

¹³⁶ Articles of Confederation (U.S. 1777)

¹³⁷ Ordinance of 1787: The Northwest Territorial Government (U.S. 1787)

¹³⁸ The Constitution of the United States (U.S. 1787)

¹³⁹ Organic law is the body of laws (as in a constitution) that define and establish a government, Fundamental law. *Blacks Law Dictionary*, (10th ed. 2007).

¹⁴⁰ Front Matter, Organic Laws, United States Code. <https://uscode.house.gov/browse/frontmatter/organiclaws&edition=prelim> .

¹⁴¹ Articles of Confederation, art I. (1778).

Declaration of Independence, the Articles of Confederation described a union of states.¹⁴² The document scarcely mentions people at all.¹⁴³ The delegates of the newly independent states decided upon a weak central government, state-by-state voting (each state receiving one vote in Congress), proportional tax burdens based on land values, and **left unresolved the issue of expansion** (western lands).¹⁴⁴ The States each had their own reservations about the Articles, but Maryland refused to ratify them until 1781 when Virginia relinquished its western land claims.¹⁴⁵

A. The Northwest Ordinance

The name of our country, The United States of America, has almost always been an incorrect identifier of the true scope of the land and people of the nation. On “March 1, 1784, only forty-seven days after the signing of the Treaty of Paris that granted the United States independence from Great Britain, Virginia ceded its claims over the north of the Ohio River to the federal government. With that, the United States was no longer a union of states alone but an amalgam of states *and territories*, which it has been ever since.”¹⁴⁶

Territorial boundaries were always a matter of contention in the colonies. Much of the early territory in North America was claimed by different sovereigns and land demarcations were often generalized with major landmarks like the Atlantic Ocean, a degree of latitude, and the Mississippi river. At one time, Connecticut and Massachusetts stretched from the Atlantic Ocean to the Mississippi river. Figure 2 shows the state land claims and cessions to the federal government in the period 1782 to 1802.

Figure 2: State Land Claims and Cessions

¹⁴² Id.

¹⁴³ Id.

¹⁴⁴ Department of State, Office of the Historian, Articles of Confederation, 1777-1781. <https://history.state.gov/milestones/1776-1783/articles>

¹⁴⁵ Ibid.

¹⁴⁶ Immerwahr, *The Greater United States*, p.383



The Articles of Confederation did not address the land ceded by the states to the federal government. The Confederation Congress labeled the land as the Western Territory, and passed the Ordinance of 1784 which was an organic act creating the nation's first organized territory.¹⁴⁷



Figure 3 Northwest Territory of 1787

¹⁴⁷ An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio. Confederation Congress (1787).

II. The Insular Cases and the Application of the Constitution to the U.S. VIRGIN ISLANDS

There exists a paradox between the United States being, at once, a republic and an empire. The United States' empire was the fifth largest in the world in 1940.¹⁴⁸ There were 19 million people living in the territories (approx. 12.6 percent of the total U.S. population).¹⁴⁹

“The poorer and weaker nation makes its choices within limits set, either directly or indirectly, by the powerful society, and often does so by choosing between alternatives actually formulated by the outsider.”¹⁵⁰

A. American Expansion and Social Darwinism

1. *Economic Concerns*

In 1828 James Madison foresaw a time, about 100 years in the future, where the continent “had been filled up and an industrial system had deprived most people of any truly productive property.”¹⁵¹ His fears were proven true far sooner than he expected. By the mid-1800's, agricultural surpluses meant a search for foreign markets, “beef and pork, as well as wheat and cotton were streaming abroad in what seemed to be an always rising river of exports.”¹⁵² The economic crisis of the 1870's stoked the need for foreign markets and “influential businessmen were calling for overseas economic expansion.”¹⁵³

An economic crisis in 1893, spurred by the failures of key railroads and manufacturers, quickly developed into a severe depression that would last until 1898.¹⁵⁴ The first year alone, 500 banks and 15,000 businesses failed, and some 4 million people were unemployed.¹⁵⁵ There was general agreement in all political circles that something drastic needed to be done.¹⁵⁶ This led to an attitude, and agitation for, vigorous action in foreign policy to protect and open markets. The 1894 dispute with Great Britain over the boundary between Venezuela and British Guiana, the bold intervention in the Brazilian revolution, and the “American-conceived and executed revolution against Queen

¹⁴⁸ Daniel Immerwahr, *How to Hide an Empire*, 11 (Farrar, Straus and Giroux, 1st ed. 2019).

¹⁴⁹ *Ibid.*

¹⁵⁰ William Appleman Williams, *The Tragedy of American Diplomacy*, p.54.

¹⁵¹ *Ibid.* at p.21

¹⁵² *Ibid.* at p.23.

¹⁵³ *Ibid.* at p.26.

¹⁵⁴ *Ibid.* at p.28.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.* at p.29.

Liliuokalani in Hawaii” are but a few examples of the aggressive U.S. foreign policy of the 1890’s.¹⁵⁷

The economic crisis, the need for foreign markets, and even the rhetoric of Christianity and the White Man’s Burden, pointed to the “practical conclusion that expansion was the way to stifle unrest, preserve democracy, and restore prosperity.”¹⁵⁸ American politicians and businessmen viewed Asia, and China in particular, as “the great market that would absorb the surplus.”¹⁵⁹ They were concerned with Japan, Russia, France, England, and Germany all engaged in a veritable free-for-all to acquire territorial concessions in China.¹⁶⁰

In 1896, President Cleveland was pressed to address the Cuban revolution to prevent “the wholesale destruction of property on the island... which is utterly destroying American investments that should be of immense value and is utterly impoverishing great numbers of Americans.”¹⁶¹ The next summer, in 1897, Theodore Roosevelt sent President McKinley a memorandum in which he advocated war in November, and *specifically recommended* that “we take and retain the Philippines.”¹⁶²

On April 21, 1898, the United States declared war against Spain, the result of which (4 months later) added Puerto Rico, Guam, the Philippines, and control of Cuba to the American Empire.

2. Racism

The concept of one person owning another person was not only a reality when the country was founded, it was also codified in the Constitution.¹⁶³ The Northwest Ordinance, discussed above, contained a specific clause stating “the utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent,”¹⁶⁴ yet some fifty years after the Ordinance was written, the Indian Removal Act of 1830¹⁶⁵ started the forced removal of Indians from their land and resettling them without regard to prior agreements.

¹⁵⁷ Ibid. at p.30.

¹⁵⁸ Ibid. at p.31.

¹⁵⁹ Ibid. at p.42.

¹⁶⁰ Ibid. at p. 39.

¹⁶¹ Ibid.

¹⁶² Paolo Coletta, McKinley, *the Peace Negotiations, and the Acquisition of the Philippines*, Pacific Historical Review, Vol. 30, No. 4, p.342, (1961).

¹⁶³ See U.S. Const. art. I § 3 (all other persons, slaves, count as 3/5 of a person); art. I § 8, cl. 15 (Congressional debate over using militia in the South to suppress slave insurrections); art. I § 9, cl. 1 (the importation of slaves will be allowed until 1808); and art. IV § 2, cl. 3 (persons held to service escaping into another state shall be delivered up on claim of the party to whom such service may be due).

¹⁶⁴ Supra note 119, at art. III.

¹⁶⁵ An Act to Provide for an Exchange of Lands with the Indians Residing in any of the States or Territories, and for Their Removal West of the River Mississippi, Pub. L No. 21-148, 4 Stat. 411 (1830).

The steady stream of laws to suppress and ostracize non-whites was extensive:

- The **Fugitive Slave Act** of 1850¹⁶⁶ (penalized Federal law enforcement officials for not arresting alleged runaways),
- the **1850 Foreign Miners Tax**¹⁶⁷ (placed a \$20 per month tax on all miners of foreign origin in California),
- The **Greaser Act of 1855**¹⁶⁸ (anti-Mexican law enacted in California thinly disguised as an anti-vagrancy statute),
- **The Black Codes of the 1860s**¹⁶⁹ (denied freed Blacks from the right to serve on juries, testify in court, serve in the state militia, jailed laborers who failed to sign yearly contracts, barred them from owning land, etc.),

The United States of America did not outlaw slavery until 1865,¹⁷⁰ and soon after the Constitution was amended to “protect all the civil rights that pertain to freedom and citizenship.”¹⁷¹ However, even with these new protections the oppression continued:

- **The Page Act of 1875**¹⁷² (prohibited the entry of Chinese women into the United States),
- **Indian Boarding Schools** (tens of thousands of native-American children forced from their homes to attend training in American standards where they were forbidden to speak their native language, taught Christianity, and were generally forced to abandon their Indian identity),
- **The Chinese Exclusion Act of 1882**¹⁷³
- **Dawes General Allotment Act of 1887**¹⁷⁴ (Congressional redistribution of Indian land transferred 93 million acres from Native American control to white settlers),
- The **Scott Act of 1888**¹⁷⁵ (building upon the Chinese Exclusion Act, it left 20,000 to 30,000 people stranded outside the United States),

¹⁶⁶ Pub. L. No. 31-60, 9 Stat. 462 (1850).

¹⁶⁷ An Act to provide for the protection of foreigners, and to define their liabilities and privileges, Cal. Stat. ___, April 22, 1850.

¹⁶⁸ 1855 Cal. Stat. 525 § 1.

¹⁶⁹ See Generally Douglas Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to WWII*, New York: Doubleday (2008).

¹⁷⁰ U.S. Const. amend. XIII.

¹⁷¹ *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Justice Harlan dissenting and characterizing the 14th and 15th amendments as such.)

¹⁷² Pub. L. No. 43-141, 18 Stat. 477, March 3, 1875.

¹⁷³ Pub. L. No. 47-126, 22 Stat. 58, May 6, 1882.

¹⁷⁴ Pub. L. No. 49-105, 24 Stat. 388, Feb. 8, 1887.

¹⁷⁵ Pub. L. No. 50-1064, 25 Stat. 504, Oct. 1, 1888.

- **Bennett Law of 1889**¹⁷⁶ (law in Wisconsin banning the use of German in all public and private schools),
- **Geary Act of 1892**¹⁷⁷ (Extended the Chinese Exclusion Act and mandated Chinese laborers carry resident permits to prove legal presence in the country, forbade Chinese from bearing witness in court and could not receive bail in habeas corpus proceedings).

The Supreme Court held in *Plessy v. Ferguson*¹⁷⁸ that racial segregation laws did not violate the U.S. Constitution. This is relevant to the present examination because American foreign policy was faced with the prospect of becoming a colonial power in the late 19th Century by “looking anxiously for markets abroad as a way of improving conditions at home”; from an economic standpoint, American businessmen were opposed to “the competition of native labor.”¹⁷⁹ In fact, Secretary of State William Bryan stated “the Filipinos cannot be citizens without endangering our civilization.”¹⁸⁰

The press was instrumental in creating an image of a benevolent Uncle Sam during the early stages of the Imperial expansion. Figure 4 shows an illustration during the sale of the Virgin Islands to the United States in 1917, the Danish press depicted the Virgin Islands as ‘pickaninnies’ and Figure 5 is from the United States press depicting “something lacking” in the Philippines. Figure 6 depicts President McKinley giving the Philippines their first bath in civilization. Figure 7 depicts a stunned United States with an “unexpected” child in the Philippines. The caricatures were intended to dehumanize the people of the new territories. The Philippines had begun their own independence revolution before the United States intervention with Spain. Figure 8 depicts Philippine leadership in attendance at the Paris Peace Conference in 1898. Neither Spain nor the United States allowed the delegation to take part in the proceedings. Figure 9 depicts Philippine leader Emilio Aguinaldo who led the revolutionary forces. Figure 10 is perhaps the most telling. It depicts the new territories as unruly children at the feet of the U.S. the caption on the blackboard reads: “The U.S. must govern its new territories *with or without their consent* until they can govern themselves.”

¹⁷⁶ 1889 Wisc. Act 519, April 18, 1889.

¹⁷⁷ Pub. L. No. 52-60, 27 Stat. 25, May 5, 1892.

¹⁷⁸ 163 U.S. 537 (1896).

¹⁷⁹ Williams, p. 46.

¹⁸⁰ Ibid.

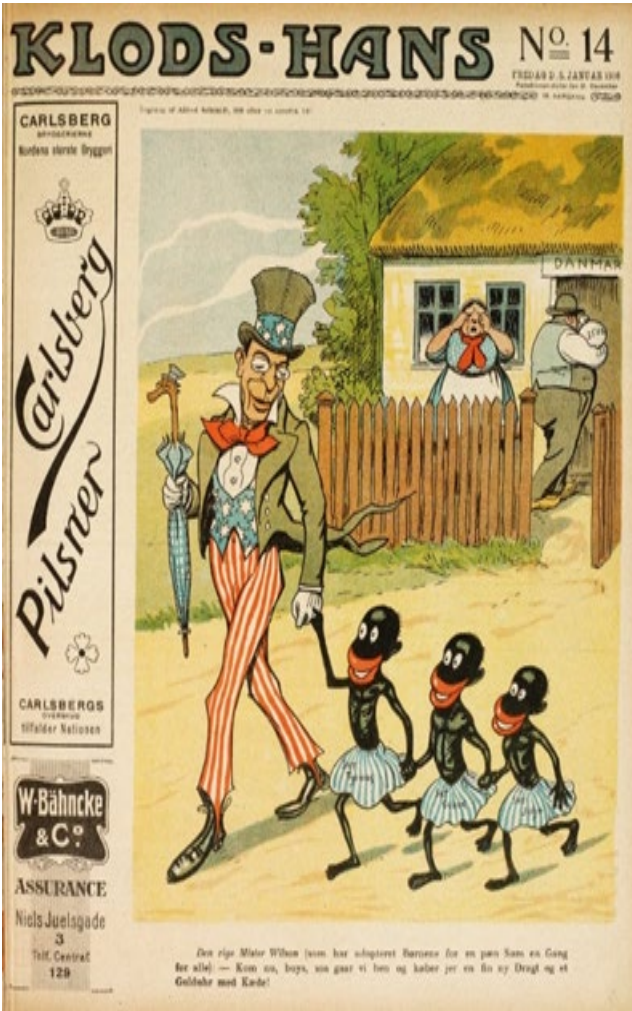


Figure 4: Danish Depiction of U.S. VIRGIN ISLANDS Sale

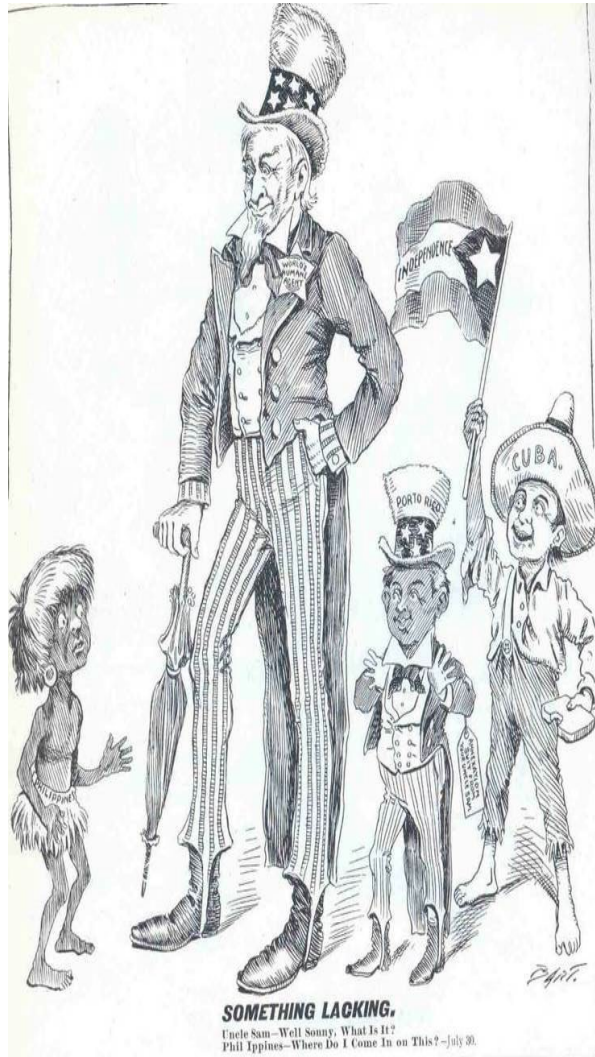


Figure 5: USA Depicted as Benefactor

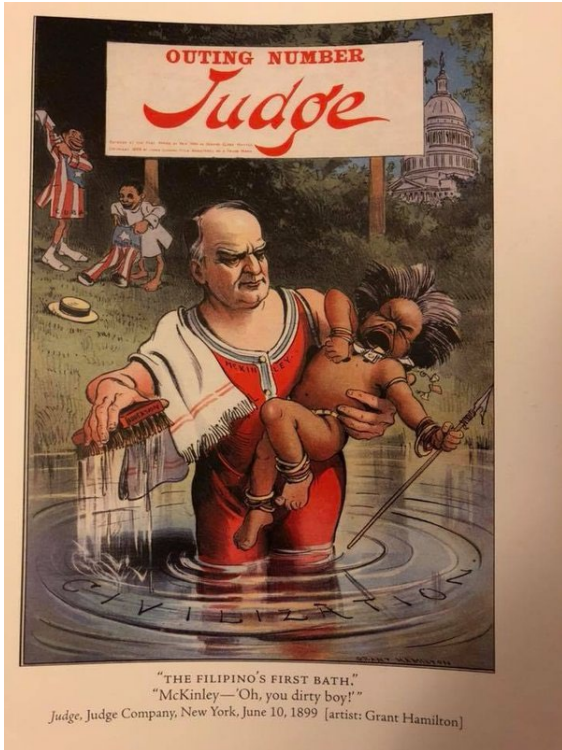


Figure 6: Philippines First Bath in Civilization



Figure 7: U.S.A with Unexpected Newborn

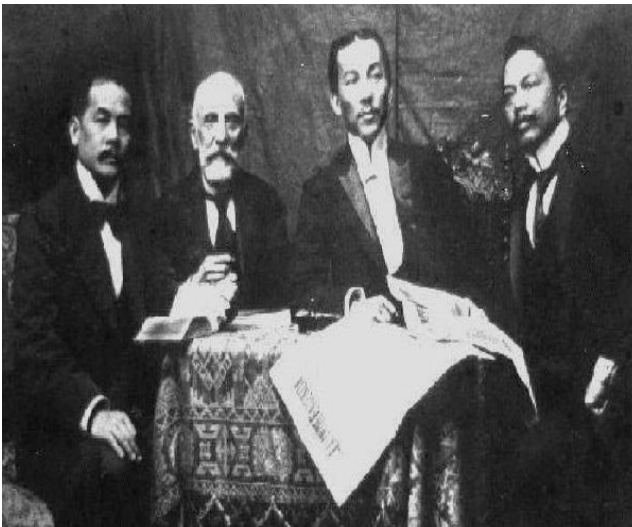


Figure 8: Philippine Delegation to Paris Peace Talks



Figure 9: Philippine Leader Emilio Aguinaldo



Figure 10 New Territories as Uncivilized Children

3. Expansion and the Constitution

The Treaty of Paris¹⁸¹ ending the war with Spain awarded the United States the Islands of Puerto Rico and Guam, gave the United States control of Cuba, and the sale of the Philippine Islands to the United States for \$20 million. The economic crisis in the United States in the 1890s stoked the need for expansion and when the U.S. acquired these new territories the legal, political, and social landscape (as discussed in the previous sections) gripped the nation with the prospect of an Imperial America, but “many wondered how a country whose identity had been forged in the crucible of colonialism could, only a century after gaining its independence, administer an empire of its own.”¹⁸² Every territory in the history of the young United States had evolved into statehood (see Table 1).

¹⁸¹ Treaty of Paris, U.S. – Spain, Dec. 10, 1898, 30 Stat. 1754.

¹⁸² Krishanti Vignarajah, *The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the Insular Cases*, Univ. of Chicago Law Rev., Vol. 77 No. 2 (Spring 2010) pp.781-845.

Table 3. Territory Admissions

Northwest Territory	1787-1803	Became the State of Ohio and the Territory of Indiana
Southwest Territory	1790-1796	Became the State of Tennessee
Territory of Mississippi	1798-1817	Became the State of Mississippi and the Territory of Alabama
Territory of Indiana	1800-1816	Split into the Illinois Territory, the Michigan Territory, and the State of Indiana
Territory of Orleans	1804-1812	Became the State of Louisiana
Territory of Michigan	1805-1837	Became the State of Michigan and the Territory of Wisconsin
Territory of Louisiana	1805-1812	Preceded by the District of Louisiana, then renamed the Territory of Missouri
Territory of Illinois	1809-1812	Split into the State of Illinois and additions to the Michigan Territory
Territory of Missouri	1812-1821	Became the State of Missouri and Unorganized Territory later attached to Territory of Michigan
Territory of Alabama	1817-1819	Became the State of Alabama
Territory of Arkansas	1819-1836	Became the State of Arkansas, additions to the unorganized territory of the original Louisiana Purchase, and the Unorganized Territory (which eventually became Indian Territory, Oklahoma Territory, and No Man's Land)
Territory of Florida	1822-1845	Became the State of Florida
Territory of Wisconsin	1836-1848	Split into the State of Wisconsin, the Iowa Territory, and Unorganized Territory
Territory of Iowa	1838-1846	Split into the State of Iowa and unorganized territory of the original Louisiana Purchase
Territory of Oregon	1848-1859	Preceded by the unrecognized Oregon Country; Split into the State of Oregon and the Washington Territory
Territory of Minnesota	1849-1858	Preceded by unorganized territory of the original Northwest Territory and original Louisiana Purchase; Split into the State of Minnesota and unorganized territory of the original Louisiana Purchase
Territory of New Mexico	1850-1912	Preceded by Nuevo Mexico; Split into the State of New Mexico and the Arizona Territory
Territory of Utah	1850-1896	Preceded by Alta California and the unrecognized State of Deseret; Split into the State of Utah, the Nevada Territory, addition to the Colorado Territory and addition to the Wyoming Territory
Territory of Washington	1853-1889	Became the State of Washington and additions to the Idaho Territory
Territory of Kansas	1854-1867	Preceded by unorganized territory of the original Louisiana Purchase; Split into State of Kansas and addition to Colorado Territory
Territory of Nebraska	1854-1867	Preceded by unorganized territory of the original Louisiana Purchase; Split into the State of Nebraska, the Dakota Territory, additions to the Idaho and Colorado Territories
Territory of Colorado	1861-1864	Preceded by parts of the territories of Kansas, Utah, New Mexico, and Nebraska; became the State of Colorado
Territory of Nevada	1861-1864	Preceded by Utah Territory and unrecognized State of Deseret; Became the State of Nevada
Territory of Dakota	1861-1889	Became the States of North and South Dakota; additions to the Idaho and Wyoming Territories
Territory of Arizona	1863-1912	Became the State of Arizona and an addition to the State of Nevada
Territory of Idaho	1863-1890	Preceded by parts of the territories of Washington, Dakota, and Nebraska; Became the State of Idaho, the Montana Territory, and additions to the Dakota and Wyoming Territories
Territory of Montana	1864-1889	Became the State of Montana
Territory of Wyoming	1868-1890	Preceded by parts of the Dakota, Utah, and Idaho Territories; Became the State of Wyoming
Territory of Oklahoma	1890-1907	Preceded by unorganized Indian Territory; Became the State of Oklahoma
Territory of Hawaii	1898-1959	Preceded by the Republic of Hawaii; Became the State of Hawaii
Territory of Alaska	1912-1959	Preceded by the Department of Alaska, and the District of Alaska; Became the State of Alaska

Source: Congressional Research Service, Admission of States to the Union: A Historical Reference Guide, R47747, Dec. 5, 2023.

Each new territory followed the plan laid out in the Northwest Ordinance,¹⁸³ and “the document’s promise to admit the territories as future states “on an equal footing” with other states became a foundational principle of federalism.”¹⁸⁴ The Ordinance did not extend the Constitution to the territory, but the “protections of freedom of worship, private property, jury trials, and its ban on ‘cruel and unusual punishment’ all prefigured, often verbatim, the provisions of the Bill of Rights.”¹⁸⁵

The Constitution’s grant of power to Congress to craft “all needful Rules and Regulations” for federal territories¹⁸⁶, a provision adopted, James Madison suggested, specifically to validate the Northwest Ordinance.¹⁸⁷ The Western territory “is a mine of vast wealth to the United States” and under proper management will “furnish liberal tributes to the federal treasury,” Speaking of the territory, Madison wrote:

*We may calculate, therefore, that a rich and fertile country, of an area equal to the inhabited extent of the United States, will soon become a national stock. Congress have assumed the administration of this stock. They have begun to render it productive. Congress have undertaken to do more: they have proceeded to form new States, to erect **temporary governments**, to appoint officers for them, and to **prescribe the conditions on which such States shall be admitted to the Confederacy.***¹⁸⁸

The first major acquisition of land outside of the original Northwest Territory happened in 1803 with the Louisiana Purchase (Treaty of Cession between the United States and France).¹⁸⁹ In that treaty, the United States *agreed to incorporate the inhabitants of the territory* “as soon as possible according to the principles of the federal Constitution to the enjoyment of all these rights, advantages, and immunities of citizens of the United States.”¹⁹⁰

The Adams – Onis Treaty of 1819¹⁹¹ which ceded Florida from Spain to the United States provided “The inhabitants of the ceded territories which His Catholic Majesty cedes to the United States, by this treaty, *shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges,*

¹⁸³ Supra note 134.

¹⁸⁴ Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 Penn. L. Rev. 1631, 1632 (2019).

¹⁸⁵ Northwest Ordinance at 340.

¹⁸⁶ U.S. Const. art IV, § 3.

¹⁸⁷ See *The Federalist No. 38*, at 191-92 (James Madison) (Ian Shapiro ed. 2009).

¹⁸⁸ Ibid.

¹⁸⁹ Treaty Between the United States of America and the French Republic (1803).

¹⁹⁰ Ibid. art. III.

¹⁹¹ Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty (1819).

rights, and immunities of the citizens of the United States.”¹⁹² The Treaty of Guadalupe Hidalgo ending the war with Mexico in 1848, and ceding the majority of what is now the western United States, contained similar language.¹⁹³

It was a stark and sudden departure from a century of precedent when the Treaty of Paris was negotiated in 1898 and contained the following language: “The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States **shall be determined by Congress.**”¹⁹⁴ The political and legal status of over 7.5 million people now lay in the hands of Congress.

4. *Plenary Power of Congress*

Any evaluation of the political and legal status of the U.S. Virgin Islands, as well as the other territories, must begin with the Territory Clause of the Constitution¹⁹⁵. Legal scholarship has described how the clause was originally understood and how that changed with the annexations of the Spanish Territories in 1898:

*Although what it means to be “unincorporated” remains contested to this day, every account of the Insular Cases agrees that they also stand for a considerably less modest proposition: that the federal government has the power to keep and govern territories indefinitely, without ever admitting them into statehood, or deannexing them. Before 1898, territories annexed by the United States were presumed to be on a path to statehood. However, the annexation in 1898 of three territories populated largely by nonwhite people gave rise to a public debate over whether the United States, for the first time in its history, could continue to hold a territory indefinitely without eventually admitting it as a state. The Court found a way. It simply invented, out of whole cloth, the distinction between incorporated territories, which were on their way to statehood, and unincorporated territories, which might never become states, and placed these newly annexed territories in the latter category. The distinction between incorporated and unincorporated territories thus served as the cornerstone of a racially motivated imperialist legal doctrine: the idea of the unincorporated territory gave sanction to indefinite colonial rule over majority non-white populations at the margins of the American empire.*¹⁹⁶

Since the passage of the Northwest Ordinance, Territories have been considered under U.S. Sovereignty. Although local representation was provided for in the Ordinance, the territories were denied federal

¹⁹² Ibid. art. VI.

¹⁹³ Treaty of Peace, Friendship, limits, and Settlement Between the United States of America and the United Mexican States Concluded at Guadalupe Hidalgo, Feb. 2, 1848, art. VIII.

¹⁹⁴ Treaty of Paris Between the United States of America and the Kingdom of Spain, U.S. – Spain, Dec. 10, 1898, 30 Stat. 1754.

¹⁹⁵ U.S. Const. art. IV.

¹⁹⁶ Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, Yale Law Journal, 131:2449 (2022).

representation. As noted earlier, this created a Constitutional paradox, but the Supreme Court squared the Constitution's language with the "implicit Conviction that nonwhite people from unfamiliar cultures were ill-suited to participate in a majority-white, Anglo-Saxon polity.

The political illegitimacy of unrepresentative federal rule over their inhabitants had been justified by the shared understanding, confirmed by consistent practice, that territorial status was a temporary necessity that would end when a territory became a state. But by giving constitutional sanction to the new and subordinate category of unincorporated territories, which might never become states, the Insular Cases raised the possibility that the United States could, if it so desired, govern unincorporated territories indefinitely despite the fact that their residents had neither representation in the federal government nor the assurance that such representation would be forthcoming upon their territory's eventual admission as a state.¹⁹⁷

The Supreme Court has interpreted the Territory Clause to grant plenary power to Congress in governing the Territories, a condition that remains to this day.¹⁹⁸

III. Purchase of the U.S. VIRGIN ISLANDS

The Virgin Islands were purchased from Denmark in 1917. Formerly known as the Danish West Indies, the Islands had been under Danish rule since the late 1600s.¹⁹⁹

A popular contemporary opinion was that the purchase was made to prevent Germany from obtaining the islands and establishing a base from which to threaten Porto Rico and the Panama Canal.²⁰⁰ The purchase was a culmination of numerous episodes of diplomatic negotiations over a fifty-two-year period that began shortly after the Civil War when the strategic military importance of the islands was evidenced.

An historian from the University of the Virgin Islands shared the following with the committee, noting the initial political organization of the Islands, and the evolution to the present-day,

¹⁹⁷ Ibid.

¹⁹⁸ Ibid. See also Congressional Research Service, *Statehood Process and Political Status of the U.S. Territories*, IFF11792, March 19, 2021.

¹⁹⁹ U.S. Dept. of the Interior, Office of Insular Affairs, <https://www.doi.gov/oia/islands/virgin-islands>.

²⁰⁰ Hoover, *The Virgin Islands Under American Rule*, Foreign Affairs Vol. 4, No. 3 (1926). <https://www.jstor.org/stable/20028473>.

In the transition from Danish West Indies into the Virgin Islands of the United States the Islands were placed under the control of the U.S. Navy. The Danish Law of 1906 remained in effect after transfer which provided only a very limited self-government by Colonial Councils whose members were appointed by the governor and representatives elected from a narrow pool of voters. Suffrage was tied to property requirements and limited by gender. While advocates within the Islands pressed for greater rights and an expanded franchise, the Islands remained under Naval jurisdiction from 1917 to 1931 when their management was transferred to the Department of the Interior. Within the Virgin Islands, strong advocates emerged for greater political representation and rights, both within the island's governing system as well as within the United States government. Virgin Islands advocates such as Rothschild Francis, Lionel Roberts, and D. Hamilton Jackson fought for a new governing framework for the Virgin Islands of the United States partnering with national organizations including the American Federation of Labor and the American Civil Liberties Union. The result was that while residents of the Virgin Islands had no formal role in the passage and adoption of the 1936 Organic Act for the USVI (49 Stat. 1807) by Congress their concerns for greater suffrage and local political development were incorporated into the Act.

Congress passed the Organic Act for the USVI (49 Stat. 1807) in 1936 which expanded the local electorate beyond the Danish limitations while continuing to limit participation in federal elections. The right to vote in local elections was extended to all men over the age of 21 removing property requirements and "blameless character" language, while also adding an English language literacy requirement. Suffrage was expanded to include women in 1938 due to the advocacy of Edith Williams, Eulalie Stevens, Anna Vessup and others. With the expansion of suffrage for local elections, local political activities expanded with the emergence of popular political parties that aimed at reforming and limiting the traditional control of political life by propertied elites.

In 1954 Congress approved a revised version of the Organic Act. The process had little local input and no process for local approval. The 1954 revision continued the practice of Congressionally appointed governors, but changed aspects of internal government and laid a groundwork for greater self-government through local elections. Aimed at greater efficiency, the separate island councils established in 1936 for St. Thomas-St. John and St. Croix were consolidated into a unicameral legislature. Suffrage was

expanded with the removal of the English literacy requirement for voting which enabled greater political participation from Spanish-speaking residents (this included a significant population in St. Croix who had migrated from the nearby US territory Puerto Rico).

In 1964 and 1971, two locally authorized constitutional conversations were held. Both called for greater political rights for Virgin Islands citizens, including an elected governor and a congressional delegate. Both of these proposals were later accepted by Congress. In 1976, Public Law-584 passed by Congress (Public Law 94-584, 90 STAT. 2899) providing authorization to adopt a locally crafted constitution. Under this law an elected constitutional convention of U.S. Citizens and qualified voters was empowered to adopt a replacement to the Organic Act with conditions. Those conditions included that the document must be consistent with U.S. sovereignty and recognize the supremacy of federal law. The law must provide three branches of government (executive, legislative, and judicial) and contain a bill of rights. Once drafted the proposal was to be presented to the governor who would transmit the document to the US president. The president would then forward the document to Congress for final approval. In the process Congress could call for changes. The constitution would then be returned to the Virgin Islands for a referendum for acceptance. Several constitutional conventions have occurred, and the process of constitutional development continues within the Territory.

Since purchase and transfer in 1917 the people of the Virgin Islands have worked to expand self-government within the limits set by their complex relationship to Congress and the United States. The work of local advocates has seen the Naval administration replaced and the expansion of voting rights within the territory over time. A local government has emerged that includes an elected governor, a lieutenant governor, a unicameral legislature, an expanded judiciary, and greater fiscal control and economic decision-making.²⁰¹

²⁰¹ Dr. Molly Perry, Ph. D., is currently an Assistant Professor of History and Geography at the University of the Virgin Islands. At UVI, Molly teaches courses on Caribbean history applying an interdisciplinary approach to encourage student research on central issues of the region's development and people over time. Dr. Perry is a member of the U.S. Virgin Islands Advisory Committee to the USCCR.

IV. Current Status of the U.S. VIRGIN ISLANDS

There have been several attempts at drafting a constitution for the U.S. Virgin Islands. Currently, there is discussion on holding a Sixth Drafting Convention. Without a local Constitution, the people of the Virgin Islands are governed by the Revised Organic Act of 1954 which requires congressional approval and would not alter the authority of Congress under the Territory Clause.²⁰² Any proposed Constitution would require the approval of Congress and the President and would not alter the authority of Congress under the Territory Clause.

Dr. Malik Sekou said this to the Committee:

*In the VI context, self-determination has that odd mix of seeking more civil rights as a US Citizen in one sense, which include a desire for a presidential vote, a desire for a vote delegator to Congress, and a desire to have more federal benefits in one hand. Yet on the other hand, we also want the level of autonomy here in the Virgin Islands that preserves our Caribbean identity and allow us to still have close ties through the region that we are a part of.*²⁰³

Dr. Sekou, the Director of the Office of Self-Determination, believes the prudent path forward is to adopt a constitution based off of the Revised Organic Act of 1954 as a foundation.²⁰⁴ Dr. Sekou does not believe the Islands have “civil rights violations within the territory.”²⁰⁵ He believes the real issues are “how can we have a capacity to vote for U.S. president...how can we have a delegate to Congress that has more power or more say in the federal government?”²⁰⁶

Dr. Neil Weare commented that “statehood is a political decision by Congress and the U.S. President. It only requires a majority vote by the House and Senate and the President’s signature. People look at statehood as something unattainable but ultimately it is simple legislation.”²⁰⁷ He also said that there was precedent to giving the territories a vote for president. “The 23rd Amendment gave the District of Columbia 3 electoral votes for president, and the Constitution has been amended many times to expand and protect voting rights.”²⁰⁸

²⁰² United States v. Sanchez, 992 F.2d 1143, 1151-52 (11th Cir. 1993). (“Congress may unilaterally repeal the Puerto Rican Constitution or the Puerto Rican Federal Relations Act and replace them with any rules or regulations of its choice.”)

²⁰³ Malik Sekou, Testimony, briefing, September 21, 2023.

²⁰⁴ Ibid. at p.4

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Neil Weare, Testimony, briefing, p.9

²⁰⁸ Ibid.

Attorney Judith Bourne and Dr. Carlyle Corbin both reference international treaties signed by the United States as fundamental to the federal government’s responsibility in developing the political and economic economies in the Virgin Islands. Ms. Bourne told the Committee:

The Charter of the United Nations states that there is a responsibility that Nation members have towards non-self-governing territories. The United States recognizes the U.S. VIRGIN ISLANDS as a non-self-governing territory. Under international law, negotiations between the U.S. and the U.S.V.I must be conducted on an equal basis. The U.S. cannot begin negotiating by saying “well, first of all, you’re under the Territorial Clause so we have that supremacy before we start negotiations.” The Virgin Islands should start looking at these international agreements and try to see what they say to us in terms of what we really want to have.²⁰⁹

Dr. Corbin told the committee that an upgrade of the territorial status, or the awarding of presidential votes would only provide the U.S. Virgin Islands with a position of lesser inequality. The answer is a genuine political education program followed by acts of self-determination as is required under the United Nations Charter.²¹⁰

V. Conclusion

The U.S. Virgin Islands Advisory Committee offers the following conclusion to its inaugural report.

In 1917, the year the Virgin Islands were purchased by the United States, the ideas of social rights and civil rights were not yet delineated. Black Americans, and other racial or ethnic minorities, were relegated to an internal colonialism as was expertly documented in 1959 by the United States Commission on Civil Rights. Voting rights were not enforced leaving men of color without a vote. Women were denied the franchise altogether. There were no laws in place to ensure workplace safety, equal opportunity, equal pay, or discrimination in general. Disabled Americans were marginalized by limited access to buildings, sub-minimum wages, and no requirements for their employers to make workplace accommodations for those that could otherwise perform the essential functions of a job.

²⁰⁹ Judith Bourne, Testimony, Briefing, p. 4.

²¹⁰ Corbin, Testimony, Briefing, p.12.

Civil Rights for these groups came gradually. For many Americans, the turning point in the struggle for universal civil rights was the landmark case of *Brown v. Board of Education* which dismantled the doctrine of separate-but-equal adopted by the U.S. Supreme Court in *Plessy v. Ferguson*. For most of the groups identified in the previous paragraph, laws, norms, and attitudes have changed and the United States has inched closer to the promises of equality and due process identified in the Constitution.

The U.S. Citizens living in the Territories, however, remain trapped in what would be called “apartheid” if it were located anywhere else. Case law based on racist tropes and an indifference by Congress toward nearly 4 million U.S. Citizens, has left the Territories in general and the U.S. Virgin Islands specifically, without a means to meaningfully influence legislation that governs their daily lives, and without the means to vote for the people who make those decisions.

The Constitution grants Congress the power to dispose of and make all needful rules and regulations respecting the territory but does not define “needful” or enumerate rules and regulations within this scope. Justice John Marshall Harlan, who felt that Congress was always bound to enact laws within the jurisdiction of the Constitution had this to say in his dissent in *Downs v. Bidwell*:

This nation is under the control of a written constitution, the supreme law of the land and the only source of the powers which our government, or any branch or officer of it, may exert at any time or at any place.

He held that the Congress had no existence outside the Constitution and thus had no authority to complete rule in the territories. He continued:

The idea prevails with some, indeed it has expression in arguments at the bar, that we have in this country substantially two national governments; one to be maintained under the Constitution, with all its restrictions; the other to be maintained by Congress outside and independently of that instrument, by exercising such powers as other nations of the earth are accustomed to. ... I take leave to say that, if the principles thus announced should ever receive the sanction of a majority of this court, a radical and mischievous change in our system will result. We will, in that event, pass from the era of constitutional liberty guarded and protected by a written constitution into an era of legislative absolutism. ... It will be an evil day for American Liberty if the theory of a government outside the Supreme Law of the Land finds lodgment in our Constitutional

Jurisprudence. No higher duty rests upon this court than to exert its full authority to prevent all violation of the principles of the Constitution.²¹¹

Considered the most important of the Insular Cases, *Downs v. Bidwell*, was based on racist logic and was decided by the same Supreme Court Justices that decided *Plessy v. Ferguson*.

Separate but equal was struck down seventy years ago and in the interim numerous laws have been passed in the United States to correct the discrimination and injustices of the past. It is time that the people of the United States Virgin Islands, citizens of the United States, take their rightful political and legal place as equals in the American family.

²¹¹ 182 U.S. 244 (1901)

Findings

1. The lack of self-determination of American citizens living in the U.S. Virgin Islands raises Constitutional, international, and human rights concerns.
2. The international law requirements, as mandated by United Nations Treaty, requires the United States to bring the U.S. Virgin Islands to the full measure of self-government.
3. The three political solutions are (a) Independence, (b) Incorporation, and (c) Free Association.
4. The general population of the U.S. may lack awareness of the political status of U.S. Citizens living in the Islands.
5. The Department of Interior has an obligation to inform the citizens of the U.S. Virgin Islands of the options available and their role within the framework of the United States political system.

Recommendations

1. The United States Commission on Civil Rights should initiate a series of joint discussions with Puerto Rico, Guam, American Samoa, the Northern Marianas Islands, and the U.S. Virgin Islands to reference the civil rights concerns on a larger context. There are common concerns that are so ingrained in the nature of territorial governance that addressing them jointly would justify stakeholder concern.
2. The United States Commission on Civil Rights should recommend to the Congress that Department of the Interior, Office of Insular Affairs, draft a proposal for the Congress to consider, that would give U.S. citizens living in the Territories a vote in federal elections and voting representation in Congress.
3. The United States Commission on Civil Rights should recommend to the Congress that it pass legislation implementing the Constitution in full to all the Territories.

**U.S. Virgin Islands Advisory Committee to the
United States Commission on Civil Rights**



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