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JAMES T. CAMPBELL

Island Judges

ABSTRACT. This Note explores the persistent differences in status among federal district judges in U.S. territories. Beginning with Congress's decision to extend life tenure to federal judges in Puerto Rico in 1966, the Note traces the evolution of local and federal courts in U.S. territories over the past half century. Although universally counted within the ninety-four districts of the Article III system, the federal district courts in Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands are not staffed by Article III judges. In some cases, these federal district judges can be replaced at any moment. This regime, once defended on account of the distinguishing jurisdictional features of federal courts overseas, has outgrown its prevailing justifications. Divorced from its once-plausible logic of necessity and institutional development, the present status of federal district judges in the territories is an emerging problem in federal judicial independence that exposes the federal courts to charges of exceptionalism and political interference. Focusing on judicial administration, this Note challenges the notion that all federal district judges are created equal, highlighting an underinterrogated space in the discourse on U.S. empire: the Judicial Conference of the United States.

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INTRODUCTION

On April 18, 2017, U.S. Attorney General Jeff Sessions appeared on a talk show to discuss the ongoing legal battle over President Trump's controversial "travel ban" policy.[1] During the interview, Sessions singled out Judge Derrick K. Watson of the U.S. District Court for the District of Hawaii, who was, at that time, neither the first nor the most recent judge to enjoin the ban.[2] "[T]his is a huge matter," Sessions told the radio host, "I really am amazed that a judge sitting on an island in the Pacific can issue an order that stops the President of the United States from [using] what appears to be clearly his statutory and [c]onstitutional power."[3]

The Attorney General's "island judge" comment triggered an energetic response, both from Hawaiians[4] objecting to perceived second-tier status within the union and from those in Washington sensing a rising tide of executive-branch attacks on the status and independence of federal judges.[5] One of Hawaii's U.S. Senators tweeted a photo of the Senate's unanimous roll-call vote confirming Judge Watson to his life-tenured Article III judgeship, noting that

1. *See* Andrew Kaczynski, *AG Sessions Says He's 'Amazed' a Judge 'on an Island in the Pacific' Can Block Trump's Immigration Order*, CNN (Apr. 21, 2017, 11:30 AM EST), https://www.cnn.com/2017/04/20/politics/kfile-sessions-psychoanalyze/index.html [https://perma.cc/VKU8-F2UU]; Audrey McAvoy, *Hawaii Lawmakers Criticize Sessions' Island Judge Remarks*, AP NEWS (Apr. 20, 2017), https://apnews.com/54be38d1d9de4b9e810a3e8e4700a1ad [https://perma.cc/EVQ2-SGCQ].

2. *See* McAvoy, *supra* note 1; Richard Wolf, *Travel Ban Timeline: 17 Months, Three Versions, Two Appeals Courts, One Supreme Court*, USA TODAY (June 26, 2018, 5:27 PM EST), https://www.usatoday.com/story/news/politics/2018/04/25/trump-travel-ban-timeline-supreme-court/547530002 [https://perma.cc/B3PW-EJ3N].

3. Aaron Blake, *Jeff Sessions Doesn't Think a Judge in Hawaii—a.k.a. 'an Island in the Pacific'—Should Overrule Trump*, WASH. POST (Apr. 20, 2017, 3:24 PM EST), https://www.washingtonpost.com/news/the-fix/wp/2017/04/20/jeff-sessions-doesnt-think-a-judge-in-hawaii-a-k-a-an-island-in-the-pacific-should-overrule-trump [https://perma.cc/Q9AE-XT9H]; *see* Hawai'i v. Trump, 263 F. Supp. 3d 1049, 1063 (D. Haw. 2017).

4. Acknowledging that the spellings "Hawai'i" and "Guåhan" are often favored as a matter of custom and in academic scholarship, *see* DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES 21-22 (2019), this Note employs the spellings "Hawaii" and "Guam" to parallel those uniformly used by Congress, the Supreme Court of the United States, and the Judicial Conference of the United States in the materials cited herein.

5. *See* Dara Lind, *Jeff Sessions's Attack on a Hawaii Judge Is an Attack on Judicial Review Itself*, VOX (Apr. 21, 2017, 11:40 AM EST), https://www.vox.com/policy-and-politics/2017/4/21/15383018/sessions-judge-hawaii-trump [https://perma.cc/S9DK-JJES]; Charlie Savage, *Jeff Sessions Dismisses Hawaii as 'an Island in the Pacific,'* N.Y. TIMES (Apr. 20, 2017), https://www.nytimes.com/2017/04/20/us/politics/jeff-sessions-judge-hawaii-pacific-island.html [https://perma.cc/CHP5-AFQZ].

Sessions himself had voted in favor of confirmation prior to becoming Attorney General.[6] Hawaii's Attorney General issued a statement to reaffirm that the "Constitution created a separation of powers in the United States for a reason. Our federal courts, established under [A]rticle III of the Constitution, are co-equal partners with Congress and the President. It is disappointing AG Sessions does not acknowledge that."[7]

On a national level, Sessions's island-judge controversy nested into a growing constellation of executive-branch assaults on the status and independence of federal judges[8]—a trend that has alarmed even President Trump's own judicial nominees[9] and high-ranking members of the Republican Party.[10] In an extraordinary move, Chief Justice John Roberts injected himself into the public conversation by issuing a statement to the *Associated Press*:

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6. Mazie Hirono (@MazieHirono), TWITTER (Apr. 20, 2017, 5:50 PM), https://twitter.com/maziehirono/status/855222156963319809 [https://perma.cc/449C-SDU8].

7. Press Release, Dep't of the Attorney Gen., Statement of Attorney General Doug Chin in Response to U.S. Attorney General Session's [sic] Recent Comment (Apr. 20, 2017), https://ag.hawaii.gov/wp-content/uploads/2017/01/News-Release-2017-42.pdf [https://perma.cc/JF4S-LUPG].

8. For a fuller accounting of the Trump Administration's attacks on the federal judiciary, see *In His Own Words: The President's Attacks on the Courts*, BRENNAN CTR. FOR JUST. (June 5, 2017), https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts [https://perma.cc/7YEM-VQEL].

9. As reported by *NBC News*, the following exchange took place during Neil Gorsuch's Supreme Court confirmation hearing:

> "When anyone criticizes the honesty, integrity, the motives of a federal judge, well, I find that disheartening, I find that demoralizing, because I know the truth," [then-Judge] Gorsuch said, responding to a question from Connecticut Sen. Richard Blumenthal hours into Tuesday's marathon grilling. "Anyone including the president of the United States?" Blumenthal asked. "Anyone is anyone," Gorsuch said. . . . "There is no such thing as a Republican judge, or Democratic judge. We just have judges in this country," he added.

Andrew Rafferty & Jane C. Timm, *Gorsuch: Trump Attacks on Federal Judges 'Disheartening,' 'Demoralizing'*, NBC NEWS (Mar. 22, 2017, 7:41 AM EST), https://www.nbcnews.com/politics/politics-news/neil-gorsuch-readies-grilling-confirmation-hearing-n736281 [https://perma.cc/6WSS-59PA].

10. During the 2016 presidential campaign, then-candidate Donald Trump attacked the impartiality of Indiana-born Judge Gonzalo P. Curiel of the Southern District of California, who had been presiding over a lawsuit related to the shuttered Trump University, because of his apparent Mexican heritage. *See* Eli Rosenberg, *The Judge Trump Disparaged as 'Mexican' Will Preside over an Important Border Wall Case*, WASH. POST (Feb. 5, 2018, 10:39 PM EST), https://www.washingtonpost.com/news/politics/wp/2018/02/05/the-judge-trump-disparaged-as-mexican-will-preside-over-an-important-border-wall-case [https://perma.cc/Q7W8-D3XT]. The Republican Speaker of the House of Representatives, Paul Ryan, immediately

> We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. . . . The independent judiciary is something we should all be thankful for.[11]

But this brand of objection to the Trump Administration's political tactics—whether dividing the federal bench into "Obama judges" and "Trump judges" or questioning individual judges' impartiality based on readily identifiable characteristics like Mexican heritage[12] or Hawaii residency—is mounted on difficult terrain. Today's defenders of the independent judiciary risk a blind spot in their framing of judicial norms: the fact that the federal judiciary *itself* perpetuates the notion that not all federal district judges are created equal.

Some four thousand miles west of Judge Watson's courtroom in the District of Hawaii sit the chambers of another island judge, Frances M. Tydingco-Gatewood. She is, by all accounts, an active member of the federal judiciary, vested with the same powers and responsibilities as the district judges in Hawaii and on the mainland. She also holds membership in the Ninth Circuit's Conference of Chief District Judges. But in terms of status and tenure protection, she and Judge Watson have little in common. Because Chief Judge Tydingco-Gatewood was appointed to the federal district court in Guam, a U.S. territory in the western Pacific, she does not enjoy life tenure—in fact, her judgeship formally expired in August 2016.[13] Initially appointed for a ten-year term by President George W. Bush in 2006, Chief Judge Tydingco-Gatewood was renominated by President

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disavowed Trump's position and called his remarks the "textbook definition of a racist comment" and "absolutely unacceptable." *Paul Ryan: Trump Made "Textbook Definition of a Racist Comment"*, PBS (June 7, 2016), https://www.pbs.org/weta/washingtonweek/web-video/paul-ryan-trump-made-textbook-definition-racist-comment [https://perma.cc/8JHC-4H3Z].

11. *See* Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap over Judges*, AP NEWS (Nov. 21, 2018), https://www.apnews.com/c4b34f9639e141069c08cf1e3deb6b84 [https://perma.cc/6WCM-JQLK].

12. *Id.*

13. *See Chief Judge Tydingco-Gatewood Nominated for Another Term*, PAC. DAILY NEWS (May 20, 2016, 12:12 AM ChST), https://www.guampdn.com/story/news/2016/05/18/district-court-guam-chief-judge-tydingco-gatewood-nominated-another-term/84566242 [https://perma.cc/GMS6-XLYB]. Federal judges appointed to the District Court of Guam have ten-year terms but can sit indefinitely pending a new appointment. *See* 48 U.S.C. § 1424b(a) (2018); Gaynor Dumat-ol Daleno, *Guam's Federal Judge May Need Trump Renomination*, PAC. DAILY NEWS (Dec. 5, 2016, 9:31 PM ChST), https://www.guampdn.com/story/news/2016/12/05/guams-federal-judge-may-need-trump-renomination/94981972 [https://perma.cc/8DYA-CJ2W].

Barack Obama in May 2016.[14] As the Obama Administration's first and only judicial nominee previously appointed to the bench by a Republican President, her confirmation could have been an asset to those now wishing to counter the "Obama judge" or "Bush judge" labels. However, the nomination expired without a vote at the conclusion of the 114th Congress.[15]

More than three years later, President Trump still has not nominated (or renominated) anyone to the District Court of Guam. As a result, Guam's district judge continues to hold her position without knowing whether she might be replaced tomorrow, next month, or not at all. This arrangement creates an ironic and dangerous appearance—that Presidents of the United States could exert considerable influence over certain parts of the independent judiciary by *not appointing* their own judicial nominees.[16] For example, by withholding his appointment power, President Trump can hold job security over the heads of federal judges in Guam and other territories where terms have expired to disincentivize them from ruling against his agenda. If and when the President decides he wants a different federal judge in one of these districts, he can simply nominate someone to fill the "vacancy."[17]

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14. *See Chief Judge Tydingco-Gatewood Nominated for Another Term*, *supra* note 13.

15. *PN1462 — Frances Marie Tydingco-Gatewood — The Judiciary*, CONGRESS.GOV, https://www.congress.gov/nomination/114th-congress/1462 [https://perma.cc/9VJ8-QJJJ].

16. *Cf.* Palmore v. United States, 411 U.S. 389, 413 (1973) (Douglas, J., dissenting) ("Without the independence granted and enjoyed by Art. III judges, a federal judge could more easily become the tool of a ravenous Executive Branch. This idea was reflected in Reports by Congress in 1965 and 1966, sponsoring a law that would give lifetime tenure to federal judges in Puerto Rico." (footnote omitted)); THE FEDERALIST NO. 79, at 384 (Alexander Hamilton) (Terence Ball ed., 2003) ("[A] power over a man's subsistence amounts to a power over his will." (emphasis removed)).

17. Until recently, this was also true in the U.S. Virgin Islands, where District Judge Curtis V. Gómez, whose term expired in 2015, sat in limbo for nearly four years before the President nominated someone to fill his "vacant seat" in May 2019. *See* Jonathan Austin, *Defense Attorney Challenges Gomez's Standing*, V.I. DAILY NEWS, ST. THOMAS (Oct. 8, 2015); *Trump Nominates V.I. Judge to Federal District Bench*, ST. JOHN SOURCE (May 30, 2019) [hereinafter *Trump Nominates V.I. Judge*], https://stjohnsource.com/2019/05/30/trump-nominates-v-i-judge-to-federal-district-bench [https://perma.cc/E3WA-4A5F]; *see also supra* note 195 and accompanying text (discussing Judge Gómez's pending replacement). In 2007, the U.S. Virgin Islands newspaper the *St. Croix Source* reported that some in the territory believed Judge Gómez had been appointed because his predecessor, Judge Thomas K. Moore, lacked a "fear of retribution" that "may have cost him his reappointment to the bench." *On Island Profile: Judge Thomas K. Moore*, ST. CROIX SOURCE (Mar. 27, 2007), https://stcroixsource.com/2007/03/27/island-profile-judge-thomas-k-moore [https://perma.cc/7K5X-2CCQ]; *see Judging Tom: Politics Bares Its Teeth*, ST. CROIX SOURCE (Nov. 17, 2003), https://stcroixsource.com/2003/11/17/judging-tom-politics-bares-its-teeth-0-538 [https://perma.cc/3UTW-RZ8G]. Before he was replaced, Judge Moore had openly criticized the *Insular Cases* and found racial and ethnic

As it turns out, Sessions's island-judge comment creates a useful device for uncovering the problem with the Chief Justice's rhetorical image of the independent judiciary. A close look at federal island judges—drawn from five of the federal judiciary's self-advertised ninety-four districts: Guam, Hawaii, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands—reveals that there is no coherent or unified status shared by all of these federal district-court judges. The group of federal island judges includes district judges with life tenure and salary protection (Hawaii and Puerto Rico),[18] as well as federal district judges who may be replaced at any time under the guise of a new appointment (Guam).[19] That both types of judges are counted within a singular "independent judiciary" casts doubt on the substantive meaning of that label.[20]

Historically, those who defend the differentiated status of the federal judiciary's island judges have cited institutional-development grounds.[21] During the first half of the twentieth century, these arguments were overtly racial. The U.S. Supreme Court consistently upheld divergent judicial practices in overseas possessions in the name of "aid[ing] the orderly administration of justice" where the United States "acquir[ed] territory peopled by savages."[22] But in the post-*Brown* era,[23] these arguments shed their explicit racial character in favor of an account centered on jurisdictional differences and functional concerns.[24] In this version of the argument, each territorial district court follows a "transitional model."[25] That is to say, it imagines territorial district courts to exist on a trajectory towards full equality at some future moment. Less-than-equal federal courts

prejudice inherent in the Virgin Islands' status under the U.S. Constitution. Ballentine v. United States, No. CIV. 1999-130, 2001 WL 1242571, at *7 (D.V.I. Oct. 15, 2001) ("[T]he nature and extent of the citizenship of residents of the Virgin Islands have been controlled up to now by a thoroughly ossified set of cases marked by the intrinsic racist imperialism of a previous era of United States colonial expansion.").

18. Act of Mar. 18, 1959, Pub. L. No. 86-3, § 9(a), 73 Stat. 4, 8 (District of Hawaii); Act of Sept. 12, 1966, Pub. L. No. 89-571, 80 Stat. 764, 764 (District of Puerto Rico).

19. 48 U.S.C. § 1424 (2018); *see Guam Federal Judge to Continue Seeking Renomination*, STARS & STRIPES (Dec. 6, 2016), https://www.stripes.com/news/pacific/guam-federal-judge-to-continue-seeking-renomination-1.442869 [https://perma.cc/9EVN-8V9D]; *Trump Nominates V.I. Judge*, *supra* note 17.

20. *See Understanding the Federal Courts*, ADMIN. OFF. U.S. CTS. 1-5, https://www.uscourts.gov/sites/default/files/understanding-federal-courts.pdf [https://perma.cc/N8LK-LVQA].

21. *See infra* Part II.

22. Dorr v. United States, 195 U.S. 138, 148 (1904) (denying a jury trial to a U.S. citizen accused of libel in the Philippines).

23. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

24. *See infra* Part II.

25. Peter Nicolas, *American-Style Justice in No Man's Land*, 36 GA. L. REV. 895, 991 (2002).

continue only as a matter of necessity, "avoid[ing] the risk of jurisdictional gaps while the territorial government takes time to organize itself."[26] As articulated by Peter Nicolas, the transitional model assumes that the jurisdiction of the federal territorial court "gradually shrinks as local territorial courts are created to adjudicate local matters," until eventually the federal court's docket "becomes indistinguishable from that of a typical Article III district court."[27] At that end point of legal maturity, when functional distinctions collapse, the model imagines status distinctions will collapse as well. The U.S. government would then extend full Article III protections, including life tenure and salary protection, to federal island judges.

Puerto Rican courts followed this precise trajectory during the 1950s and '60s. Informed by the transitional model, Congress observed in 1966 that the federal judge in Puerto Rico had become "the only such judge in the entire Federal system who does not have life tenure and whose court has exclusive Federal jurisdiction."[28] As functional differences in jurisdiction disappeared, Congress could not find "any reason" to deny Puerto Rico's federal court "the same treatment as a State . . . [and] the same dignity and authority enjoyed by other Federal district courts."[29] On September 12, 1966, President Johnson signed H.R. 3999 into law, conferring life tenure on judges of the U.S. District Court for the District of Puerto Rico, who previously sat for eight-year terms.[30]

But this moment also highlighted constraints imposed by the transitional model. The legislation that gave Puerto Rico's federal judges Article III protections carefully excluded the other territorial district judges in Guam, the U.S. Virgin Islands, and the Panama Canal Zone. The House Judiciary Committee explained this decision on the basis that Puerto Rico's district court exercised "*only* Federal jurisdiction,"[31] whereas "judges in the U.S. District Courts for Panama, the Virgin Islands, and Guam . . . exercise local jurisdiction as well."[32] In other words, Puerto Rico—and only Puerto Rico—had reached the functional terminus of Congress's transitional model. Employed to correct a problem in one territory, the transitional logic foreshadowed future problems in several more.

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26. *Id.* at 992.

27. *Id.*

28. S. REP. NO. 89-1504, at 2 (1966).

29. *Id.* at 2-3.

30. GUILLERMO A. BARALT, HISTORY OF THE FEDERAL COURT IN PUERTO RICO: 1899-1999, at 338-39 (Janis Palma trans., 2004).

31. H.R. REP. NO. 87-684, at 2 (1961) (emphasis added).

32. *Id.*

This Note traces the story of the federal island judges from the moment the District of Puerto Rico became an Article III court in 1966. Commentators have yet to fully observe the slow transformation in U.S. territorial-court jurisdiction that has been taking shape in the fifty years since. This transformation has had little to do with any formal changes to the status or composition of the federal district courts themselves. Rather, it has been driven by institutional developments at the *local* level—action by territorial legislatures to create appellate courts such as the supreme courts of the Commonwealth of the Northern Mariana Islands (1989), Guam (1994), and the Virgin Islands (2007).[33] Congress and the Judicial Conference, the federal courts' policy-making body, have repeatedly pointed to functional differences—specifically, the lack of "exclusive federal jurisdiction"—to exclude certain territorial judges from Article III protections.[34] But this functional justification rings increasingly hollow. The jurisdictional transformation of the last fifty years has divested these federal courts of their once-distinguishing local-law functions, leaving each of the territorial district courts with exclusive federal jurisdiction. The island judges who are still denied life tenure occupy the very position now that Congress intervened to correct in Puerto Rico in 1966.

In chronicling the now-outmoded logic of institutional difference in the territories' federal courts, this Note's immediate purpose is to shine a light into corners of the federal judiciary that exhibit arbitrariness or post hoc rationalization and to expose weaknesses in today's defenses of a unified, independent judiciary. Its broader purpose, however, is to show that the administrative facet of the judicial branch has been an underinterrogated space in the public discourse surrounding U.S. empire.

When evaluating the legacy of the United States's continued and uncertain sovereignty over Puerto Rico and other possessions, legal commentators of the past two decades focus almost exclusively on two areas: the doctrinal legacy of

33. The years 1989, 1994, and 2007 correspond to when each of these courts assumed jurisdiction over local-law appeals. *See infra* Part IV; *see also* Defoe v. Phillip, 702 F.3d 735, 737 n.1 (3d Cir. 2007) (noting that the Supreme Court of the Virgin Islands did not begin exercising its judicial authority until January 9, 2007, even though its enabling legislation had been passed in 2004). For the local legislation authorizing these courts, see 1988 N. Mar. I. Pub. L. No. 6-25; and Guam Pub. L. No. 21-147 (1992).

34. *See infra* Parts III & IV.

the *Insular Cases*[35] and the exercise of Congress's plenary power under the Territory Clause.[36] For example, some scholars, such as Efrén Rivera Ramos, posit that because of the *Insular Cases*' understanding of the Territory Clause, it is in the domain of "congressional policy . . . and not necessarily in the judicial sphere . . . that we find possibilities for moving forward with a resolution of the condition of the territories."[37] But the story of U.S. territorial courts over the past half century reveals a third space for evaluating the legal dimension of U.S. empire. At each stage of the territorial courts' transformation, the Judicial Conference of the United States, the Administrative Office of the U.S. Courts, and other judicial-branch institutions have been primary engines or inhibitors of change. Even today, these institutions play a key role in hiding the unequal status of island judges from public view.[38] This is a blind spot in our understanding of

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35. *See, e.g.*, Juan R. Torruella, *Ruling America's Colonies: The* Insular Cases, 32 YALE L. & POL'Y REV. 57 (2013); Rose Cuison Villasor, *Problematizing the Protection of Culture and the* Insular Cases, 131 HARV. L. REV. F. 127 (2018). The term *Insular Cases* refers to a series of early twentieth-century U.S. Supreme Court decisions holding that Puerto Rico and other territories acquired as a result of the Spanish-American War of 1898 were neither foreign nations nor within the meaning of the term "United States" for various constitutional purposes. *See, e.g.*, Downes v. Bidwell, 182 U.S. 244, 266-67 (1901). The most famous of the *Insular Cases*, *Downes v. Bidwell*, is best known for Justice Edward Douglass White's concurring opinion describing Puerto Rico as "foreign . . . in a domestic sense." *Id.* at 341 (White, J., concurring). Other *Insular Cases* include: *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); and *De Lima v. Bidwell*, 182 U.S. 1 (1901). For a developmental account of this constitutional doctrine and its origins in the legal academy, see SAM ERMAN, ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE 27-46 (2019). *Cf.* Sanford Levinson, *Why the Canon Should Be Expanded to Include the* Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 243-45 (2000) (arguing that the *Insular Cases*, which can be characterized as "central documents in the history of American racism," are conspicuously missing from law-school casebooks and the "academic theory canon").

36. *See, e.g.*, *Developments in the Law: The U.S. Territories,* 130 HARV. L. REV 1616 (2017); Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of "Territorial Federalism,"* 131 HARV. L. REV. F. 65 (2018).

37. Efrén Rivera Ramos, *The* Insular Cases*: What Is There to Reconsider?*, *in* RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 29, 36-37 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015). Ramos acknowledges, however, that in order to move forward in this domain, Capitol Hill often "needs prodding." *Id.* at 37. He writes that this "pressure must come from the peoples of the territories themselves, from sympathetic sectors of the American people, from the international community, and perhaps even from the White House." *Id.* Even within this framework, there is significant room to expand the account of the role that judicial administration and policy-making play in this discourse.

38. *See infra* Part IV; *see also* Stephen L. Wasby, *Judging and Administration for Far-Off Places: Trial, Appellate, and Committee Work in the South Pacific*, 45 GOLDEN GATE U. L. REV. 193 (2015) (exploring the work of various Pacific Islands-focused committees within the Judicial Conference

federal institutional relationships whose constitutional underpinnings are presently before the U.S. Supreme Court in *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*.[39]

For legal scholars, the story of federal island judges since 1966 reveals the importance of interrogating the instruments of U.S. empire that operate outside the marble chambers of Capitol Hill and the U.S. Supreme Court. It also refreshes Christina Duffy Ponsa's observation that an excessive focus on constitutional questions of political status (such as Puerto Rican statehood) can obscure and disrupt more productive conversations about functional autonomy.[40] The formal status of federal island judges has changed little since 1966, and yet their overall relationship to the mainland judiciary has evolved as much in the past fifty years as it did in the first half of the twentieth century, at the height of U.S. overseas imperialism. Prominent academics have already decried the omission of the *Insular Cases* from the constitutional-law canon,[41] but the story of the island judges evinces an equally pressing need for scholarship on the institutional development of U.S. territories below the constitutional level.

What is most instructive about this story is that it can only be observed by weaving together the idiosyncrasies of all territorial jurisdictions, each of which

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of the United States and Ninth Circuit Judicial Council and highlighting the tremendous influence of Ninth Circuit judges on the structure and development of these courts through the simultaneous exercise of adjudicatory and policy-making authority).

39. 915 F. 3d 838 (1st Cir. 2019), *cert. granted*, 139 S. Ct. 2735 (June 20, 2019); *see* Brief Amici Curiae of the American Civil Liberties Union and the ACLU of Puerto Rico, Supporting the First Circuit's Ruling on the Appointments Clause Issue, *Fin. Oversight & Mgmt. Bd. for P.R.*, No. 18-1334 (U.S. Aug. 29, 2019).

40. *See* Christina Duffy Ponsa, *When Statehood Was Autonomy*, *in* RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 1 (Gerald L. Newman & Tomiko Brown-Nagin eds., 2015). Ponsa argues that the constitutional-status framework produced by the *Insular Cases* has come to monopolize debates about Puerto Rico's future, which

> rendered these territories essentially invisible. The territories became, that is, doubly marginal: neither fully "domestic" nor fully "foreign," and devoid of both voting representation in the federal government and independent status on the international stage, they were at the top of nobody's agenda, and stripped of the power to set their own.

Id. at 2. Ponsa suggests that this discursive transformation of autonomist debates about Puerto Rican ethnic identity and pluralism into debates centered on U.S.-defined political statuses created new political fracture within Puerto Rico. *Id.* at 27-28.

41. *See* Sanford Levinson, *Installing the* Insular Cases *into the Canon of Constitutional Law*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 121 (Christina Duffy Burnett & Burke Marshall eds., 2001).

has unique institutional relationships with the federal government.[42] This exposes a threshold problem with the contemporary academic and political discourse on U.S. territories: it is often monopolized by questions of inequality that concern territories in isolation—and almost always Puerto Rico.[43] A coherent discourse on U.S. territorial relationships requires scholarship that monitors these relationships and unites them into a conceptual whole. Observing their collective momentum is essential to understanding the mechanics of a regime that denies four million U.S. citizens full equality across all three branches of government—voting representation in Congress, Electoral College votes, and access to federal courts with the decisional independence of those on the mainland.

Finally, this Note argues that it is in the interest of the judiciary, and in the interest of territorial self-determination, to put distance between the judicial branch and this vestige of U.S. imperialism. Rather than endorse a wholesale defense of judicial norms or strain to rationalize an outmoded logic of institutional difference, the Judicial Conference of the United States should do what it did with respect to Puerto Rican judges in 1957, 1958, 1959, 1961, 1963, and 1965: urge Congress to remedy the diminished independence of federal judges in the Commonwealth of the Northern Mariana Islands, Guam, and the U.S. Virgin Islands.[44] By masking the judiciary's own structures of institutional subordination—structures that are now divorced from their underlying functional justifications—the Judicial Conference tacitly endorses an arbitrary legal order with two sets of rules: one for in-groups and another for those at the margins.[45] To

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42. For instance, there has never been a federal district court in American Samoa, an example that provides a helpful foil for thinking about larger questions regarding the role of the federal judiciary in overseas possessions. *See generally* LINE-NOUE MEMEA KRUSE, THE PACIFIC INSULAR CASE OF AMERICAN SĀMOA: LAND RIGHTS AND LAW IN UNINCORPORATED US TERRITORIES (2018) (providing an overview of the legal traditions in American Samoa).

43. In the midst of the 2020 Democratic primary, candidates Elizabeth Warren, Cory Booker, Pete Buttigieg, Bernie Sanders, and Julián Castro brought considerable public attention to Puerto Rico's colonial status. *See, e.g.*, *Should Puerto Rico Be Granted Statehood?*, WASH. POST, https://www.washingtonpost.com/graphics/politics/policy-2020/voting-changes/puerto-rico-statehood [https://perma.cc/4WZQ-QR6U]. These candidates rarely (if ever) brought attention to parallel questions about the United States's relationships with Guam, the Northern Mariana Islands, the U.S. Virgin Islands, or American Samoa. *But see* Zusha Elinson, *Mike Bloomberg's $620 Million Campaign Did Really Well—in American Samoa*, WALL ST. J. (March 6, 2020, 6:42 PM ET), https://www.wsj.com/articles/mike-bloombergs-620-million-campaign-did-really-wellin-american-samoa-11583538043 [https://perma.cc/5FDQ-M2DB].

44. *See infra* Part III.

45. Although outside the scope of this Note, the present regime of island judges may also present Article III and Fifth Amendment problems. *See* Nguyen v. United States, 539 U.S. 69, 88-89

the same end, the Judicial Conference should direct the Administrative Office and Federal Judicial Center to stop obscuring these distinctions from public view. These bodies gamble with judicial legitimacy when they misrepresent the status of island judges in this way.

This Note takes no position on the important threshold question of whether federal courts ought to exist in overseas territories[46] or on the virtues or vices of

(2003) (Rehnquist, C.J., dissenting) (suggesting that although the petitioners' constitutional claims had been waived, their objection to having their appeal heard by a Ninth Circuit panel that included a non-life-tenured Article IV judge from the District Court for the Northern Mariana Islands could have run afoul of the Constitution's "guarantee of an impartial and independent federal adjudication"). In 2019, the Third Circuit considered and summarily rejected an appellant's Article III and Appointments Clause challenges to allowing territorial district judges who have exceeded their designated ten-year terms to adjudicate federal criminal cases. United States v. Ayala, 917 F.3d 752, 755-59 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 164 (2019) (rejecting these challenges and reaffirming early-nineteenth-century Supreme Court precedents that predate annexation of the United States's overseas territories); *see also* United States v. Canel, 708 F.2d 894, 897-98 (3d Cir. 1983) (addressing a Fifth Amendment due-process challenge to non-Article III district judges presiding over federal criminal trials that was raised prior to the major jurisdictional developments detailed in Part III).

46. The continued existence of federal courts in overseas territories is inherently linked to more fundamental questions surrounding the territories' constitutional and political future—questions properly answered through local processes of self-determination. Judge José A. Cabranes has argued that

> a federal court in Puerto Rico is *synonymous* with the application and enforcement of the laws of the United States and consistent with the idea that Puerto Rico is, and should be, a part of the American constitutional system in one form or another. It is therefore entirely understandable that someone who does not believe that Puerto Rico should be a part of the American system of government—who believes Puerto Rico should be an independent nation—will not recognize the legitimacy of a federal court in Puerto Rico. It is equally clear that one cannot believe in *some* form of permanent union with the United States and reject the idea of a federal court for Puerto Rico.

José A. Cabranes, *Judging in Puerto Rico and Elsewhere*, 49 FED. LAW. 40, 41 (2002). Whether or not Judge Cabranes is correct that any idea of permanent union with the United States assumes the existence of a federal court, *see, e.g.*, Uilisone Falemanu Tua, Comment, *A Native's Call for Justice: The Call for the Establishment of a Federal District Court in American Samoa*, 11 ASIAN-PAC. L. & POL'Y J. 246 (2009) (describing more than one hundred years of adjudication in American Samoa under U.S. sovereignty without a federal district court), the more important observation is that one who "live[s] in New Haven . . . probably lack[s] the standing to offer instructions to those who are *here* [in Puerto Rico] on how best *they* should resolve their most important political question." Cabranes, *supra*, at 41. For background on the various efforts to abolish the federal district court in Puerto Rico, see CARMELO DELGADO CINTRÓN, IMPERIALISMO JURÍIDICO NORTEAMERICANO EN PUERTO RICO (1898-2015), at 279-322 (2015), which describes early 1900s efforts; JOSÉ TRÍAS MONGE, 4 HISTORIA CONSTITUCIONAL DE PUERTO RICO 234 (1980), which describes mid-twentieth-century efforts; and BARALT, *supra* note 30, at 342-52.

judicial life tenure itself,[47] although lingering status questions in U.S. territories do provide a natural on-ramp to more fundamental questions about Article III and judicial independence at a time when public faith in the Supreme Court is approaching thirty-year lows.[48] Those deeper questions concerning the merits of judicial life tenure, the nationwide powers of district judges, or the constitutional future of U.S. overseas possessions are complex issues about which reasonable people disagree. The same cannot be said of a President's power to quietly fire a federal judge in response to an adverse decision.

Part I of this Note traces the historical development of federal judgeships in U.S. territories and the various justifications invoked to differentiate them from the rest of the Article III judiciary. Part II then describes the political moment leading to judicial life tenure in Puerto Rico in 1966 and the problems it foreshadowed for other territories. Part III examines the subtle transformation in U.S. territorial-court jurisdiction since 1966, which has eroded the logic once invoked to justify the separate status of island judges within the federal judiciary. Finally, Part IV explores the roles of the Judicial Conference, Administrative Office, and related judicial spaces in shaping and rationalizing these institutional relationships, and with them, the national discourse on both federal judicial independence and the legacy of U.S. imperialism.

I. ARTICLE IV COURTS AND THE LOGIC OF DIFFERENTIATION

The analytical category of "island judges" can be said to include three different types of federal district judges whose powers are functionally identical: undisputed Article III district judges with life tenure (Hawaii); Article IV district

47. Beyond general questions about federal judicial legitimacy, a full accounting of the effects or normative desirability of federal judicial life tenure *in U.S. territories* cannot be divorced from the larger structural conflicts that those judges are likely to come into contact with, as well as the politics and mechanisms of judge selection itself. *See* JOSÉ TRÍAS-MONGE, LEGISLATIVE AND JUDICIAL REORGANIZATION IN PUERTO RICO 214-55 (1948). Trías-Monge notes that "a system of life appointment to the judiciary" had already been developed in Puerto Rico under Spanish rule. *Id.* at 244. In his view, however, the impact of judicial reforms such as life tenure had been "fatally marred" by Spanish colonial policy "that not even the slightest degree of self-government was to be allowed the colonies." *Id.* at 245. Any juxtaposition of Trías-Monge's account of nineteenth-century Spanish colonial policy and the United States's formal commitments to paradigms of self-government during the twentieth century suggests very different stakes for questions of judicial life tenure within these two regimes.

48. *See* Amelia Thomson-DeVeaux & Oliver Roeder, *Is the Supreme Court Facing a Legitimacy Crisis?*, FIVETHIRTYEIGHT (Oct. 1, 2018, 6:00 AM), https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis [https://perma.cc/29EW-3S2V].

judges[49] serving ten-year terms and those who await replacement after their terms have expired (the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, and Guam); and district judges with Article III protections but whose precise constitutional status has been questioned by scholars (Puerto Rico).[50] The "Article IV judge" label refers to Congress's power to create

49. Article IV judges are sometimes lumped together with other types of non-Article III federal judges, such as U.S. magistrate judges, judges of military courts, and judges of Article I legislative courts like the U.S. Bankruptcy Court, U.S. Tax Court, or U.S. Court of Federal Claims. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 233-74 (7th ed. 2016). Unlike these other non-Article III adjudicators, Article IV district-court judges perform the same range of functions as Article III district judges (including jury trials and criminal sentencing), with or without the consent of the parties. Though many courts and commentators continue to refer to these federal judges in the territories as "Article I" judges, *see* Godfrey v. Int'l Moving Consultants, Inc., No. 79-cv-188, 1980 WL 626401, at *8 (D.V.I. Dec. 12, 1980) (referring to the District Court of the Virgin Islands as an Article I court), the "Article IV" label better reflects the source of Congress's power to create judicial structures in the territories that would violate Article III in the fifty states. U.S. CONST. art. IV, § 3, cl. 2 (granting to Congress the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"); *see* Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 589-93 (1985) (addressing Congress's authority to create non-Article III courts in the territories pursuant to constitutionally enumerated powers); *see also* Sere v. Pitot, 10 U.S. (6 Cranch) 332, 337 (1810) (relying on Article IV's Territory Clause to uphold Congress's "absolute and undisputed" power to define the jurisdiction of territorial courts).

50. The remainder of this Note adopts the Judicial Conference committees' characterization of the U.S. District Court for the District of Puerto Rico as an Article III court, *see, e.g.*, JUDICIAL CONFERENCE COMM., AGENDA F-10, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMM. ON FEDERAL STATE JURISDICTION 3 (Sept. 1994) [hereinafter AGENDA F-10], although some scholars have questioned the present court's constitutional status. Christina Duffy Burnett has argued that "it would be more accurate to say that Congress established a federal district court in Puerto Rico analogous to an Article III court, rather than to suggest that Congress had the discretion to 'extend' Article III to Puerto Rico." Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 822 n.107 (2005). Burnett suggests that Congress cannot truly be subject to the limitations of Article III when its plenary authority under the Territory Clause remains intact; in order for the District of Puerto Rico to be a true Article III court, Congress's plenary Article IV power must be constrained by Article III in the first place. *Id.* Using a slightly different argument, the U.S. District Court for the District of Puerto Rico's website explains that Congress established the court "as a Constitutional Court pursuant to Article III of the Constitution" because "[i]t is said that . . . Puerto Rico had 'ceased' being a territory upon the establishment of the Commonwealth." *Judges of the United States District Court*, U.S. DISTRICT CT. FOR DISTRICT OF PUERTO RICO, https://www.prd.uscourts.gov/judges-united-states-district-court [https://perma.cc/9MLF-2VRG]. But the 2015 Supreme Court term reaffirmed that Puerto Rico's Commonwealth Agreement did not extricate the territory from the reach of the Territory Clause. *See* Comment, Puerto Rico v. Sanchez Valle, 130 HARV. L. REV. 347 (2016). Peter Ni-

territorial courts pursuant to Article IV's Territory Clause,[51] which permits court structures in the territories that would violate the Constitution if Congress attempted to replicate them in a state under Article III. However, not all U.S. territorial courts created or authorized by Congress are counted among the ninety-four districts of the federal judiciary. For example, the High Court of American Samoa, although a product of federal law,[52] is not considered a federal court and does not correspond to any of the federal judiciary's ninety-four districts.[53]

For much of federal judicial history, *none* of the nation's non-Article III territorial courts were counted among the judicial districts of the Article III framework. The Judiciary Act of 1789, which created the federal court system, established federal districts only for areas within states that had ratified the Constitution.[54] Significantly, the 1789 Act excluded from the Article III frame-

colas notes that while "several commentators and courts now refer to the [Puerto Rico] district court as an Article III court . . . the matter has yet to be conclusively determined." Nicolas, *supra* note 25, at 990.

51. U.S. CONST. art. IV, § 3, cl. 2.

52. *See* 48 U.S.C. § 1661(c) (2018) (vesting all judicial powers in American Samoa in "such person or persons . . . as the President of the United States shall direct"); Exec. Order No. 10,264, 3 C.F.R. § 765 (1949-53) (vesting full authority over American Samoa's civil government in the Secretary of the Interior). For an account of the jurisdictional development of the High Court of American Samoa and its present relationship to the Department of the Interior, see MEMEA KRUSE, *supra* note 42.

53. Article IV state-court analogs, such as the High Court of American Samoa and the Supreme Court of Guam, are not the only overseas courts that have been excluded from the headcount of federal judicial districts. For example, the U.S. Court for China, which operated from 1907 to 1943, was never counted as a federal judicial district within the Article III framework, despite being described as "part of the Federal Judicial system, corresponding in grade mainly to the District Courts." CHARLES SUMNER LOBINGIER, AMERICAN COURTS IN CHINA 5-8 (1919); *see* Teemu Ruskola, *Colonialism Without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China*, 71 LAW & CONTEMP. PROBS. 217, 219-32 (2008) (analyzing the relationship of the so-called "District of China" to the Article III judicial framework and discussing notable appeals from that court to the Ninth Circuit); *see also* RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUDICIAL CTR., CREATING THE FEDERAL JUDICIAL SYSTEM 22 (3d ed. 2005) (depicting the federal judicial district and circuit organization in 1929, which counted the federal court in Puerto Rico but not the U.S. Court for China).

54. Act to Establish the Judicial Courts of the United States, ch. 20, § 2, 1 Stat. 73, 73 (1789) (outlining districts within the territories of the following states: Massachusetts, New Hampshire, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, South Carolina, and Georgia). This explains why the 1789 Act created stand-alone federal districts in non-states like Maine (which then belonged to Massachusetts) and Kentucky (which then belonged to Virginia) but no federal districts for North Carolina or Rhode Island, which had previously been recognized as states under the Articles of Confederation. *Id.*

work those courts Congress had recently organized for the Northwest Territory,[55] whose first judges had already been appointed when the 1789 Act became law.[56] Their exclusion from the rolls of the federal judiciary reflects the fundamentally different purpose that territorial courts served prior to late nineteenth-century overseas expansionism. In creating early America's territorial courts, Congress was acting as "the functional equivalent of a state legislature,"[57] establishing flexible, efficiency-minded tribunals "to deal with the everyday litigation matters that go before state courts in states."[58] Because settlement and westward expansion had formed a predictable arc linking the frontier to eventual statehood, more permanent court structures followed closely upon the heels of the expedient and hastily organized frontier judiciaries.[59] The original courts of the Northwest Territory all disappeared within fifteen years of their creation.[60]

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55. Arnold H. Leibowitz notes that the Northwest Ordinance was closely followed as a pattern of territorial organization: "[T]he Northwest Ordinance was either implicitly accepted as the governing statute for the newly acquired territories by the courts or was followed as the model in other governing legislation." ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 6 (1989).

56. *See* JAY FORD LANING, BEGINNINGS OF LAW AND ORDER IN THE NORTHWEST TERRITORY OF THE UNITED STATES, at XVIII (1925).

57. Resnik, *supra* note 49, at 590.

58. Stanley K. Laughlin, Jr., *The Constitutional Structure of the Courts of United States Territories: The Case of American Samoa*, 13 U. HAW. L. REV. 379, 384 (1991) (discussing the purpose and function of Article IV courts in early America). These courts' flexible design and implementation reflected the federal government's views toward the lands over which they entered judgment: their function, at least initially, was to rush ahead and lay the foundation for a rule of law where recognizable judicial institutions and permanent white settlements were lacking. One Chief Justice of the Supreme Court of Indiana, Timothy E. Howard, described the first Supreme Court of the Northwest Territory as "primitive," though with the caveat that "[t]he first session of the Court . . . was opened with impressive ceremonies,—as if the Judges realized the grand future of the government thus inaugurated." TIMOTHY E. HOWARD, THE INDIANA SUPREME COURT: WITH SOME ACCOUNT OF THE COURTS PRECEDING IT 7 (N. Ind. Historical Soc'y ed. 1900). Perhaps so rushed, George Washington's first nominee to Congress's newly minted Supreme Court of the Northwest Territory held his appointment for just three months. Justice Parsons had been claimed by the frontier, drowning after his canoe overturned on the journey from Connecticut to Marietta. LANING, *supra* note 56, at XVIII; Patrick J. Furlong, *The Governor vs. the Judges*, *in* PATHWAYS TO THE OLD NORTHWEST: AN OBSERVANCE OF THE BICENTENNIAL OF THE NORTHWEST ORDINANCE 47, 49 (1988).

59. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 543-47 (1962); *see, e.g.*, Resnik, *supra* note 49, at 590 (noting the "traditional explanation . . . that it was sensible not to require life-tenured judges for the territories because these lands would eventually become states").

60. The replacement began with the General Court of the Indiana Territory in 1801, *see* HOWARD, *supra* note 60, at 8, and a new U.S. district court and Supreme Court of Ohio upon admission to the Union in 1803. *See* Act to Provide for the Due Execution of the Laws of the United States, Within the State of Ohio, ch. 7, § 2, 2 Stat. 201, 201-02 (1803). Congress had created a

A century later, territorial courts remained excluded from the headcount of federal judicial districts, even where those courts bore the formal label of a federal "district court" and were installed with "the civil and criminal jurisdiction of district courts of the United States."[61] Today's concept of a non-Article III territorial *federal* court emerged only after the United States began to acquire overseas territories not destined for mass settlement.[62] In the aftermath of the Spanish-American War of 1898, the *Insular Cases* and resulting incorporation doctrine untethered the story of territorial-court development from the story of settlement, formal political equality, and statehood. That some of these territories, particularly Puerto Rico and the U.S. Virgin Islands, already possessed sophisticated legal systems at the time of annexation further disrupted the traditional pattern of judicial transformation that had occurred on the mainland.[63]

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district court for "the territory of the United States northwest of the Ohio, and the Indiana territory . . . to be called the district of Ohio" as part of the later-repealed Judiciary Act of 1801, ch. 4, § 4, 2 Stat. 89, 90, a component of the "midnight judges" controversy. Act of Mar. 8, 1802, ch.8, 1 Stat. 132. *See* Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494 (1961). In the Oregon Territory, the frontier judiciary organized by Congress in 1848 gave way to a new Article III district court just ten years later at the moment of statehood in 1859. *See* Act to Provide for Extending the Laws and Judicial System of the United States to the State of Oregon and for Other Purposes, ch. 85, § 2, 2 Stat. 437 (1859).

61. For example, the Federal Judicial Center's own publications include an 1891 map of the federal judiciary showing sixty-seven judicial districts. WHEELER & HARRISON, *supra* note 53, at 20. This count omits the district court in Alaska, which had been hearing cases under federal law for seven years. *See* Act of May 17, 1884, ch. 53, §§ 1, 3, 15 Stat. 240, 240 ("That there shall be, and hereby is, established a district court for said district [of Alaska], with the civil and criminal jurisdiction of district courts of the United States . . . and a district judge shall be appointed for said district.").

62. Chief Justice Taft wrote in *Balzac* that

> Alaska was a very different case from that of Porto Rico. It was an enormous territory, very sparsely settled and offering opportunity for immigration and settlement by American citizens. It was on the American Continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents . . . .

Balzac v. Porto Rico, 258 U.S. 298, 309 (1922); *see also* ERMAN, *supra* note 35, at 28-29 (discussing President McKinley's "provisions to deny U.S. citizenship" to people in Alaska and "duck[ing]" of "questions about the political status" of those in Puerto Rico and the Philippines).

63. For an extended discussion of Puerto Rico, see *infra* Part III. In the Virgin Islands, the United States left intact a Danish constitutional system that had been in place since 1863. As Gordon K. Lewis observes, this produced an "anomaly of being governed by an odd combination of American sovereignty and Danish institution, with the minor modification, of course, of a changed nomenclature to conform to American usage." GORDON K. LEWIS, THE VIRGIN ISLANDS: A CARIBBEAN LILLIPUT 45 (1972).

Divorced from any immediate prospect of statehood and mass settlement, the arguments employed to justify divergent court structures adopted an overtly racial character during the first half of the twentieth century. In 1904, the Supreme Court upheld a decision by the Philippine Commission under then-Civil Governor William Howard Taft to deny jury trials to two U.S. citizens accused of libel in the Philippines, on the explanation that "uncivilized parts of the archipelago were wholly unfitted to exercise [that] right."[64] The majority concluded that requiring newly established Philippine courts to operate the mainland's jury system might "work injustice and provoke disturbance rather than . . . aid the orderly administration of justice," impeding future scenarios in which the United States, "impelled by its duty and advantage, shall acquire territory peopled by savages."[65] In 1922, former President Taft—now Chief Justice of the United States—wrote an opinion denying jury-trial rights to a U.S. citizen journalist accused of libel in Puerto Rico. While addressing the structure of Puerto Rico's federal district court, Chief Justice Taft noted a close "resemblance of its jurisdiction to that of true United States courts" before ultimately deferring to Congress's observation that "a people like . . . the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions" did not satisfy the jury system's need for "citizens trained to the exercise of the responsibilities of jurors."[66] As Judge Juan R. Torruella has pointed out, "Taft conveniently overlooked the fact that civil and criminal jury trials had been conducted in the U.S. District Court for Puerto Rico for twenty-three years, since 1899."[67]

Judge selection for the early island courts mirrored the paternalism of Taft's opinion. Even though Puerto Rico had already developed an advanced judiciary and functioning law school prior to World War I,[68] Congress imported twelve mainland judges to the District of Puerto Rico—none of them Puerto Rican—before Clemente Ruiz Nazario became the island's first native-born district judge in 1952.[69] As was the case with many colonial officials and administrators at the

64. Dorr v. United States, 195 U.S. 138, 145 (1904); *see also Outlawing American Citizens*, WATCHMAN, June 9, 1904, at 5 (describing the "absurdity" of the *Dorr* decision's "entirely new development of the limitations of American citizenship").

65. *Dorr*, 195 U.S. at 148.

66. *Balzac*, 258 U.S. at 310.

67. Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 326 (2007).

68. *See* CINTRÓN, *supra* note 46, at 178-81.

69. *See* Aida M. Delgado Colón, *Anniversary Message from the Chief Judge of the U.S. District Court*, FROM THE BAR, Summer 2016, at 3; *see also* BARALT, *supra* note 30, at 139 tbl.3.3. In 1984, the

turn of the twentieth century, the United States cycled quickly through its federal judges in Puerto Rico.[70] Life tenure made little sense for appointees on this temporary assignment. Of the first six judges sent down by the federal government, none remained for more than four years.

By the middle of the twentieth century, the arguments justifying differentiated federal judgeships shed their explicit racial character, evolving into facially race-neutral and noncolonial arguments about functional differences in jurisdiction. In the ensuing decades, the unequal status of the remaining island judges outside of Puerto Rico was defended as a temporary "transitional model."[71] In this version of the developmentalist argument, the federal courts in overseas territories moved on an imagined trajectory towards full equality at some future moment, differentiated only to "avoid[] the risk of jurisdictional gaps while the territorial government takes time to organize itself."[72] The transitional model envisions that the jurisdiction of the federal territorial court "gradually shrinks as local territorial courts are created to adjudicate local matters until its docket becomes indistinguishable from that of a typical Article III district court."[73]

By reframing the justification as one of practical necessity within a larger effort of enhanced self-government, the transitional model implies that local institutions, not the federal government, account for the continued status distinction. The contours of this theory emerged in the late 1950s, when the Judicial Conference of the United States first approached Congress with the observation that functional distinctions between the Article IV district court in Puerto Rico and Article III district courts on the mainland had collapsed.

II. THE 1966 LANDSCAPE: A NEW STATUS FOR PUERTO RICO (ONLY)

The present condition of federal island judges and the constraints of the transitional model are best understood against the backdrop of Congress's decision to convert the District of Puerto Rico into an Article III court in 1966. By the late

United States Courthouse in Hato Rey, Puerto Rico, was named after Judge Nazario. *See* Act of Oct. 30, 1984, Pub. L. No. 98-589, 98 Stat. 3114.

70. *See* IMMERWAHR, *supra* note 4, at 155 (contrasting European colonial administration with the U.S. practice of appointing administrators who could not speak the native language and who "cycled rapidly through their posts").

71. *See* Nicolas, *supra* note 25, at 990-93.

72. *Id.* at 992.

73. *Id.*

1950s, judicial reforms in Puerto Rico had divested the federal court of the functional differences that once separated it from mainland district courts. Because the District Court of Puerto Rico resembled Article III courts in every sense other than tenure and salary protection, Congress saw no reason to deny Puerto Rico "the same dignity and authority enjoyed by the other Federal district courts."[74] In Congress's view, equality would aid the district judges to "perform their functions impartially, particularly in those cases involving the Federal Government on one side and the Commonwealth government on the other."[75]

1966 is as significant for what did not change as it is for what did. The reforms deliberately excluded all of the federal district judges in Guam, the U.S. Virgin Islands, and the Panama Canal Zone, whose courts still exercised sizable local-law jurisdiction as of 1966.[76] By excluding the federal island judges outside of Puerto Rico, Congress doubled down on the logic of the transitional model that has controlled the regime of federal territorial courts ever since,[77] endorsing formal inequality for federal judges whose courts had not completed the transition to exclusive federal jurisdiction.

The Judicial Conference of the United States played a critical role in the 1966 Puerto Rico legislation.[78] Over nearly a decade, the Judicial Conference repeatedly urged Congress to pass this legislation, drafting and submitting the bill to five consecutive Congresses before it finally became law.[79] Although these repeated judicial recommendations were not the only driving force behind that law,[80] the story of Congress's 1966 Puerto Rico legislation foregrounds the key role that the Judicial Conference and other judicial spaces played in elevating these status distinctions onto legislative and executive agendas and entrenching the transitional logic used to justify the remaining distinctions.

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74. 112 CONG. REC. 20,768 (1966).

75. *Id.*

76. *See infra* Part III.

77. *See infra* Part IV.

78. The Judicial Conference of the United States, the official policy-making body of the judicial branch, is composed of the Chief Justice of the United States, the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each regional judicial circuit. *See* 28 U.S.C. § 331 (2018). Its enabling legislation specifies that "[t]he Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation." *Id.*

79. *See infra* notes 88-93 and accompanying text.

80. *See infra* Part III. Landmark events of the early 1960s, including the Cuban Missile Crisis, the civil-rights movement, and the creation of the Puerto Rico Status Commission brought renewed attention to Puerto Rico's uncertain relationship to federal institutions.

A. Puerto Rico Comes into View

By the early 1950s, the District of Puerto Rico was approaching the endpoint of the transitional model. A series of important functional transformations during the first half of the twentieth century revealed that Puerto Rico's federal judge had become "the only such judge in the entire Federal system who does not have life tenure and whose court has exclusive Federal jurisdiction."[81] Most significantly, the Judicial Article of Puerto Rico's new Commonwealth Constitution, ratified in 1952, reorganized the territory's local court system and vested the Supreme Court of Puerto Rico with final authority over all matters of local law.[82]

The original district court in Puerto Rico hardly resembled the court Congress sought to reform in 1966. The early "district court of the United States for Porto Rico," formally established by the Foraker Act in 1900,[83] was the final appellate authority for decisions from the Supreme Court of Puerto Rico from 1900 until 1915, when the district court became subject to appellate review by the First Circuit Court of Appeals.[84] It was not until 1961 that the Supreme Court of Puerto Rico was deemed eligible for direct review by the U.S. Supreme Court—rather than by a federal district or circuit court—putting it on the same procedural plane as its state court counterparts.[85] Puerto Rico's district court also shed its initially expansive diversity jurisdiction, which for many years permitted cases or controversies between two aliens residing in the territory.[86] By the late 1950s, the First Circuit noted, "[The territories of] Hawaii and Puerto Rico are included as judicial districts of the United States, since in matters of jurisdiction, powers, and procedure, they are in all respects equal to other United States district

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81. S. REP. NO. 87-684, at 1-2 (1961).

82. *See* Charles E. Clark & William D. Rogers, *The New Judiciary Act of Puerto Rico: A Definite Court Reorganization*, 61 YALE L.J. 1147, 1153-55 (1952); Juan M. García-Passalacqua, *The Judicial Process and the Status of Puerto Rico*, 30 REV. JURÍDICA U. P.R. 145, 153-54 (1961). Despite withholding life tenure from the original federal district court in Puerto Rico, whose judges were originally granted four-year terms, Congress did not discontinue life tenure in the Supreme Court of Puerto Rico in 1898. TRÍAS MONGE, *supra* note 47, at 257-60, 275; *see* P.R. CONST. art. V; *supra* note 47 and accompanying text.

83. Foraker Act, ch. 191, § 34, 31 Stat. 77, 84 (1900).

84. *See* Royal Ins. Co. v. Martin, 192 U.S. 149, 160 (1904) (holding that Congress did not intend any connection between the district court in Puerto Rico and any circuit court of appeals); *see also* Act of January 28, 1915, ch. 22, 38 Stat. 803 (adding the district court in Puerto Rico to the First Circuit Court of Appeals).

85. *See* Act to Eliminate the Right of Appeal from the Supreme Court of Puerto Rico to the Court of Appeals for the First Circuit, Pub. L. No. 87-189, 75 Stat. 417, 417 (1961).

86. *See* BARALT, *supra* note 30, at 228-29.

courts."[87] The court went even further to note the significance of these changes within the context of the transitional model:

> Congress was intent on raising the status of the district courts in Hawaii and Puerto Rico from that of territorial courts established under the respective organic acts to that of district courts of the United States . . . on a parity with the other federal district courts . . . . Indeed, since these two courts exercise only federal judicial power as defined by Article III, section 2, of the Constitution they might well be regarded as constitutional district courts indistinguishable in any respect from the federal district courts in the States, were it not for the fact that Congress has treated their judges differently from the other district judges in the matter of tenure of office.[88]

The erasure of functional differences was a matter of great concern to the Judicial Conference. Without these differences, there did "not appear any reason why the U.S. district judges for the District of Puerto Rico should not be placed in a position of parity as to tenure with all the other Federal judges throughout the judicial system."[89] Faced with this arbitrariness concern, the Judicial Conference was the first actor to propose a change to the District of Puerto Rico's status within the federal judiciary. The Judicial Conference's draft bill was straightforward: to "provide that the U.S. district judge for the district of Puerto Rico . . . be appointed to serve during good behavior."[90] By 1961, the House Judiciary Committee concurred in the observation that the U.S. district court in Puerto Rico had become identical to U.S. district courts in the states "in its jurisdiction, powers, and responsibilities" and recommended that the legislation be passed.[91]

From the perspective of the Judicial Conference, part of what brought the District of Puerto Rico into relief from the rest of the judiciary was the admission of Alaska and Hawaii as states in 1959.[92] When Congress originally created the District of Puerto Rico, a mosaic of other non-Article III tribunals (operating in territories that were clearly on the path to statehood) obscured its divergence

87. Miranda v. United States, 255 F.2d 9, 14 (1st Cir. 1958) (quoting H.R. REP. NO. 80-308, at 6 (1947)).

88. *Id.* at 14-15.

89. H.R. REP. NO. 89-135, at 2 (1965); *see also id.* at 2-3 (noting that the Judicial Conference had previously recommended this reform to the 86th, 87th, and 88th Congresses).

90. H.R. REP. NO. 87-684, at 3 (1961).

91. *Id.* at 2.

92. JUDICIAL CONFERENCE, REPORT OF THE PROCEEDINGS OF A SPECIAL SESSION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 29-30 (Mar. 1959) [hereinafter 1959 SPECIAL SESSION].

from mainland court structures. Congress had established similar transitional courts in places like Oklahoma, New Mexico, Arizona, Alaska, and Hawaii—all of which had yet to enter the Union when the United States annexed Puerto Rico.[93] The last two, Alaska and Hawaii, were admitted as states in 1959 under enabling acts that expressly transformed their Article IV district courts with limited-tenure judgeships into life-tenured Article III tribunals.[94] These developments allowed the Judicial Conference to frame the issue of Puerto Rican judicial independence as a true jurisdictional abnormality. Central to the Conference's 1959 recommendation was the observation that Puerto Rico's federal district judge had become the *only* judge in the entire federal system without life tenure whose court had exclusive federal jurisdiction.[95] This observation also captured the House Judiciary Committee's statement of purpose when it drafted H.R. 3999, the Act extending life tenure to district judges in Puerto Rico, six years later.[96]

Of course, seven years of continuous Judicial Conference prodding suggests that Congress may not have based its decision to extend life tenure to Puerto Rico's judges solely on judicial-branch concerns about the inequality among federal district judges. The law's history suggests that these Judicial Conference recommendations became a channel for broader concerns surrounding the relationship between the federal government and the Puerto Rican Commonwealth during the early 1960s. By the time the legislation passed, the Departments of Justice and Interior had both weighed in to voice their formal support for judicial life tenure in Puerto Rico.[97] Several mid-twentieth-century developments in the territory's formal relationship to the United States, whose presence in the Caribbean was of mounting international significance in the two decades following World War II,[98] may have also helped to move the needle towards judicial reform. During this period, a range of formal and informal institutional reforms

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93. *See* PETER B. SHERIDAN, CONG. RESEARCH SERV., CRS 85-765, ADMISSION OF STATES INTO THE UNION AFTER THE ORIGINAL THIRTEEN: A BRIEF HISTORY AND ANALYSIS OF THE STATEHOOD PROCESS 4-6, 15-17, 35-37, 40-42 (1985).

94. U.S. district-court judges in the Territory of Hawaii served six-year terms. Act of Apr. 30, 1900, ch. 339, § 86, 31 Stat. 141, 158 (calling for the establishment of a district court in Hawaii, with the judge to be appointed by the President for a six-year term and having the same jurisdiction and powers as U.S. district and circuit courts); *see also* H.R. REP. NO. 89-135, at 2 (1965) (explaining why Puerto Rican judges should not be deprived of life tenure).

95. *See* H.R. REP. NO. 87-684, at 5 (statement of Deputy Att'y Gen. Byron R. White).

96. H.R. REP. NO. 89-135, at 2.

97. *Id.*

98. *See* Juan M. García-Passalacqua, *Intertwined Futures: Puerto Rico, the United States, the Caribbean Basin, and Central America*, 9 FLETCHER F. 269, 269-70 (1985).

designed to signal increased Puerto Rican autonomy and home rule gained traction in Washington, notwithstanding prominent efforts of Puerto Rican elected leaders to obtain most of them in the five decades prior. Reforms of this period included the island's first democratic gubernatorial election, a new constitution, a new formal political label of "Commonwealth," the first Puerto Rican federal judge, and eventually, the protection of judicial life tenure.[99]

All of this occurred against the backdrop of new pressures on U.S. national security interests, both domestically and under international law. By the start of the 1950s, the United States faced mounting pressure to replace its traditional forms of territorial administration with recognizable consent relationships. The United States brought much of this pressure upon itself. It struggled to persuade the international community to observe and enforce rights of self-government against a spreading tide of communism so long as those rights rang hollow at home.[100]

The threat of global communism spurred a first wave of development in the Puerto Rico-U.S. relationship immediately following World War II.[101] This period saw a shift toward a formalistic "consent paradigm," reflecting the United States's desire to win international acceptance of its long-term overseas projects while maintaining an aggressive rhetoric of popular consent in the fight against communism.[102] The U.S. government publicly committed itself to the consent paradigm's imperatives of self-determination and local autonomy, while doubling down on its practice of lodging key defense interests within the territories and preserving the political branches' prerogative over them.[103]

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99. *See* GUSTAVO A. GELPÍ, THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES, 1998-PRESENT 121-24 (2017); Delgado Colón, *supra* note 69, at 3-5.

100. HOWARD P. WILLENS & DEANNE C. SIEMER, NATIONAL SECURITY AND SELF-DETERMINATION: UNITED STATES POLICY IN MICRONESIA 1961-1972, at 57-82 (2000).

101. Political turbulence within the territory also accelerated these developments. A series of armed uprisings in 1950 targeted or destroyed government buildings in Peñuelas, Jayuya, Mayagüez, Utuado, Arecibo, and San Juan. And on November 1, 1950, Puerto Rican nationalists opened fire on Blair House in Washington, D.C., in an attempt to assassinate President Truman. *See* CHÉ PARALITICI, HISTORIA DE LA LUCHA POR LA INDEPENDENCIA DE PUERTO RICO: UNA LUCHA POR LA SOBERANÍA Y LA IGUALDAD SOCIAL BAJO EL DOMINIO ESTADOUNIDIENSE 148-49 (2017); *see also* JOSÉ TRÍAS MONGE, COMO FUE: MEMORIAS 189-200 (2005) (discussing Puerto Rican efforts in pursuit of self-determination during the 1950s).

102. Chimène I. Keitner, *From Conquest to Consent: Puerto Rico and the Prospect of Genuine Free Association*, *in* RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 77, 79, 101-02 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015); *see* García-Passalacqua, *supra* note 98, at 269-80.

103. *See* Keitner, *supra* note 102, at 109-10; *see also* U.S. DEP'T DEF., INDO-PACIFIC STRATEGY REPORT 1-24, 45 (2019), https://media.defense.gov/2019/Jul/01/2002152311/-1/-1/1/department-of-defense-indo-pacific-strategy-report-2019.pdf [https://perma.cc/P4WA-HW28].

The next decade brought yet another wave of pressure on the United States to reconsider its territorial relationships, notwithstanding formal consent to "commonwealth status" and popular ratification of Puerto Rico's constitution in 1952. The Cuban Missile Crisis and civil-rights movement supplied new motivations for the United States to attend to questions surrounding Puerto Rico's constitutional status and political autonomy. Altering the status of Puerto Rican courts was an attractive route for policy-makers who wished to signal the formal equality of Puerto Ricans without making significant administrative or financial commitments.[104] As Christina Duffy Burnett and others have suggested, the decision to extend Puerto Rico the same functional protections as an Article III district arguably changed nothing about that court in the constitutional sense, surrendering none of Congress's plenary power over the territories under Article IV.[105]

In short, a host of forces external to the judiciary spurred Congress to adjust the status of Puerto Rico's judges in 1966. But although the success of this legislation did not begin and end with recommendations from the Judicial Conference, its recommendations played a critical role in highlighting the obsolescence of the transitional model for Puerto Rico. The District of Puerto Rico's current Chief Judge, Gustavo A. Gelpí, has written that the present parity between district judges in Puerto Rico and those in the mainland "would not have been possible but for the vision of the Judicial Conference."[106] In its repeated recommendations to adjust the status of Puerto Rico, the Judicial Conference assumed a noticeably more active posture toward judges in overseas territories than it appears to adopt today.[107] Instead of hiding its non-Article III judges behind ill-fitting *Federalist No. 78* images of a singular and uniformly independent judiciary,[108] the Judicial Conference took action, becoming both the first mover and loudest voice in challenging the differential treatment of territorial judges.

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104. A 1992 memorandum from the Ninth Circuit Judicial Council's Pacific Islands Committee explained that "expense is not a major factor" in "denying federal judges the independence that Article III confers . . . . [J]udges and staffs [would be] paid just as they would be if Article III status were conferred on the judges." Memorandum from David Pimentel, Assistant Circuit Exec., U.S. Courts for the Ninth Circuit, to Judge Alfred T. Goodwin, Ninth Circuit Court of Appeals, at 5 (Aug. 18, 1992) (on file with author) [hereinafter Pimentel Memorandum].

105. *See* Ponsa (née Burnett), *supra* note 50, at 822 n.107.

106. GELPÍ, *supra* note 99, at 144.

107. *See infra* Part IV.

108. *Federalist No. 78* famously details Alexander Hamilton's vision of a uniformly independent federal judiciary insulated by life tenure, calling judicial life tenure an "indispensable ingredient" of the Constitution and "the citadel of the public justice and public security." THE FEDERALIST NO. 78, at 378 (Alexander Hamilton) (Terence Ball ed., 2001). *Federalist No. 78* also explicitly rejects the idea of limited-term judgeships within this vision of the federal judiciary:

B. Cementing the Logic of the Transitional Model: "Exclusive Federal Jurisdiction"

Although the District of Puerto Rico's transformation into a life-tenured court is an important moment in federal judicial history, the 1966 legislation is equally important for what it left untouched. That Puerto Rico's federal court had outgrown the logic of the transitional model brought renewed attention to the model itself—specifically, whether the *other* island judges (those in Guam, the U.S. Virgin Islands, and the Panama Canal Zone) ought to be included in the new law, or left in transitional limbo. Congress ultimately concluded that life tenure was inappropriate in the remaining overseas courts, citing lingering jurisdictional differences in the domain of local law.[109] The decision to grant Article III protections solely to Puerto Rico cemented the transitional logic that has governed separate status of federal territorial courts ever since. In the context of the 1966 court landscape, the transitional model provided a facially nonracial, noncolonial basis for differentiation. But Congress set the stage for a future in which the other territories would occupy the same position that the District of Puerto Rico occupied in the early 1960s—a position for which the eighty-ninth Congress could no longer find "any reason" to deny "parity as to tenure with all other Federal judges throughout our judicial system."[110]

> [A]dherence to the rights of the Constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would in some way or other be fatal to their necessary independence.

Id. at 382. During Supreme Court confirmation hearings, Senators, nominees, and commentators of varied political affiliations frequently quote *Federalist No. 78*. *See, e.g.*, *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 2*, C-SPAN 1:52:12 (Sept. 5, 2018), https://www.c-span.org/video/?449705-10/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-2 [https://perma.cc/B6LB-BAVF] (featuring a question by Senator Mike Lee specifically referencing *Federalist No. 78*); *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 4*, C-SPAN 42:00 (Sept. 5, 2018), https://www.c-span.org/video/?449705-14/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-4 [https://perma.cc/2EGP-PL7F] (featuring a question by Senator Jeff Flake specifically referencing *Federalist No. 78*); *see also Al Gore Quotes Federalist 78 in Speech on Judicial Confirmation Process*, NBCLEARN (Apr. 27, 2005), https://static.nbclearn.com/files/nbcarchives/site/pdf/2982.pdf [https://perma.cc/S4UE-QL8G] (noting Al Gore's quotation of *Federalist No. 78*); *Roberts Confirmation Hearing, Day 1*, C-SPAN 38:20 (Sept. 12, 2005), https://www.c-span.org/video/?188437-1/roberts-confirmation-hearing-day-1 [https://perma.cc/6S35-PR2C] (featuring the remarks of Senator Orrin Hatch).

109. *See infra* notes 115-118 & accompanying text.

110. H.R. REP. NO. 89-135, at 2 (1965).

At the time of the 1966 law's passage, the House Judiciary Committee expressly considered whether it ought to similarly revise the limited eight-year terms of district judges in Guam, the U.S. Virgin Islands, and the Panama Canal Zone. One argument in favor of including them was grounded in the transformation of Hawaii and Alaska's territorial district courts into Article III tribunals in 1958 and 1959—a change that the Judicial Conference recommended at least two years prior to Hawaii becoming a state.[111] While acknowledging some degree of similarity between Hawaii and Puerto Rico in that "[f]ormerly, the judges in the U.S. district court in Hawaii had a similar 8-year term," the committee distinguished the cases of Hawaii and Alaska by explaining that it was only "upon admission" that these district-court judges received their life tenure.[112]

The Committee then distinguished Puerto Rico from other territorial districts, noting that Puerto Rico's federal court had become "in its jurisdiction, powers, and responsibilities the same as the U.S. district courts in the several States."[113] Importantly, Puerto Rico's district court exercised "*only* Federal jurisdiction, the local jurisdiction being exercised by a system of local courts headed by a Supreme Court of the Commonwealth of Puerto Rico."[114] In contrast, "judges in the U.S. district courts for Panama, the Virgin Islands, and Guam . . . exercise[d] local jurisdiction as well."[115] For example, in Guam and the U.S. Virgin Islands, all appeals in matters of local law were heard by an appellate division of the district court, as neither territory yet had its own supreme court or equivalent appellate body.[116] In the District Court for the Canal Zone, federal judges regularly heard cases related to divorce, child support, and alimony.[117] Similarly,

111. *See* REPORT OF THE PROCEEDINGS OF THE REGULAR ANNUAL MEETING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, JUDICIAL CONFERENCE 43 (1957), https://www.uscourts.gov/sites/default/files/1957-09_0.pdf [https://perma.cc/2ED6-LNJQ].

112. H.R. REP. NO. 89-135, at 2 (1965).

113. *Id.*; 112 CONG. REC. 20,767 (1966).

114. 112 CONG. REC. 20,767 (1966) (emphasis added).

115. *Id.*

116. *See* Guam v. Olsen, 431 U.S. 195, 198-204 (1977); Defoe v. Phillip, 702 F.3d 735, 737 (3d Cir. 2012).

117. *See, e.g.*, Egle v. Egle, 715 F.2d 999, 1001 (5th Cir. 1983) (affirming, in part, the district court's modification of a custody order).

the District Court of Guam exercised original jurisdiction over local-law felonies.[118] In effect, Congress made exclusive federal jurisdiction the formal touchstone of the transitional model, a phrase that would feature prominently in later discussions within the Judicial Conference about whether Article III protections should be extended to the Commonwealth of the Northern Mariana Islands, not yet a U.S. territory in 1966.[119]

A number of commentators treat 1966 as a landmark in the history of the federal courts.[120] But the moment that produced Article III protections for the District of Puerto Rico foreshadowed future problems of differentiation in other territories. By cementing the logic of the transitional model and exclusive federal jurisdiction, Congress set the stage for the Puerto Rico problem to arise at least three more times: first, in the Commonwealth of the Northern Mariana Islands; next, in Guam; and finally, in the U.S. Virgin Islands.

III. A SLOW TRANSFORMATION: 1966 TO 2020

Congress's observations about the landscape of territorial courts in 1966 did not hold for long. Outside of Puerto Rico, a tectonic shift in territories' local jurisdiction fundamentally reshaped the foundation upon which Congress had legislated. In some respects, the fabric of U.S. territorial courts has transformed as much from 1966 to the present as it did from 1898 to 1966.[121]

The rapid disappearance and restructuring of territorial courts during this period lends support to the observation that Congress and delegated officials "used their hands freely in designing territorial court systems, often with little

118. *See* 1967 ANNUAL REPORT FROM THE GOVERNOR OF GUAM TO THE SECRETARY OF THE INTERIOR, at 6; *see also* Hatchett v. Gov't of Guam, 212 F.2d 767, 771-72 (9th Cir. 1954) (reversing a District Court of Guam criminal conviction based on violations of Guam's Penal and Vehicle Codes).

119. *See* AGENDA F-10, *supra* note 50, at 3.

120. *See, e.g.*, David M. Helfeld, *Understanding United States-Puerto Rico Constitutional and Statutory Relations Through Multidimensional Analysis*, 82 REV. JURÍDICA U.P.R. 841, 866-69 (2013).

121. In addition to the jurisdictional transformations detailed in the following sections, a number of the nation's then-active overseas courts—the U.S. District Court for the Canal Zone, the U.S. Court for Berlin, and the Trust Territory of the Pacific Islands High Court, for example—disappeared from the landscape before the Supreme Courts of Guam and the Virgin Islands were even on the horizon. *See* Temengil v. Trust Territory of the Pacific Islands, 881 F.2d 647, 650 (9th Cir. 1989) (discussing the dissolution of the Trust Territory of the Pacific Islands, to which the Northern Mariana Islands previously belonged).

regard for the due process rights or equal protection needs of territorial residents."[122] But for those courts that endured, this jurisdictional transformation ultimately reproduced the very situation that the eighty-ninth Congress acted to correct in Puerto Rico. The collective momentum of these local developments can be observed in the origin stories of three territorial appellate systems that did not exist in 1966, culminating in the creation of the Supreme Courts of the Commonwealth of the Northern Mariana Islands (1989), Guam (1997), and the U.S. Virgin Islands (2007).

A. The Commonwealth of the Northern Mariana Islands

The eighty-ninth Congress had no reason to consider the status of judges in the Commonwealth of the Northern Mariana Islands (CNMI), which did not yet exist in 1966. Until 1975, the Northern Marianas had been one of six districts organized under the Trust Territory of the Pacific Islands, a post-WWII United Nations strategic trusteeship that vested the United States with the duty and authority "to steward Micronesia to self-government"[123] while maintaining these Pacific islands within the United States's sphere of influence.[124] In the 1970s, the Northern Marianas formed a new political entity organized as a U.S. territory: the Commonwealth of the Northern Mariana Islands. The 1976 CNMI Covenant Agreement established this territory as a "Commonwealth," conferring upon it the same formal political status as Puerto Rico.[125] In the same stroke, the Covenant established the District Court for the Northern Mariana Islands, belonging to "the same judicial circuit of the United States as Guam" and exercising "the jurisdiction of a district court of the United States,"[126] with the exception of amount-in-controversy requirements and "such appellate jurisdiction as the Constitution or laws of the Northern Mariana Islands may provide."[127] Despite being the last of the current territories to come under U.S. sovereignty, CNMI in 1989 became the first territory after Puerto Rico to have its federal court reach the preordained terminus of exclusive federal jurisdiction.

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122. *See* STANLEY K. LAUGHLIN, JR., THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS 214 (1995).

123. *Temengil*, 881 F.2d at 649; *see* Act of July 18, 1947, Pub. L. No. 80-204, ch. 271, 61 Stat. 397, 397.

124. Act of July 18, 1947, ch. 271, 61 Stat. at 397.

125. Act of Mar. 24, 1976, Pub. L. No. 94-241, § 1, 90 Stat. 263, 264 (codified at 48 U.S.C. § 1801 (2018)); *see* WILLENS & SIEMER, *supra* note 100, at 253-55.

126. Act of Mar. 24, 1976 §§ 401-402(a).

127. Act of Mar. 24, 1976 § 402(c).

In 1977, Congress formally recognized the District Court for the Northern Mariana Islands within the Ninth Circuit, removing the Northern Marianas from the Trust Territory High Court's jurisdiction.[128] Congress simultaneously authorized the President to appoint a "judge for the District Court," "United States attorney," and "United States marshal" with the advice and consent of the Senate.[129] But even though Article IV of the CNMI Covenant establishes a federal court with the jurisdiction of "a district court of the United States," its drafters were aware that certain functional differences would be present from the outset. In fact, a later section of the Covenant specifies that "[w]hen [the federal court] sits as an appellate court," it must convene a panel of three judges, only one of whom must be "a judge of a court of record of the Northern Mariana Islands."[130] Through its first decade in operation, the District Court for the Northern Mariana Islands was the lone appellate tribunal on questions of purely local law. Its federal judge's term of office, originally eight years, was extended to ten years in 1984.[131] As with the decision to grant life tenure to Puerto Rico's district-court judges in 1966, CNMI's new federal court structure was adopted pursuant to recommendations by the Judicial Conference of the United States.[132]

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128. Act of Nov. 8, 1977, Pub. L. No. 95-157, § 5, 91 Stat. 1265, 1267 (codified at 48 U.S.C. § 1823 (2018)). This was required because the CNMI Covenant is a non-self-executing agreement. For a firsthand account of the operations of the High Court of the Trust Territory of the Pacific Islands, see Philip R. Toomin, *The High Court of the Trust Territory of the Pacific Islands*, 8 U. CHI. L. SCH. RECORD 6, 44 (1958).

129. Act of Nov. 8, 1977 § 1(b), 91 Stat. at 1267 (codified at 48 U.S.C. §§ 1821, 1823 (2018)). Today, the United States has ninety-four judicial districts but only ninety-three U.S. Attorneys. One U.S. Attorney serves both Guam and the Commonwealth of the Northern Mariana Islands. *See About the Districts of Guam & the Northern Mariana Islands*, U.S. DEP'T JUSTICE (Mar. 14, 2017), https://www.justice.gov/usao-gu/about-districts-guam-northern-mariana-islands [https://perma.cc/DG5R-Y48A] ("The two districts share a single United States Attorney.").

130. Act of Mar. 24, 1976 § 402(c).

131. Act of Oct. 5, 1984, Pub. L. No. 98-454, tit. IX, 98 Stat. 1732, 1744 (codified at 48 U.S.C. § 1424b (2018)). This appears to have been a compromise position. 132 CONG. REC. H5274 (daily ed. Aug. 1, 1986) (statement of Rep. Udall) ("When the 1984 provisions expanding the jurisdiction of Federal courts in these insular areas and the positions of these judges were being considered, members of the Committee on Interior and Insular Affairs favored life tenure for these judges, as is provided for judges of the Federal district court in Puerto Rico. Administration concerns prompted a compromise with the Senate that increased the former 8-year term to the 10-year minimum needed for retirement.").

132. *To Create the U.S. District Court for the Northern Mariana Islands: Hearing on S. 2149 Before the S. Comm. on the Judiciary*, 95th Cong. 4-12 (1977) (statements of C. Brewster Chapman, Jr., Assistant Solicitor for Territories, Dep't of the Interior; Herman Marcuse, Dep't of Justice; Stafford D. Ritchie, II, Assistant General Counsel, Admin. Office of the U.S. Courts) (addressing the role of the Judicial Conference).

Despite the provisions of the Covenant that contemplated the district court's role as an appellate tribunal, the agreement made clear that the CNMI government would possess a forward-looking power to decide the scope of the federal court's local-law jurisdiction.[133] Stanley K. Laughlin suggests that this provision was added on the idea that "in the early years the Marianas might not have enough local expertise to handle complex and serious legal matters."[134] The provision, in theory, gave the territory the power to control when and how it achieved exclusive federal jurisdiction, though limited in an important way. Section 403(a) of the Covenant created a fifteen-year buffer period in which all final decisions from CNMI's future local appellate courts would be subject to review by the U.S. Court of Appeals,[135] rather than the U.S. Supreme Court, thus preserving a state of differentiation from state supreme courts. Although the Covenant vested power in the local legislature to shape when and how CNMI's district court's functional differences from the mainland federal judiciary would be eliminated, the fifteen-year provisional period prevented the territory from removing all of those differences overnight. On the one hand, this deepened the roots of the transitional logic by specifying a formal, preprogrammed process of advancement. On the other hand, it served as a concrete roadblock to transition, limiting the speed at which the local legislatures could alter the status quo.

The watershed moment in the District Court for the Northern Mariana Islands's transition was the Commonwealth Judicial Reorganization Act of 1989, a local law that created the territory's supreme court and finally removed all local-law appellate jurisdiction from the District Court for the Northern Mariana Islands.[136] This marked the first successful attempt by a territorial legislature to create its own supreme court and divest the federal district court of all local-law

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133. *Id.* at 5 ("[T]he district court will have such appellate jurisdiction as the constitution or laws of the Northern Mariana Islands may provide."). For more on this issue and the U.S. Supreme Court's interpretation of this phrase, see *infra* Section III.B. This provision would be amended by the Omnibus Territories Act of 1984 in light of the U.S. Supreme Court's decision in *Guam v. Olsen*, 431 U.S. 195 (1977). *See id*. However, the question of the territory's power to shape its local appellate jurisdiction received different treatment in CNMI than in Guam because—according to the newly formed Northern Mariana Islands Supreme Court—Congress "*was bound by the terms of the Covenant* that the NMI will provide the District Court with whatever appellate jurisdiction it was to have, and that at any time, and from time to time, eliminate its appellate jurisdiction." *See* CNMI v. Superior Court, 1 N. Mar. I. 287, 293 (1990) (emphasis added).

134. *See* LAUGHLIN, *supra* note 122, at 451.

135. Act of Mar. 24, 1976, Pub. L. No. 94-241, § 403(a), 90 Stat. 263, 267 (codified at 48 U.S.C. § 1824 (2018)).

136. Commonwealth Judicial Reorganization Act of 1989, N. Mar. I. Pub. L. No. 06-25, §§ 3101, 3102.

jurisdiction.[137] Thus, by the start of the 1990s, CNMI's district court "was not a true Article III court, but it ha[d] all of the jurisdiction of a true Article III court."[138] The Ninth Circuit's Pacific Islands Committee, in a verbatim restatement of Puerto Rico's situation in 1966, informed the Ninth Circuit Judicial Council that the judge for the District Court for the Northern Mariana Islands had become "the only judge in the entire Federal system who does not have life tenure and whose court has exclusive Federal jurisdiction."[139] Another report to the Judicial Council spelled out the Committee's position even more plainly: the CNMI "is now in exactly the same position as Puerto Rico before Congress granted Puerto Rico's judges Article III status."[140]

In 2003, the U.S. Supreme Court emphasized the CNMI federal judge's lingering inequality. In *Nguyen v. United States*,[141] the Court vacated a decision by the Ninth Circuit Court of Appeals because the federal district judge from the Northern Mariana Islands had been invited to sit on the panel. The Court held this designation impermissible because Congress did not contemplate the district-court judges in the Northern Mariana Islands to be "'district judges' within the meaning of [28 U.S.C.] § 292(a),"[142] the designation statute.[143] "Congress' decision to preserve the Article III character of the courts of appeals is more than a trivial concern and is entitled to respect," wrote Justice John Paul Stevens for the Court.[144]

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137. *See infra* notes 151-156 and accompanying text (discussing an earlier attempt by the Guam legislature invalidated by the U.S. Supreme Court in *Guam v. Olsen*, 431 U.S. 195 (1977)).

138. LAUGHLIN, *supra* note 122, at 450.

139. Memorandum from the Pac. Islands Comm. to the Ninth Circuit Judicial Council, *Article III Status for the Commonwealth of the Northern Mariana Islands*, at 1 (undated) (on file with author).

140. PAC. ISLANDS COMM., REPORT OF THE PACIFIC ISLANDS COMMITTEE: ARTICLE III STATUS; NORTHERN MARIANAS AND GUAM 4 (Sept. 29, 1992) [hereinafter 1992 REPORT OF THE PACIFIC ISLANDS COMMITTEE] (on file with author).

141. 539 U.S. 69 (2003).

142. *Id.* at 74.

143. *Id.* at 80 (citation omitted).

144. *Id.* Even the dissenters in this case took no issue with the contention that the *Insular Cases* "allowed Congress to anoint territorial judges with the judicial power of the United States without also cloaking them with the full independence Article III requires." Chris Mooney, *Second-Class Citizens: The Separate and Unequal Treatment of Our Far-Flung Territories*, LEGAL AFF., July/Aug. 2003 (offering an account of the *Nguyen* case and its significance to the broader question of U.S. territorial relationships). Justice Ruth Bader Ginsburg, who joined Chief Justice William Rehnquist's dissent, pointed out during the argument that residents of U.S. territories have "no entitlement to an Article III tribunal either at trial or on appeal." *Id.* Later, Jeffrey Green, counsel for the petitioners, pointed to an amicus brief by Judge Moore of the U.S. Virgin Islands regarding the unequal status of island judges, suggesting that the looming

Having shed the functional differences previously invoked to justify its differentiation, CNMI's present federal court finds itself mired in a status that the Judicial Conference no longer appears to defend.[145] But the court has continued to evolve in other ways. CNMI's district court was the last of the island courts to be staffed exclusively by judges who were not from the territory and had not practiced law in the jurisdiction. CNMI's first Chamorro district judge, Ramona V. Mangloña, was nominated by President Barack Obama in 2011.[146] Her judgeship expires in July 2021.

B. Guam

Just thirty miles away from CNMI sits a separate territorial judiciary that has followed a very different path to exclusive federal jurisdiction. Even though the United States annexed Guam some eighty years before CNMI formally became a U.S. territory,[147] the District Court for the Northern Mariana Islands achieved exclusive federal jurisdiction nearly a decade before the District Court of Guam. In 1966, Guam's federal district court was still a hybrid of local and federal jurisdiction. Created by the Guam Organic Act of 1950, the District Court of Guam had been operating only since 1951, making it fifty years younger than the federal courts in Hawaii and Puerto Rico even though all three territories were annexed by the United States in the same year.[148] Despite some developments in other

political power over his appointment compromised his position as a judge. Justice Antonin Scalia responded that Judge Moore "should resign if he feels that way." *Id.*

145. *See infra* Part IV.

146. *See* Andrew O. De Guzman, *Obama Nominates Manglona to Federal Court*, MARIANAS VARIETY (Jan. 27, 2011), http://www.mvariety.com/cnmi/cnmi-news/local/33816-obama-nominates-manglona-to-federal-court [https://perma.cc/6KQJ-H4JQ].

147. The United States annexed Guam at the same moment it acquired Puerto Rico and the Philippines, following the Spanish-American War in 1898. *The Spanish-American War, 1898*, U.S. DEP'T STATE OFF. HISTORIAN, https://history.state.gov/milestones/1866-1898/spanish-american-war [https://perma.cc/4DU2-QKNP] ("The Spanish-American War of 1898 . . . secured the position of the United States as a Pacific power. U.S. victory in the war produced a peace treaty that compelled the Spanish . . . to cede sovereignty over Guam, Puerto Rico, and the Philippines to the United States."); *see* JULIUS W. PRATT, EXPANSIONISTS OF 1898: THE ACQUISITION OF HAWAII AND THE SPANISH ISLANDS 231 (1936). Although Guam is, geographically speaking, part of the Mariana Islands chain, the United States elected not to annex the twelve northern Mariana Islands in 1898. *See* Letter from Alfred Thayer Mahan to John Davis Long, *in* ALFRED THAYER MAHAN: THE MAN AND HIS LETTERS 632 (Robert Seager II ed., 1977) (arguing that taking Guam "would largely meet the needs of the U.S. for naval stations" and suggesting that these stations "not be multiplied beyond the strictly necessary").

148. Beyond the context of courts, Guam has often lagged behind the other territories in the measures of recognition and self-government that Washington slowly extended to most or all

areas of Guam's governmental structure,[149] the 1951 organization of Guam's district court "continued without substantial change for 23 years."[150]

The story of Guam's judicial development since 1966 is distinctive among the island territories, beginning with the Guam Legislature's failed attempt to establish the first Supreme Court of Guam in 1974. In that year, the legislature passed a law divesting the District Court of Guam of its appellate jurisdiction in all matters of local law and transferring that jurisdiction to a new territorial supreme court.[151] Under this reorganization, the Guam Legislature intended for the new supreme court to exercise exclusive and final authority over all local-law matters, leaving the district court with exclusive federal jurisdiction overnight. The law also unified the island's three existing local courts into a new Superior Court vested with original jurisdiction over all cases arising under the laws of Guam.[152] Laughlin calls this attempt by the territorial legislature to unilaterally curtail the jurisdiction of a congressionally created court "unique in territorial history."[153] Such an arrangement would have made Guam the first territory out-

of the territories. For example, Puerto Ricans were collectively naturalized as U.S. citizens through the Jones Act in 1917 and Virgin Islanders by statute in 1927, yet Guamanians did not receive U.S. citizenship until 1951. *See* An Act to Confer United States Citizenship Upon Certain Inhabitants of the Virgin Islands and to Extend the Naturalization Laws Thereto, Pub. L. No. 69-640, 44 Stat. 1234 (1927); JOSÉ A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE (1979). The people of Guam requested U.S. citizenship as early as 1902, but it was only after enduring thirty-one months of occupation by Japanese forces in World War II—during which Guam's Chamorro population maintained an active resistance and harbored American servicemen hiding from the Japanese—that Guamanians were formally organized under an Organic Act and naturalized as U.S. citizens. *See* LEIBOWITZ, *supra* note 55, at 329-35. *See generally* TONY PALOMO, AN ISLAND IN AGONY (1984) (recounting the Japanese occupation of Guam). Guam's first Chamorro federal district judge, Judge Cristobal Duenas, revealed many years later that his own brother Eduardo was beheaded by Japanese officers during this period of occupation. Interview by Lolita Toves with Cristobal C. Duenas, Retired Judge, Dist. Court of Guam (Apr. 16, 1996) (on file with the District Court of Guam). After the war, Judge Duenas was surprised to learn during his first year at University of Michigan Law School that he had been made a U.S. citizen by the Organic Act of Guam. *Id.*

149. Although Congress did not revise the structure of Guam's judiciary in 1966, it made other important changes to the territory's government during this period. In 1968, Guam was permitted to elect its own governor, and in 1972, it was afforded a nonvoting delegate to the House of Representatives. The executive branch, which had appointed two mainland judges in the first eighteen years of the court's existence, would appoint a native Chamorro to the bench for the first time in 1969.

150. Guam v. Olsen, 431 U.S. 195, 197 (1977).

151. Guam Pub. L. No. 12-085 (1974).

152. *Id.*; *see* Guam v. Dist. Court of Guam, 641 F.2d 816 (9th Cir. 1981).

153. LAUGHLIN, *supra* note 122, at 406.

side of Puerto Rico to shed the functional differences underlying the differentiated status of its federal court—had it not been overturned by the U.S. Supreme Court.[154]

In *Guam v. Olsen*,[155] a five-to-four Court found that the Guam Legislature's 1974 law exceeded its authority under the Organic Act to give the District Court of Guam "such appellate jurisdiction as the [Guam] legislature may determine."[156] Although a Ninth Circuit panel originally upheld the local legislation establishing Guam's supreme court, finding that Guam's Organic Act was intended to give the territorial government "significant responsibility for adapting that system to its changing needs,"[157] the U.S. Supreme Court found that the power to "determine" did not necessarily include the power to "transfer."[158] Ultimately, the Court struck the law down on constitutional-avoidance grounds.[159] Writing for the majority, Justice William Brennan explained that the Organic Act was ambiguous as to the power of Guam's legislature to restructure its judiciary in this way and resolved the issue instead with reference to concerns about allowing territorial legislatures to limit the access of their citizens to an Article III tribunal.[160]

This ruling defied the very logic of the transitional model, which purported to give the territorial governments agency over their institutional advancement toward the mainland arrangement of local-federal jurisdiction. The Supreme Court upset this logic by holding that transition to exclusive federal jurisdiction was not to be a natural process of institutional development achieved by local legislatures but rather a gatekeeping regime requiring Congress's explicit permission at each stage of advancement. In dissent, Justice Thurgood Marshall (joined by Justices Rehnquist, Stewart, and Stevens) wrote that the majority had failed to consider legislation apart from its larger context:

> Although this case may at first glance seem unimportant to anyone but the residents of Guam, the result of the Court's decision is perhaps unprecedented in our history. The Court today abolishes the Supreme

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154. *See Olsen*, 431 U.S. at 196.

155. *Id.*

156. Organic Act of Guam, Pub. L. No. 81-630, § 22(a), 64 Stat. 384, 389-90 (1950).

157. Agana Bay Dev. Co. v. Supreme Court, 529 F.2d 952, 954 (9th Cir. 1976), *overruled by* Guam v. Olsen, 540 F.2d 1011 (9th Cir. 1976) (en banc).

158. *Olsen*, 431 U.S. at 199-200.

159. *Id.* at 203-04.

160. *Id.* at 201-02.

> Court of Guam, a significant part of the system of self-government established by some 85,000 American citizens through their freely elected legislature. . . . [T]his approach ignores the horse while concentrating on the minute details of the cart's design.[161]

Even though the dissenters viewed Guam as "a small and isolated possession," they believed that Congress "wished to give [the territory] unusual autonomy in local affairs . . . to accommodate both the aspirations of the people of Guam and the requirements of federal jurisdiction."[162] The dissenting Justices grounded this argument in their understanding that "Congress' sense of the proper way to govern far-distant citizens has changed considerably in recent decades from the expansionist ethic."[163] The new paradigm of territorial self-government was supposed to accommodate the "good sense of the people of Guam" to determine how and at what pace to pursue their institutional development.[164] It could not serve this purpose, the dissenters believed, to "eviscerate the court system carefully devised by the people of Guam in the exercise of their right of self-government."[165]

In the wake of the decision, Congress enacted an override to the Supreme Court's understanding of the Guam Organic Act, reasserting the logic of the transitional model. With specific reference to *Olsen*, Congress expressly permitted the Guam Legislature to transfer its local-law appellate jurisdiction to local appellate courts in the Omnibus Territories Act of 1984.[166] The Senate Committee on Energy and Natural Resources's 1982 analysis of this legislation explained that the bill "specifically authorize[d] the legislature of Guam to establish an appellate court" in the mold of the Supreme Court of Guam that had been "struck down by the Supreme Court of the United States in *Guam v. Olsen*."[167] Congress thus amended the Organic Act to provide that "[u]pon the establishment of the appellate court provided for in section 22A(a) . . . all appeals from the decisions of the local courts not previously taken *must* be taken to the appellate court."[168] However, Congress also imposed the same fifteen-year "transitional period" it

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161. *Id.* at 204-05 (Marshall, J., dissenting) (footnotes omitted).

162. *Id.* at 207-08.

163. *Id.* at 207.

164. *Id.*

165. *Id.* at 208.

166. Act of Oct. 5, 1984, Pub. L. No. 98-454, § 801, 98 Stat. 1732, 1743.

167. *Hearing on S. 2633 Before the S. Comm. on Energy & Nat. Res.*, 97th Cong. 93, 97 (1982).

168. *Id.* at 75 (emphasis added).

implemented for the CNMI district court,[169] albeit with one key distinction: Congress directed the Ninth Circuit Judicial Council—an organ of the Judicial Conference—to submit reports to Congress every five years following the establishment of a territorial Supreme Court in order to assess whether Guam had developed "*sufficient institutional traditions* to justify direct review by the Supreme Court of the United States."[170] Judicial administrative bodies emerged once again as a principal architect and gatekeeper of territorial federal courts' place within the federal judiciary.[171]

Thus, Congress returned control over judicial "transition" to the local legislature in Guam while preserving its own prerogative as the arbiter of whether the territory's institutional developments were "sufficient" to merit parity with state supreme courts. Only after meeting Congress's subjective standards for "sufficient institutional traditions" could "[t]he relations between the courts established by the Constitution or laws of the United States and the local courts of Guam" fully parallel "the relations between the courts of the United States . . . and the courts of the several States."[172]

Even though Congress now authorized the exact sort of legislation Guam had passed before the *Olsen* decision, the Guam Legislature did not immediately attempt to reestablish its supreme court. The legislature eventually reauthorized the court in 1992, though its first justices were not sworn in until 1996.[173] This moment marked the end of the District Court of Guam's appellate jurisdiction in matters of local law. By 1997, the District of Guam had joined CNMI in the category of island judges who—as in 1960s Puerto Rico—"do not have life tenure and whose court has exclusive Federal jurisdiction."[174] But although the district court had achieved exclusive federal jurisdiction, the functional endpoint of

169. *Hearing on S. 2729 Before the S. Comm. on Energy & Nat. Res.*, 97th Cong. 87 (1982) ("The transitional period of fifteen years is the same as the one provided for in § 4 of the Act of November 8, 1977, 48 U.S.C. § 1694c, relating to the Northern Mariana Islands. It is based on the consideration that, during the formative years of the new appellate court and while it establishes its institutional traditions, its decisions should be reviewed as a matter of right by a court of appeals which is familiar with the local conditions rather than on a discretionary basis by the Supreme Court.").

170. Act of Oct. 5, 1984 § 801, 98 Stat. at 1742 (emphasis added).

171. *See* REPORT OF THE JUDICIAL COUNCIL OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ON THE VIRGIN ISLANDS SUPREME COURT (2012), https://www.vicourts.org/UserFiles/Servers/Server_9784218/File/Reports%20and%20Publications/Reports/BookletReportofVirginIslandsSupremeCourt.pdf [https://perma.cc/JSH7-ZF7U].

172. 48 U.S.C. § 1424–2 (2018).

173. *See Judicial History*, JUDICIARY OF GUAM: HUSTISIAN GUAHAN, http://www.guamcourts.org/Judicial-History/Judicial-History.html [https://perma.cc/R4F2-ZQYM].

174. *See* S. REP. NO. 89-1504, at 2 (1966).

its foretold transition, Congress did not deem Guam's local appellate system to have "sufficient institutional traditions" for direct review by the U.S. Supreme Court until 2004.[175]

The combination of *Olsen* and Congress's new role as arbiter of so-called sufficient institutional traditions short-circuited the Guam Legislature's efforts to realize the transition on its own terms, turning an eight-year journey into a thirty-year saga under the watchful eye of the Ninth Circuit Judicial Council. As I will show in Part IV of this Note, the Ninth Circuit Judicial Council also began to entertain novel rationalizations for these institutional differences once Guam at last achieved exclusive federal jurisdiction in the 1990s. Although none of these novel justifications survived, they introduced new fracture and confusion that delayed the Judicial Conference's eventual recommendation that Guam receive Article III status in September 2003, which was the last time that the status of an island judge appeared in the Proceedings of the Judicial Conference.[176] Today, Guam's lone federal district judge continues to sit at the pleasure of the President and Senate, not knowing whether she will be renominated to the judgeship that formally expired in 2016.[177]

C. The U.S. Virgin Islands

Despite some developments in the U.S. Virgin Islands' system of government outside the courts during the 1960s and 1970s,[178] the District Court of the

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175. Act of Oct. 30, 2004, Pub. L. No. 108-378, § 2, 118 Stat. 2206, 2208.

176. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 8 (Sept. 2003), https://www.uscourts.gov/sites/default/files/2003-09.pdf [https://perma.cc/8TSQ-TB3N].

177. As noted earlier, although President Obama renominated Chief Judge Tydingco-Gatewood in 2016, the Senate did not hold a confirmation hearing for her, allowing the nomination to expire. *See Chief Judge Tydingco-Gatewood Nominated for Another Term*, *supra* note 13; *PN1462 — Frances Marie Tydingco-Gatewood — The Judiciary*, *supra* note 15.

178. As in Guam, Congress made other formal changes to the U.S. Virgin Islands' system of government outside the courts during the 1960s and 1970s. Signaling the United States's formal commitment to consent relationships, Congress permitted the territory to elect its own governor in 1968 — as Puerto Rico had done since 1948. Act of Aug. 23, 1968, Pub. L. No. 90-496, 82 Stat. 837; *see* Act of Aug. 5, 1947, ch. 490, 61 Stat. 770. In 1972, Congress gave the Virgin Islands a nonvoting delegate to the House of Representatives — which Puerto Rico has had in the form of a "Resident Commissioner" since 1904. Act of Apr. 10, 1972, Pub. L. No. 92-271, 86 Stat. 118; *see* William R. Tansill, *The Resident Commissioner to the United States from Puerto Rico: An Historical Perspective*, 47 REV. JUR. U. P.R. 68, 82 (1978) (concluding that in 1904, the office of Resident Commissioner was "at last on a par, in terms of powers and privileges, with Delegates"). And in 1976, Congress authorized the Virgin Islands to adopt its own constitution — as Puerto Rico had in 1952. Act of Oct. 21, 1976, Pub. L. No. 94-584, 90 Stat. 2899; *see*

Virgin Islands, like the District Court of Guam, stood largely unchanged during the three decades between its creation and 1966.[179] The Organic Act of 1936 created the district court to hear an expansive array of federal and nonfederal subject matter, including marriage and annulment, municipal offenses, "all cases in equity," and local-law appeals.[180] In many respects, the early structure of the U.S. Virgin Islands' judiciary was less like that of Guam and more like that of Puerto Rico, where Congress built upon a landscape of preexisting European judicial institutions.[181] The islands' already-established Danish institutions may help to explain why the federal District Court of the Virgin Islands began hearing cases nearly two decades before the District Court of Guam, even though Guam had come under U.S. sovereignty nineteen years before the U.S. Virgin Islands.[182]

As the transitional model predicted, the U.S. Virgin Islands' local judiciary soon began the process of transforming its federal court into the type of tribunal that Congress might find deserving of equal "dignity and authority" as an Article III district court.[183] In September 1976, the Legislature of the Virgin Islands reorganized its local court system into a unified Territorial Court of the Virgin Islands,[184] which eventually became the present Superior Court of the Virgin Islands, assuming exclusive original jurisdiction over local-law matters in 1994.[185]

Meanwhile, at the federal level, Congress enacted the Omnibus Territories Act of 1984, which revised the Virgin Islands Organic Act to allow the territorial

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Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327. In short, the U.S. Virgin Islands' federal institutions appeared to follow in Puerto Rico's wake, a trend that remained true for Virgin Islands courts after the federal judge in the District of Puerto Rico received life tenure in 1966.

179. The United States purchased the U.S. Virgin Islands from Denmark in 1917; however, Congress did not organize its own civil service for the island until the 1930s. *See* LEWIS, *supra* note 63, at 42. Gordon Lewis suggests that because the islands were purchased out of "fear that St. Thomas would fall into German hands" during World War I, "[o]nce American fear of German motives had been allayed, national interest in the new possessions almost completely faded away" during the following decade. *See id.* at 42.

180. Organic Act of Virgin Islands of the United States, Pub. L. No. 74-749, § 28, 49 Stat. 1807, 1814 (1936).

181. *See supra* Section III.B; *see also* LEWIS, *supra* note 63, at 47 (observing that the United States continued in effect most of the provisions of the Danish Colonial Law of 1906 and that under early U.S. rule, the territory reflected "an odd combination of American sovereignty and Danish institutions, with the minor modification . . . of a changed nomenclature").

182. LAUGHLIN, *supra* note 122, at 377, 381; *see Judicial History*, *supra* note 173.

183. S. REP. NO. 89-1504, at 3 (1966).

184. 1976 V.I. Sess. Laws 187.

185. 1993 V.I. Sess. Laws 214; *see* Edwards v. Hovensa, LLC, 497 F.3d 355, 358 (3d Cir. 2007) (noting that the court assumed original jurisdiction in "all civil cases" as of 1991).

legislature to create a local court of appeals.[186] The Act also changed the appellate procedure at the district court, employing three-judge panels often staffed by Article III judges from outside the territory, and extended the term of office for federal district judges in Guam and Virgin Islands from eight years to ten.[187] Like Guam, the U.S. Virgin Islands was subject to a fifteen-year "transitional period" during which the Third Circuit would hear appeals from the Virgin Islands appellate court by writ of certiorari until Congress determined, based on reports prepared by the Third Circuit Judicial Council,[188] that the local judiciary had developed "sufficient institutional traditions to justify direct review by the Supreme Court of the United States."[189] Fifteen years later, however, the Virgin Islands had yet to establish a local court of appeals. One commentator in 1995 noted that the District Court of the Virgin Islands still had "considerably broader jurisdiction than Article III [d]istrict [c]ourts in Puerto Rico and on the mainland."[190]

In 2004, the Legislature of the Virgin Islands set the end stages of the territory's transition into motion when it reorganized the local judiciary into a unified Superior Court of the Virgin Islands and established the supreme court contemplated by the Omnibus Territories Act of 1984.[191] In 2006, the local legislature unanimously confirmed the new supreme court's first three justices, and on Jan-

186. Act of Oct. 5, 1984, Pub. L. No. 98-454, § 702, 98 Stat. 1732, 1737 (codified as amended at 48 U.S.C. § 1611 (2018)).

187. *Id.* §§ 705-706, 802; *see* Hanley v. V.I. Port Auth., 57 F. Supp. 2d 184, 184 (D.V.I. 1999) (noting that an Article III judge from the District of New Jersey was on the appellate panel). Mainland Article III judges' involvement increased following the death of one of the territory's district judges in 1988, *see David V. O'Brien*, *Federal Judge, 57*, N.Y. TIMES, Dec. 26, 1988, at D9, at which time an Article III judge from New Jersey was made the acting Chief Judge of the District Court of the Virgin Islands until 1992. *See Judge Stanley Brotman Leaves Important Legacy in Territory*, ST. JOHN SOURCE (Feb. 27, 2014), https://stjohnsource.com/2014/02/27/judge-stanley-brotman-leaves-important-legacy-territory [https://perma.cc/UND9-9R8C]; *see also* Erysthee v. El Nuevo Lirio Grocery, No. 1101/1986, 1990 WL 10656615 (D.V.I. Aug. 15, 1990) (deciding an appeal heard by a panel consisting of two mainland Article III judges and one district judge from the Virgin Islands court).

188. *See* REPORT OF THE JUDICIAL COUNCIL OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ON THE VIRGIN ISLANDS SUPREME COURT, *supra* note 171, at 15-18 (reporting to Congress that the Virgin Islands Supreme Court had obtained "sufficient institutional traditions" for direct review by the U.S. Supreme Court after just five years, noting the "impressive quality of the case law").

189. Act of Oct. 5, 1984 § 704, 98 Stat. at 1739 (codified as amended at 48 U.S.C. § 1613 (2018)).

190. LAUGHLIN, *supra* note 122, at 384.

191. 2004 V.I. Sess. Laws 179.

uary 29, 2007, the Supreme Court of the Virgin Islands officially became the exclusive forum for local-law appeals in the territory.[192] According to the court's own official account, the first justices' investiture "not only made an indelible mark in the history of the Virgin Islands, but complement[ed] the progressive framework of the local judiciary that was established more than half a century" earlier.[193] At this moment, the U.S. Virgin Islands "joined the other states and territories of the union with a judicial structure that sp[oke] to its own progressive autonomy."[194]

While the U.S. Virgin Islands has a smaller population than Guam, it currently has two active federal district judges, one of whom sits in St. Croix and the other in St. Thomas. At the time of writing, the St. Thomas judge—whose official term expired in 2015—continues to hear cases, though his successor was confirmed by the U.S. Senate on February 25, 2020.[195] The outgoing judge's five years of uncertain appointment status gave him much in common with the district court's senior judge in St. Croix, who was nominated to the same court by four different Presidents, though only two of these nominations were successful.[196]

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192. *History of the V.I. Judiciary*, JUD. BRANCH U.S.V.I., https://www.vicourts.org/about_us/overview_of_judiciary_of_the_virgin_islands/history_of_the_v__i__judiciary [https://perma.cc/MSH3-6R3G].

193. *History of the Court*, SUP. CT. U.S.V.I., http://visupremecourt.org/Know_Your_Court/History_of_the_Court [https://perma.cc/F3T8-8DKR].

194. *2009 U.S. Virgin Islands Budget*, U.S.V.I. OFF. MGMT. & BUDGET 21 (2009), http://www.caribbeanelections.com/eDocs/budget/vi_budget/vi_executive_budget_2009.pdf [https://perma.cc/8AFJ-56VZ]. The developments of 2004-2007 have had an observable impact on the jurisprudence of the Virgin Islands. For example, the new Virgin Islands Supreme Court abrogated the territory's statutory mandate to follow certain American Law Institute Restatements as the islands' de facto common law. *See* V.I. CODE ANN. tit. 1, § 4; Co-Build Cos. v. V.I. Refinery Corp., 570 F.2d 492, 494 n.6 (3d Cir. 1978) (describing the role of ALI Restatements in U.S. Virgin Islands law at that time). That court is gradually reconstituting the fabric of Virgin Islands common law using "three non-dispositive factors," including "most importantly, which approach represents the soundest rule for the Virgin Islands." Gov't of the Virgin Islands v. Connor, 60 V.I. 597, 600 (2014) (citing Simon v. Joseph, 59 V.I. 611, 623 (2013)).

195. Ernice Gilbert, *U.S. Senate Confirms Judge Robert Molloy as District Court Judge for the U.S. Virgin Islands*, V.I. CONSORTIUM (Feb. 25, 2020, 3:00 PM), https://viconsortium.com/vi-government/virgin-islands-u-s-senate-confirms-judge-robert-molloy-as-district-court-judge-for-the-u-s-virgin-islands [https://perma.cc/UAC5-Q73E]*; see* Austin, *supra* note 17.

196. Judge Raymond L. Finch was nominated by multiple Presidents from both parties: Presidents Carter, George H.W. Bush, Clinton, and George W. Bush (though only the nominations under Presidents Clinton and George W. Bush were ultimately successful). *See Judge Finch Nominated to Second Federal Term*, ST. THOMAS SOURCE (Feb. 6, 2004), https://stthomassource.com/content/2004/02/06/judge-finch-nominated-second-federal-term-o

D. The New Landscape: Island Judges in the Twenty-First Century

Viewed together, the jurisdictional developments of the past fifty years have eroded the justifications that Congress and the Judicial Conference gave for maintaining differentiated federal district judgeships in 1966. In the twenty-first century, what was once the exception has become the rule. Whereas the district judge in Puerto Rico was by the 1960s "the *only* such judge in the entire Federal system who does not have life tenure and whose court has exclusive Federal jurisdiction,"[197] every other federal district judge in the United States's island territories now occupies that position. All territorial federal courts now possess jurisdiction, powers, and responsibilities functionally identical to their Article III counterparts on the mainland. No federal district court exercises original or appellate jurisdiction over purely local-law matters in U.S. territories today.

In spite of these developments, the transitional model has survived as the prevailing justification for differentiated federal district judgeships. Through the 1990s and into the twenty-first century, Judicial Conference committees have invoked the transitional logic to justify the separate status of federal island judges.[198] But the envisaged transition has been complete for more than a decade. Unsupported by either the overt racial justifications offered in the first half of the twentieth century or the functional jurisdictional arguments offered by the Judicial Conference in the latter half, the controlling theory of island judges' place in the federal judiciary is presently at sea. That the current Article IV regime has outlived its foundational premise suggests that other reasons have been tacitly perpetuating it all along. It casts the transitional model as an instance of "preservation-through-transformation," supplying newer, more palatable arguments where overt racial justifications failed.[199] Whether the outmoded transitional logic will be preserved, transformed, rationalized, or even noticed depends on the Judicial Conference and related judicial spaces.

[https://perma.cc/PD48-5TPV]; *Judicial Nominees Finch, Gomez Win Bar Approval*, ST. THOMAS SOURCE (Feb. 11, 2004), https://stthomassource.com/content/2004/02/11/judicial-nominees-finch-gomez-win-bar-approval [https://perma.cc/PR68-SL72].

197. S. REP. NO. 89-1504, at 2 (1966) (emphasis added).

198. *See, e.g.*, 1992 REPORT OF THE PACIFIC ISLANDS COMMITTEE, *supra* note 140, at 4.

199. Reva B. Siegel, *"The Rule of Love": Wife-Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2184 (1996).

IV. THE JUDICIAL CONFERENCE OF THE UNITED STATES: DISCOURSE-SHAPING AND RATIONALIZATION

The Judicial Conference's relationship to this emerging problem extends far beyond its repeated calls for Article III status in Puerto Rico during the 1960s. In some instances, the Judicial Conference has observed pieces of the territories' jurisdictional transformation taking shape over the past fifty years, including in 1994, when it voted to support legislation that would establish Article III status for the district judgeship authorized for the Commonwealth of the Northern Mariana Islands.[200] But even in those moments in which the Judicial Conference and its committees have endorsed action to correct the lingering inequality among federal district judges in an individual territory, these judicial spaces[201] display a tendency to invent new justifications for differentiation where old justifications have failed. During the process of recommending Article III status for CNMI in the 1990s, for example, the Ninth Circuit Judicial Council and Judicial Conference Committee on Federal-State Jurisdiction brought new arguments to the table—arguments nowhere to be found in the conversations about equal tenure for island judges in 1966. The two most prominent arguments centered on caseload statistics and whether each territory had achieved a "permanent political relationship" with the United States.[202]

These two attempts to refashion the functional justification for the island courts' unequal status struggled to survive even initial scrutiny from within the judicial administrative bodies themselves. For example, when the Ninth Circuit Judicial Council voted to recommend that the district courts of Guam and CNMI be combined into one district in light of concerns about giving Article III independence to judges with below-average caseloads, judges of the Ninth Circuit Pacific Islands Committee highlighted conceptual flaws in the new logic and caused the circuit's Judicial Council to reverse that recommendation within the year.[203] However, in emphasizing those flaws, the stated goal of the Pacific Islands Committee had not been to realize equality among island judges and their

200. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 51 (Sept. 1994), https://www.uscourts.gov/sites/default/files/1994-09_0.pdf [https://perma.cc/YX4B-W59Y].

201. The federal judiciary has a number of administrative bodies organized under the Judicial Conference of the United States and its committees, including the circuit judicial councils, the Administrative Office of the U.S. Courts, the Federal Judicial Center, the Judicial Panel on Multidistrict Litigation, and the United States Sentencing Commission. *See Understanding the Federal Courts*, *supra* note 20, at 21-24.

202. *See infra* Section IV.A.

203. *See* 1992 REPORT OF THE PACIFIC ISLANDS COMMITTEE, *supra* note 140, at 5.

Article III peers but rather to "*rationalize* the status of Guam and CNMI."[204] It is unclear what exactly the Committee meant by "rationalize." But it seems to have called for a new justification to preserve the federal status quo because the transitional model could no longer supply one. Meanwhile, the administrative arms of the judicial branch continue to hide the unequal status of island judges from public view, forcing increasingly arbitrary distinctions into an ill-fitting image of a singular independent judiciary that is uniformly insulated from politics. This practice of rendering meaningful institutional differences invisible mirrors discourse-defining mechanisms of colonial administration and threatens judicial legitimacy in the long term.[205]

A. Caseloads and Commonwealths

By the early 1990s, the Ninth Circuit Judicial Council acknowledged that "[t]he CNMI [was] in the exact same position that Puerto Rico was in at the time their court was reestablished as an Article III court."[206] It therefore took up the issue whether to recommend that the Judicial Conference advise Congress to revisit the status of CNMI's federal judgeship, just as it had recommended for Puerto Rico in 1959.[207] The Ninth Circuit's Pacific Islands Committee took the position that "there is simply no reason that a United States District Court Judge . . . whose court has exclusive Federal jurisdiction and has the exact same authority as any other United States District Court in the country, should not have the same independence, security, retirement benefits and dignity."[208] Thus, the Committee urged the Council to recommend Article III status for the Northern Marianas "*as soon as that status can be enacted*,"[209] and for Guam, upon passage of the pending Guam Commonwealth Act, legislation that would have left Guam's district court with exclusive federal jurisdiction.[210] The Pacific Islands Committee noted that "[u]pon passage of the Commonwealth Bill, Guam would become comparable to Puerto Rico."[211] The Judicial Conference of the United

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204. *Id.* at 4 (emphasis added).

205. *See infra* Section IV.B.

206. Memorandum from the Pac. Islands Comm. to the Ninth Circuit Judicial Council, *supra* note 139, at 5.

207. 1959 SPECIAL SESSION, *supra* note 92, at 29-30.

208. Memorandum from the Pac. Islands Comm. to the Ninth Circuit Judicial Council, *supra* note 139, at 6.

209. 1992 REPORT OF THE PACIFIC ISLANDS COMMITTEE, *supra* note 140, at 4 (emphasis added).

210. Guam Commonwealth Act, S. 692, 102d Cong. §§ 401-404 (1991).

211. 1992 REPORT OF THE PACIFIC ISLANDS COMMITTEE, *supra* note 140, at 4.

States eventually accepted the Ninth Circuit's recommendation, voting to support legislation extending Article III status to the district judges of the Northern Marianas, but not before entertaining novel ideas that could be used to justify further exclusion of federal district judges in Guam and the U.S. Virgin Islands.

Although the Pacific Islands Committee originally proposed "a recommendation that Commonwealth judges be granted [A]rticle III status in the Northern Marianas and Guam," the Ninth Circuit Judicial Council, acting on its own initiative, altered the resolution to recommend Article III status only in the event that the two districts were combined.[212] The Committee nominally based its recommendation on the "caseload statistics from the two districts."[213] Some members of the Judicial Council argued that "Congress would not or should not grant Article III status to districts with caseloads-per-judge substantially lower than in the average stateside district."[214]

This recommendation came as a surprise to the Ninth Circuit Pacific Islands Committee and the Guam and Northern Marianas Bar Associations, which knew nothing of the Judicial Council's altered recommendation.[215] The Pacific Islands Committee issued a report expressing its opposition to this unexpected recommendation on a number of grounds.[216] Not only was sentiment in both Guam and CNMI overwhelmingly against such a move, but this consolidation also appeared to violate the terms of the CNMI Covenant Agreement, which expressly provides that "the United States will establish for and within the Northern Mariana Islands a court of record to be known as the 'District Court for the Northern Mariana Islands.'"[217] The Committee also argued that "caseload is not an appropriate basis for granting or denying Article III status" and that "[i]ndependence is even more necessary in the small-scale island world than it is in a metropolis."[218]

The harshest critique of the Ninth Circuit Judicial Council's pioneering amendment came from the President of the Northern Mariana Islands Bar As-

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212. *Id.* at 2.

213. *Id.*

214. *Id.* at 5.

215. *Id.* at 2.

216. *Id.*

217. Act of Mar. 24, 1976, Pub. L. No. 94-241, § 401, 90 Stat. 263, 266 (codified at 48 U.S.C. § 1811 (2018)); *see also* 1992 REPORT OF THE PACIFIC ISLANDS COMMITTEE, *supra* note 140, at 4-5 (misquoting CNMI Covenant Section 401 and referring to the court as the "District Court of the Commonwealth of the Northern Marianas").

218. 1992 REPORT OF THE PACIFIC ISLANDS COMMITTEE, *supra* note 140, at 5.

sociation, Michael A. White, in his remarks at the 1991 Ninth Circuit Conference. White proposed that the Judicial Council withdraw this recommendation immediately, noting that Guam and CNMI "are separate jurisdictions, as different from each other as California is from Oregon."[219] White also pointed out that the Judicial Council based its caseload logic on bad math, noting that "the number of criminal filings in Guam exceeded that in at least one state in the Circuit."[220] He further observed that the total civil filings in Alaska and Hawaii combined were still less than those in Arizona, Oregon, or Nevada, asking: "Shall Alaska and Hawaii be combined into a single district?"[221] His remarks concluded with an even more provocative question: "[H]ow many cases does it take to make an Article III judge? Is it like airline miles—you get to a certain level, and you get an Article III judge? When did our nation's founders link case load with judicial independence?"[222] In his view, the Council had engaged in the same sort of reasoning that produced the frontier courts of the Northwest Territory: compromising decisional independence to fit the expedient structures best suited to the federal system's administrative needs.

Within the year, the Ninth Circuit Judicial Council withdrew its recommendation, replacing it with a related resolution "[e]ndorsing Article III status" for CNMI "as soon as practicable."[223] The Judicial Council immediately reconciled its prior position with these resolutions, voting to support Article III status for CNMI and deferring action on the status of the District Court of Guam.[224] In 1994, the Judicial Conference Committee on Federal-State Jurisdiction endorsed this revised recommendation, noting that "[a]lthough concerns about the minimal caseload in the District Court of the Northern Mariana Islands were considered, the committee viewed the need for insulation from political pressures as paramount."[225] In the end, the Judicial Conference voted to endorse the recommendation of the Committee on Federal-State Jurisdiction that the Conference "support legislation that would establish Article III status for the district judgeship authorized for the Commonwealth of the Northern Mariana Islands."[226]

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219. Michael A. White, Remarks at the 1991 Ninth Circuit Judicial Conference in Support of Resolutions No. 5 and 6, at 1 (on file with author).

220. *Id.* at 4.

221. *Id.* at 1.

222. *Id.* at 4.

223. *See* Pimentel Memorandum, *supra* note 104, at 1-2.

224. *Id.*

225. *See* AGENDA F-10, *supra* note 50, at 3.

226. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 200, at 51.

But at the same time at which they caused the Ninth Circuit Judicial Council to reverse course on the issue of caseload, the judges of the Ninth Circuit Pacific Islands Committee and the Northern Mariana Islands Bar Association advanced a separate, novel argument in support of the continued differential treatment of Guam and the U.S. Virgin Islands: the importance of a "permanent political relationship" with the United States.[227] Nothing in the legislative history of Public Law 89-571,[228] the law that extended life tenure to the District of Puerto Rico, suggests that Congress's decision was predicated on commonwealth status. Still, many of those invested in this question—including Michael A. White—appeared to be under the impression that "[h]istorically, Article III status depends upon the permanence of the political relationship with the United States."[229] This new logic made its way into the revised recommendations of the Ninth Circuit Judicial Council and of the Judicial Conference Committee on Federal-State Jurisdiction, which in 1994 formally recommended "Article III status for the district judgeship authorized for the Commonwealth of the Northern Mariana Islands" but only endorsed such status for Guam "in the event Congress approves commonwealth status."[230]

The new requirement for a permanent political relationship with the United States—a synonym for commonwealth status in this instance—reflects an outmoded understanding of the legal meaning of the term "commonwealth." The Judicial Conference Committee on Federal-State Jurisdiction explained its recommendation with the argument that "[t]he attainment of this permanent, political relationship with the United States, which may not be terminated unilaterally, has traditionally been viewed as a significant factor in determining whether to extend Article III status to what was formerly an Article I[V] territorial court."[231] The Committee's report cites no authority to support its characterization of this approach as "traditional," but its explanation reflects an assumption that the commonwealth relationship cannot be altered unilaterally by

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227. *See* AGENDA F-10, *supra* note 50, at 3.

228. Act of Sept. 12, 1966, Pub. L. No. 89-571, 80 Stat. 764.

229. *See* White, *supra* note 219, at 2.

230. AGENDA F-10, *supra* note 50, at 2, 4; *see also* Memorandum from Mark W. Braswell to the Chairman and Members of the Committee on Federal-State Jurisdiction, Proposal to Recommend Article III Status for the District Judge of the Commonwealth of the Northern Mariana Islands 1 (May 1994) [hereinafter Braswell Memo] (on file with author) (noting both recommendations). These recommendations were made while Congress was considering the Guam Commonwealth Act, which never became law. *See* S. 692, 102d Cong. §§ 401-404 (1991); Braswell Memo, *supra*, at 2-3 (discussing contemporaneous Guam commonwealth legislation in Congress).

231. AGENDA F-10, *supra* note 50, at 3.

Congress. This assumption was shared by the Ninth Circuit Pacific Islands Committee, which distinguished commonwealth from territory for the purposes of evaluating the permanence of a possession's relationship to the federal government: "Guam is *presently still a territory*[;] . . . its relationship with the United States is not necessarily permanent in form."[232] Although courts once entertained a substantive legal distinction between a "commonwealth" and a "territory of the United States subject to the plenary powers of Congress,"[233] this idea has since been rejected by the Supreme Court.[234]

A few years later, a new memorandum from the Administrative Office called commonwealth status an "obvious distinction between Puerto Rico, which has an Article III district court, and the Virgin Islands, which does not."[235] The memo concluded, however, that "[t]here is no reason why this distinction, whatever its political importance may be, should have any constitutional significance for the exercise of Congress' power to create Article III courts."[236] Further, the memo did not equate commonwealth status with a permanent political relationship with the United States. Rather, it suggested that the significance of the term "commonwealth" was limited to its expressive power, connoting a relationship separate and distinct from those existing between the federal government and other territories, like the U.S. Virgin Islands, that were "not currently a serious candidate for statehood."[237] More importantly, the memo explicitly qualified the recommendation made by the Judicial Conference Committee on Federal-State Jurisdiction in 1994: "[T]he Committee's position that Article III status should be conferred only on district courts in territories that have attained Commonwealth status" was a recommendation "based on policy considerations only," rather than established custom.[238] In other words, various judicial spaces had been holding these justifications out as historical or traditional approaches when they were in fact unprecedented and had nothing to do with the 1966 question of status in the District of Puerto Rico. Chief Judge Cristobal Duenas of the District

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232. 1992 REPORT OF THE PACIFIC ISLANDS COMMITTEE, *supra* note 140, at 4 (emphasis added).

233. United States v. Quinones, 758 F.2d 40, 42 (1st Cir. 1985).

234. *See* Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1874-76 (2016) (claiming that Puerto Rico's constitution fell under Congress's "broad latitude to develop innovative approaches to territorial governance"); *cf.* United States v. Sanchez, 992 F.2d 1143, 1151-52 (11th Cir. 1993) (suggesting that the constitutional boundary between "commonwealth" and "territory" had been an open question even into the 1990s).

235. Memorandum from Jeffrey N. Barr, Assistant Gen. Counsel, Admin. Office of the U.S. Courts, to Toby D. Slawsky, Circuit Exec., Third Circuit 5 (Aug. 20, 1997) (on file with author).

236. *Id.*

237. *Id.*

238. *Id.* at 10.

Court of Guam brought this to the attention of Ninth Circuit Chief Judge John Clifford Wallace in 1992, remarking that "it will be of great service to all concerned if the Judicial Council will let us be the recipient of any authoritative source it may have supporting its position."[239]

The last time the Judicial Conference proceedings reported a recommendation to change the status of federal judges in Guam, the Northern Mariana Islands, or the U.S. Virgin Islands was in 2003, when it "agreed that the judiciary would seek Article III status for the District Court of Guam."[240] When the Judicial Conference Committee on Federal-State Jurisdiction revisited the matter in 2013, it abandoned all previous suggestions that commonwealth status or a permanent political relationship was a prerequisite for Article III status.[241] Whereas the Judicial Conference once recommended life tenure for Puerto Rico before five consecutive Congresses over nearly ten years leading up to Public Law 89-571,[242] it has now fallen silent and failed to address identical problems in three of its ninety-four districts.

B. Judge Laundering

An important discourse-shaping function inheres in today's defenses of a purportedly unified "independent judiciary," with its image of ninety-four districts, thirteen circuits, and one U.S. Supreme Court as cohering instruments of Article III judicial power.[243] Yet both internally and in their public-facing capacities, the Judicial Conference[244] and Administrative Office[245] glossed over the unequal and dependent position of island judges in the federal judiciary. Even in

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239. Cristobal C. Duenas, Chief Judge, Dist. Court of Guam, Remarks at the District Court of Guam Investiture Ceremony 3 (Dec. 22, 1992) (on file with author).

240. JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 176, at 8.

241. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON FEDERAL-STATE JURISDICTION 11 (Mar. 2013).

242. Act of Sept. 12, 1966, Pub. L. No. 89-571, 80 Stat. 764.

243. *See* UNDERSTANDING THE FEDERAL COURTS, *supra* note 20, at 5 (displaying the Administrative Office's graphic representation of "The United States Federal Courts").

244. In 1978, for example, the Conference published an almanac titled *Judges of the United States* in honor of the United States Bicentennial. Sandwiched between Hon. Charles Clark of the Fifth Circuit and Hon. Launard Garsh of the District of New Jersey was Judge "Cristobal Camacho Duenas, D. Guam." The Bicentennial almanac reported everything from the date of Judge Duenas's wedding to the names of his seven children, yet it said nothing of the fact that his judgeship had just expired on December 11, 1977. BICENTENNIAL COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, JUDGES OF THE UNITED STATES 111 (1978).

245. The Administrative Office's webpage for "Frequently Asked Questions" about federal judges treats "district court judge" as an Article III synonym: "[D]istrict court judges are nominated

the few moments in which judicial bodies have formally considered that position, they have helped obscure its differentiation from public view.

In obscuring the persisting status distinctions among federal judges, the administrative arms of the judiciary distort the history and institutional reality of the federal judiciary. This obfuscation reinforces what Daniel Immerwahr has called the defining feature of the U.S. empire in modern world history: its ability to remain hidden from the mainland political consciousness.[246] Hidden, in other words, from those with federal voting rights. Mistaken images of what is "foreign" and what is "domestic" have "relegated [the territories] to the shadows . . . a dangerous place to live" for political communities that today encompass almost four million U.S. citizens, nearly all of whom are racial or ethnic minorities.[247]

Judicial obfuscation of the island judges' diminished independence takes many forms. First, in the few instances where judicial bodies presently acknowledge the existence of separate "territorial courts within the federal system," they fail to account for their jurisdictional transformations both leading up to and in the decades following 1966.[248] The Federal Judicial Center's website, for instance, mistakenly explains that the district courts in Guam, the Northern Mariana Islands, and the U.S. Virgin Islands "exercise the same jurisdiction as U.S. district courts, as well as local jurisdiction."[249]

Second, administrative bodies of the federal judiciary obscure the different naming conventions for Article III and territorial island courts. Mainland districts and Puerto Rico—those with Article III protections—are called "United States District Court," for the "[Geographic] District of [State or Territory],"[250] while the non-life-tenured districts are called "District Court of Guam," "District Court for the Northern Mariana Islands," and "District Court of the Virgin Islands."[251] Congress thus subtly acknowledges the differentiation of island judges, employing a naming convention for the district courts of Guam, CNMI, and the U.S. Virgin Islands that suggests they belong to some separate category.

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by the President and confirmed by the United States Senate . . . . [T]hese judicial officers are appointed for a life term." Admin. Office of the United States Courts, *FAQs: Federal Judges*, U.S. COURTS, https://www.uscourts.gov/faqs-federal-judges [https://perma.cc/C5RJ-24SQ].

246. *See* IMMERWAHR, *supra* note 4, at 1-18.

247. *Id.* at 19.

248. *Territorial Courts*, FED. JUD. CTR., https://www.fjc.gov/history/courts/territorial-courts [https://perma.cc/5THQ-KQ3P].

249. *Id.*

250. *See, e.g.*, 48 U.S.C. § 864 (2018); 15 U.S.C. § 1071 (2018).

251. 48 U.S.C. § 1424 (2018) (Guam); *id.* § 1821 (Northern Mariana Islands); *id.* § 1612 (U.S. Virgin Islands).

By contrast, the administrative bodies of the federal judiciary lump them together with the Article III district courts.

In fact, the Administrative Office appears to call each island court by different names depending on the context. A 2018 story published in the *Guam Daily Post* featured the following courtroom photo:[252]

In its public-facing capacity, the court thus takes a small liberty in order to appear the same as every other mainland district, displaying in the courtroom: "United States District Court · District of Guam." But this is not the seal that gives binding effect to the court's judgments. *That* seal bears the true legal name of the tribunal:[253]

252. Photo by David Castro, courtesy of the *Guam Daily Post*. *Federal Drug Indictment Unsealed*, GUAM DAILY POST (Apr. 11, 2018), https://www.postguam.com/news/local/federal-drug-indictment-unsealed/article_8489070c-3ca9-11e8-89ec-9b05287b4355.html [https://perma.cc/93SM-BSJT].

253. United States v. Aquino, No. 1:17-cr-00033, slip op. at 5 (D. Guam Apr. 12, 2019); *see* 48 U.S.C. § 1424 (2018).

Retiring after two terms on the federal bench in Guam, Judge Duenas remarked, "I had a great hope that before long the District Court of Guam would have the potential of becoming a 'United States District Court.'"[254] Despite the courtroom seal, Judge Duenas's hope has yet to be realized. In 2018, the Federal Judicial Center sponsored a conference on federal judicial independence attended by judges and academics. Despite an entire day's worth of panel discussions on the history of federal judicial independence, neither the story of Puerto Rico nor the diminished independence of territorial-court judges was mentioned.[255]

Keeping the status of island judges and territorial courts in the shadows does more than obscure the fact that the underlying logic of their differentiation has evaporated; it impedes a deeper and more complete discussion about the merits of institutional differentiation in U.S. territories more broadly. While these conversations occur in the context of territories' political status, citizenship, and property, they are artificially pared when it comes to judicial administration and institutional development. Attempts to rationalize the logic of the transitional model with reference to novel functional concerns such as caseload statistics or commonwealth status have commandeered opportunities to consider other theories of differentiation, particularly those that foreground the preservation of local custom and processes that foster self-determination. In the context of citizenship and property, commentators like Rogers M. Smith have suggested that new theories of institutional heterogeneity might serve the interests of home rule and self-determination by accounting for prior unjust differentiations and "giv[ing] enduring legal recognition to various person' and groups' distinctive sense of their identities, values, and interests by modifying legal regulations and public services so that these people can flourish in their own ways, yet equally with other citizens."[256] These theories, of course, raise parallel questions about the desirability of framing today's defenses of federal judicial independence as a defense of judicial norms. As articulated by Smith in the context of citizenship,

254. Duenas, *supra* note 239, at 8. For an account of the "historical significance" of the term "United States District Court," as distinct from the territorial district courts, see *Nguyen v. United States*, 539 U.S. 69, 76 (2003).

255. National Constitution Center, *Judicial Independence and the Federal Courts: A Historical Perspective*, YOUTUBE (Dec. 13, 2018), https://www.youtube.com/watch?v=Ez1VNcmBqyo [https://perma.cc/NX7F-DTZT].

256. Rogers M. Smith, *The Insular Cases, Differentiated Citizenship, and Territorial Statuses in the Twenty-First Century*, *in* RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 105 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

"Whether these [theories] present appropriate accommodations or abdications of core constitutional values remains deeply disputed."[257]

Finally, the territories' erasure from broader discussions of federal judicial independence obscures a potentially explosive connection between these judges' separate and diminished status and the claims of constitutional exceptionalism and discrimination being litigated before them. A number of high-profile cases from these courts, which will implicate the underpinnings of federal-territorial relationships even beyond *Aurelius* and the 2020 U.S. Supreme Court Term, have attracted considerable attention. It is no accident that local activists selected the District Court of Guam as the end-point of their 2019 "march for Chamorro self-determination," the territory's largest political demonstration in years.[258] In the District Court of Guam, Chief Judge Tydingco-Gatewood recently considered the constitutionality of an indigenous plebiscite registry for self-determination by "Native Inhabitants of Guam"[259] at the same time that the federal government announced plans for a strategic military buildup that will relocate between four thousand and nineteen thousand U.S. Marines from Okinawa to Guam by 2028.[260] In Puerto Rico, Chief Judge Gelpí adjudicated the federal exclusion of Puerto Rico residents from Supplemental Security Income at a time when hurricane relief and the PROMESA fiscal control board had become national political issues.[261] Chief Judge Gelpí, who enjoys life tenure, issued a ruling in that case that could shake the foundations of Puerto Rico's relationship with the federal government, calling the exclusion "a citizenship apartheid based on historical and social ethnicity within United States soil."[262] And in CNMI, Chief Judge Mangloña—whose term will expire in 2021—recently heard a challenge to a federal government action to convert multiple islands containing native Chamorro cultural sites into "tactical ops and mechanized ground training" for the U.S.

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257. *Id.* at 104.

258. *See Guam Prepares for Largest March for Self-Determination on September 2nd 2019*, UNPO (Aug. 26, 2019), https://unpo.org/article/21634 [https://perma.cc/ZQS6-236Q]; *see also* Jerick Sablan, *Hundreds March for CHamoru Self-Determination*, PAC. DAILY NEWS (Sept. 2, 2019, 2:36 PM ChST), https://www.guampdn.com/story/news/2019/09/02/hundreds-march-chamoru-self-determination/2189704001 [https://perma.cc/W2A8-FWV4].

259. Davis v. Guam, No. 11-00035, 2017 U.S. Dist. LEXIS 34240, at *12 (D. Guam Mar. 8, 2017), *aff'd*, 932 F.3d 822 (9th Cir. 2019), *petition for cert. filed*, No. 19-827 (U.S. Dec. 26, 2019).

260. *See U.S. to Start Moving Okinawa-Based Marines to Guam in 2024*, JAPAN TIMES (Apr. 27, 2017), https://www.japantimes.co.jp/news/2017/04/27/national/politics-diplomacy/u-s-start-moving-okinawa-based-marines-guam-2024 [https://perma.cc/FHF3-ALLB].

261. United States v. Vaello Madero, 356 F. Supp. 3d 208 (D.P.R. 2019), *aff'd*, No. 19-1390, 2020 WL 1815967 (1st Cir. Apr. 10, 2020).

262. *Id.* at 215.

military.[263] These are precisely the sorts of disputes the Judicial Conference had in mind when it urged Congress to extend Article III status to judges in Puerto Rico, where it found judicial independence especially lacking "in those cases involving the Federal Government on one side and the Commonwealth government on the other."[264]

The Judicial Conference should not blind itself to the possibility that diminished judicial independence could itself become a lightning rod for social movements that have looked to these courts for relief. Because residents of the territories have no voting representation in Congress or the Electoral College, federal territorial courts cannot point to political representation as an alternative recourse. In these abovementioned situations, the courts spotlight themselves as gatekeepers to the political process and enforcers of separateness under the rubric of equality. This has the potential to foster sentiment that there is no forum at all, legal or political, where questions of self-government can receive fair consideration. The risk of this perception increases to the extent the judges *themselves* embody the sort of constitutional exceptionalism that is the very subject of their most prominent cases.

Far from theoretical, the politics of reappointment are playing out in real time. In May 2016, one year after Judge Gómez's ten-year term expired, a Virgin Islands attorney with matters pending before the district court filed an extraordinary ex parte letter asking Judge Gómez to "voluntarily recuse [him]self" from all of her cases on of account of the political battle surrounding his uncertain future on the bench. The letter, made public only because the court construed it as a disqualification motion under 28 U.S.C. § 455,[265] claims that the attorney "successfully lobbied" the White House and the territory's nonvoting member of Congress[266] to withhold support for Judge Gómez's renomination using "the aid of . . . several [political action committees]." Even more striking is her claim that she induced the territory's previous member of Congress, Donna Christen-

263. Tinian Women Ass'n v. U.S. Dep't of the Navy, No. 16-cv-00022, 2018 U.S. Dist. LEXIS 143988, at *9 (D. N. Mar. I. Aug. 22, 2018); *see* Anita Hofschneider, *The Fight to Save Pagan Island from US Bombs*, HONOLULU CIV. BEAT, https://www.civilbeat.org/2016/12/the-fight-to-save-pagan-island-from-us-bombs [https://perma.cc/ENE4-G2UV].

264. S. REP. NO. 89-1504, at 2-3 (1966); H.R. REP. NO. 89-135, at 2-3 (1965).

265. The body of the letter suggests that the attorney filed it ex parte in order to avoid having these allegations surface as a "public fight." Motion to Disqualify Judge by Plaintiff Cary Chapin at 2, Chapin v. Great S. Wood Preserving Inc., No. 3:12-cv-00077 (D.V.I. Oct. 1, 2012).

266. 48 U.S.C. § 1711 (2018).

sen, to withdraw a letter in support of Judge Gómez's renomination "shortly after [Judge Gómez] sat on the matter of [Christensen]'s running mate's eligibility to run as Lieutenant Governor."[267]

The letter paints an alarming picture of the state of federal judicial independence in U.S. territories. By virtue of their separate and unequal position within the judiciary, these unique federal judges are launched into fierce political currents as their formal terms expire. Regardless of how cases are adjudicated on the merits, the territories' federal courts become acutely susceptible to the appearance of political intrigue and prejudicial interference. Fourteen years earlier, the same attorney wrote a public letter to the *St. Croix Source* describing political efforts to oust Judge Gómez's predecessor: "the movement not to reappoint Judge Moore is . . . widespread in the Virgin Islands bar."[268]

In the territories whose federal judges lack life tenure, these situations raise questions about decisional independence that sap judicial legitimacy regardless of how cases are resolved. After sitting in limbo for five years beyond the expiration of his term, Judge Gómez has continued to preside over jury trials and sentence criminal defendants while he awaits the arrival of his replacement, who has already been confirmed by the U.S. Senate but whose investiture has yet to be scheduled. The political maneuverings surrounding his renomination will subside once the new district judge is finally sworn in. However, even though President Trump's incoming appointee has bipartisan support and was confirmed in the Senate by a vote of ninety-seven to zero, the story of his two predecessors

267. Motion to Disqualify Judge by Plaintiff Cary Chapin, *supra* note 265, at 2. The order denying the motion identifies the 2014 matter involving Delegate Christensen's running mate as *Haynes v. Ottley*, No. 3:14-cv-00070 (D.V.I. Oct. 23, 2014). Judge Gómez entered judgment in that case on October 23, 2014, fewer than ninety days before his term expired. The attorney's efforts to install a new federal judge in St. Thomas to fill Judge Gómez's seat were reported by the *St. Thomas Source* the following year. *See* Bernetia Akins, *Undercurrents: At District Court, They Also Serve Who Wait—For Replacement*, ST. THOMAS SOURCE (Feb. 29, 2016), https://stthomassource.com/content/2016/02/29/undercurrents-at-district-court-they-also-serve-who-wait-for-replacement [https://perma.cc/ZB9J-49NP]. Christensen had previously expressed public support for Judge Gómez before resigning her congressional seat to run for Governor. When Judge Gómez's 2004 nomination was held up on the Senate floor in 2004, Delegate Christensen publicly decried the dynamic in which the territory's "outstanding nominees . . . are unfortunately caught up in [] political conflict." *See Christensen Praises Finch, Asks for Gomez OK*, ST. THOMAS SOURCE (Sept. 9, 2004), https://stthomassource.com/content/2004/09/09/christensen-praises-finch-asks-gomez-ok-0 [https://perma.cc/Z6XD-PHHM].

268. United States v. Roebuck, 289 F. Supp. 2d 678, 684-85 (D.V.I. 2003) (reprinting the attorney's letter in full).

suggests political tumult awaits him in the latter half of this decade.[269] The Judicial Conference appears to have forgotten what it announced when it urged Congress to extend Article III protections to Puerto Rico: "Federal litigants . . . should not be denied the benefit of judges made independent . . . from the pressures of those who might influence [their] chances of reappointment."[270]

CONCLUSION

The evolution of territorial courts since 1966 reveals that the justification for their differentiation has collapsed. Federal island judges have all reached the endpoint Congress cited when it granted life tenure to district judges in Puerto Rico. Arguments grounded in gap-filling and jurisdictional necessity are no longer plausible. Despite what appears in Federal Judicial Center materials, each of these district courts has slowly been transformed into a forum of "exclusive federal jurisdiction," the Judicial Conference's touchstone for institutional equality in 1966.[271] There are now four active federal district judges in CNMI, Guam, and the U.S. Virgin Islands who exercise powers and responsibilities identical to their mainland counterparts but are denied equivalent stature and decisional independence. Two of them can be replaced at any moment, even as they preside over high-profile cases in which the interests of the United States and those of local self-government are directly adverse.

The Judicial Conference, once the vocal and persistent driver of a ten-year effort to make Puerto Rico's federal judges equal to the rest of the judiciary, has fallen silent on the question of federal island judges. In the few times in which judicial bodies have formally taken up the question of territorial differentiation since 1966—including the Judicial Conference's endorsement of "Article III status" for the District Court for the Northern Mariana Islands in 1994[272]—judicial bodies have tried and failed to transmute their own 1966 logic into new articulations that would continue to support separate status in these three judicial districts. Whether this is a function of simple oversight or intentional design, the Judicial Conference is failing to fully reckon with the reality that not all of its district judges are as independent as they are held out to be.

The obfuscation of meaningful institutional differences limits our understanding of the forces that preserve the constitutional order in which four million U.S. citizens' access to the independent judiciary—not to mention Congress and

269. *See Judging Tom: Politics Bares Its Teeth* and other sources cited *supra* note 17.

270. S. REP. NO. 89-1504, at 2-3 (1966); H.R. REP. NO. 89-135, at 2-3 (1965).

271. 112 CONG. REC. 20,767 (1966).

272. *See supra* note 200 and accompanying text.

the electoral college—is by every measure less than what is enjoyed by U.S. citizens living on the mainland. Whatever underlies the shapeshifting logic of transition and institutional maturity, the Judicial Conference could render a better defense of judicial independence by bringing these distinctions into the open and distancing itself from the vestige of U.S. overseas expansionism.

The Judicial Conference and other judicial spaces should open a new channel for Congress to address the state of federal judicial independence and U.S. territorial relationships, just as it repeatedly did with Puerto Rico.[273] In the meantime, commentators must look beyond purely constitutional questions to observe the idiosyncratic federal-territorial relationships as a conceptual whole. The 2020 Democratic primary demonstrated the limiting and narrow lens that politicians and officials frequently apply to territorial issues in Washington today: nearly every candidate included a platform proposal concerning justice for Puerto Rico but few mentioned the parallel issues in the U.S. Virgin Islands, which was similarly devastated by Hurricanes Irma and Maria in 2017.[274] While the story of Puerto Rico's federal court in 1966 suggests that the Judicial Conference may not be able to elevate island judges on its own, its initiative is nonetheless crucial. Neither Congress nor a new President is likely to have a hand in changing what is actively hidden from them.

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273. *See supra* notes 89-94 and accompanying text.

274. *See, e.g.*, Amanda Alcántara, *Beto O'Rourke Says He's for Puerto Rico Statehood: Is Taking a Position Enough?*, LATINOREBELS (Mar. 25, 2019), https://www.latinorebels.com/2019/03/25/betopuertorico [https://perma.cc/M838-ZMPM]; *Empower the People of Puerto Rico,* BERNIE 2020: ISSUES, https://berniesanders.com/issues/empower-the-people-of-puerto-rico [https://perma.cc/ZLK9-478E]. Michael Bloomberg was the only candidate to open a campaign office in the U.S. Virgin Islands, which has delegates in the primary election but no electoral votes in the general election. *See* Don Buchanan, *Bloomberg Opening V.I. Campaign Office, Other Candidates Eye Territory*, ST. THOMAS SOURCE (Jan. 21, 2020), https://stthomassource.com/content/2020/01/21/bloomberg-opening-v-i-campaign-office-other-candidates-eye-territory [https://perma.cc/FXF3-J48C]; Rebecca R. Ruiz, *The Bloomberg Campaign Is a Waterfall of Cash*, N.Y. TIMES (Feb. 13, 2020), https://www.nytimes.com/2020/02/13/us/politics/bloomberg-campaign-cash.html [https://perma.cc/M2JT-ESQZ]. Other Democratic candidates campaigned in Puerto Rico, which has more than five times as many Democratic delegates as the U.S. Virgin Islands. *See* Marc Caputo, *Puerto Rico Emerges as 2020 Campaign Hotspot*, POLITICO (Feb. 27, 2019), https://www.politico.com/story/2019/02/27/puerto-rico-2020-1194114 [https://perma.cc/W8C2-MSRQ]; Alexandra Hutzler, *Democrat Mike Bloomberg Is Taking His 2020 Campaign to the Virgin Islands. Here's Why it Could Be a Winning Strategy*, NEWSWEEK (Dec. 31, 2019), https://www.newsweek.com/mike-bloomberg-2020-campaign-virgin-islands-strategy-1479872 [https://perma.cc/JJ5C-AA9T].