

The Virgin Islands Consortium

Supreme Court Attorney Joins Case Seeking Recognition of Birthright Citizenship In U.S. Territories

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ST. CROIX -- Does Congress have the power to switch the Constitution's guarantee of birthright citizenship on and off in U.S. territories?

This is one of the questions a group of Americans denied recognition as U.S. citizens because they were born in American Samoa plan to ask the Supreme Court when they file their petition for certiorari in the coming weeks, a press release We the People Project has revealed.

Joining them in [Tuaua v. United States](#) to make the case that the Constitution's guarantee of birthright citizenship cannot be restricted by Congress is prominent

Supreme Court attorney Theodore B. Olson (biography [here](#)), who has argued over 60 cases before the U.S. Supreme Court. On Monday, Mr. Olson filed a motion to the Court on behalf of the Tuaua petitioners requesting a 30-day extension to file a petition for certiorari seeking Supreme Court review of the United States Court of Appeals for the District of Columbia Circuit's June decision holding that birthright citizenship is not a "fundamental right" in U.S. territories. The motion, which includes an overview of the arguments and issues in the case, is available [here](#).

"I am a proud, passport-carrying American, was born on U.S. soil, and signed up for the draft during the Vietnam War -- yet the federal government will not recognize me as a U.S. citizen. I know that's wrong, and I hope the Supreme Court will agree it's also unconstitutional," said Leneuot Tuaua, lead plaintiff in *Tuaua v. United States*.

Three of the five Tuaua plaintiffs are veterans; American Samoa has among the highest rates of U.S. military service in the nation, with casualty rates in Iraq and Afghanistan more than seven times the national average.

"The text and history of the Citizenship Clause definitively show that the Constitution's guarantee of birthright citizenship applies in States and territories alike," said Mr. Olson, who in 2008 wrote a letter with Harvard Professor Laurence Tribe defending the eligibility of John McCain to run for President as a "natural-born citizen" based on his birth in a U.S. possession, among other reasons.

"We hope that the Supreme Court will take the case to once again make clear that Congress has no power to turn off or redefine the Constitution's guarantee of birthright citizenship."

"Theodore Olson has a record of standing up for constitutional rights. We are thrilled to have his experience and expertise as we work to help our clients have their day before the Supreme Court," said Neil Weare, who argued the case before the D.C. Circuit, and is President and Founder of We the People Project, a non-profit organization that advocates for equal rights and representation for the over 4 million Americans living in U.S. territories.

The D.C. Circuit's June opinion, authored by Judge Janice Rogers Brown and joined by Senior Judges Laurence H. Silberman and David B. Sentelle, held that the meaning of the Citizenship Clause was "ambiguous" as to whether its guarantee of birthright citizenship applied in overseas U.S. territories. The panel's opinion also broadly expanded the reach of the Insular Cases, a series of controversial decisions that have been criticized by First Circuit Judge Juan Torruella as creating a doctrine of "separate and unequal" status for residents of U.S. territories. In doing so, it held that rights recognized as "fundamental" in other parts of the United States need not be recognized as "fundamental" in so-called "unincorporated" U.S. territories, a controversial and unprecedented classification created by the Supreme Court at the turn of the 20th century to apply to newly acquired overseas territories.

"Fundamental constitutional rights should mean the same thing throughout the United States, whether one lives in a state, territory, or the District of Columbia," Mr. Weare said.

The Tuaua case and the controversial Insular Cases doctrine were examined in a recently published book, "Reconsidering the Insular Cases," which is the result of a major conference sponsored last year at Harvard Law School.

As discussed at Harvard, the Supreme Court explained in 2008 that although "[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory," it does not give them "the power to decide when and where its terms apply." The Court's decision in *Boumediene v. Bush* also rejected the idea that "the political branches have the power to switch the Constitution on or off at will," explaining that "[i]t may well be that over time the ties between the United States and any of its territories strengthen in ways that are of constitutional significance."

"The D.C. Circuit's decision is in tension with recent Supreme Court pronouncements that Congress cannot pick and choose which constitutional rights apply in U.S. territories today. Tuaua provides the Court an opportunity to review these important constitutional questions, which affect the lives of more than 4 million Americans who live in U.S. territories," Mr. Olson said.

A recent mini-documentary examined the impact the inferior status of "non-citizen national" status has had on the American Samoan community in Los Angeles – the largest in the continental United States – who are denied the right to vote and even access to certain jobs, even as they are expected to pay the same taxes as other Americans. Loa Pele Faletogo, President of the L.A.-based Samoan Federation of America, a plaintiff in the case, explained, "We hope the Supreme Court will recognize our right to citizenship. Otherwise the only way thousands of American Samoans living in Los Angeles and other communities will be able to vote is to naturalize, which with a nearly \$700 fee and a test on English and civics, amounts to a poll tax and literacy test all rolled into one."

HBO's *Last Week Tonight with John Oliver* also examined this injustice in a segment that was cited by the Ninth Circuit for its sharp critique of any continued reliance on the Insular Cases to deny equal rights in U.S. territories.

If plaintiffs' motion is granted, their petition for certiorari will be due on Monday, February 1, 2016. A decision by the Supreme Court on whether it will take up the case is expected by the end of the Term, which ends in June.