

# OUT OF SIGHT, OUT OF MIND? ADMINISTERING FEDERAL PROGRAMS IN AMERICA’S TERRITORIES

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## INTRODUCTION

It is already tomorrow in Hagåtña, Guam, fourteen time zones from Washington, D.C.<sup>1</sup> When the federal government’s work week starts in the nation’s capital on Monday, it is almost Tuesday in Guam. Territorial governments may especially feel this temporal disconnect when executive agencies administer federal programs in the U.S. territories. Throughout its history, the United States has maintained numerous territories and possessions, but today, five remain: Puerto Rico, the U.S. Virgin Islands, the Commonwealth of the Northern Mariana Islands, American Samoa, and Guam.<sup>2</sup> Additionally, there are three Freely Associated States (FAS): the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands.<sup>3</sup>

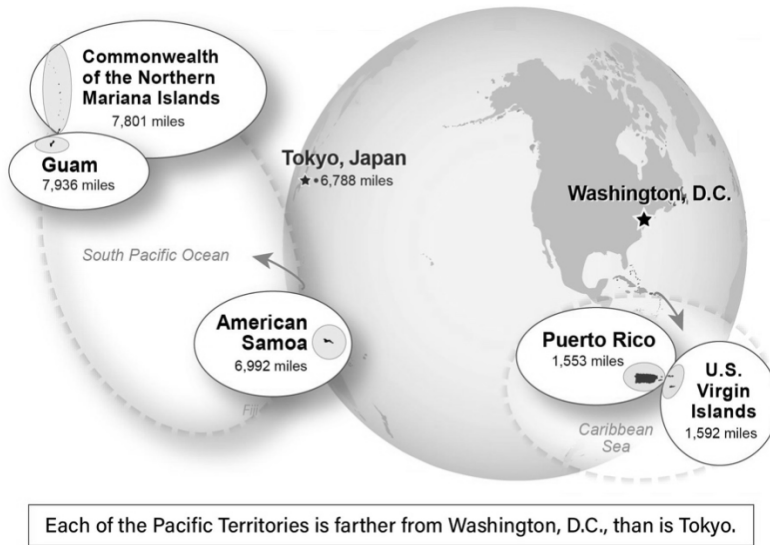
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1. See *Wake Island: Where America’s Day Really Begins*, CBS NEWS (Jan. 14, 2018), <https://www.cbsnews.com/news/wake-island-where-americas-day-really-begins/> [https://perma.cc/62SZ-2PBM]. Although America’s day technically starts on Wake Island, a small atoll and military installation 15,000 miles east of Guam, Guam still proudly claims the honor for itself. *About Wake Island*, U.S. AIR FORCE, <https://www.15wing.af.mil/Units/11th-AF-Det-1-Wake-Island/> [https://perma.cc/L488-3YHL] (last visited Feb. 8, 2025).

2. See *Dependencies and Areas of Special Sovereignty*, U.S. DEP’T OF STATE (DOS) (Jan. 17, 2024), <https://www.state.gov/dependencies-and-areas-of-special-sovereignty/> [https://perma.cc/W9PD-JZUT].

3. See THOMAS LUM, CONG. RSCH. SERV., IF12194, *IN FOCUS: THE COMPACTS OF FREE ASSOCIATION* 1–2 (2024).

**Figure 1.** Map of the United States and the territories of Guam, American Samoa, the Northern Marianas, Puerto Rico, and the Virgin Islands<sup>4</sup>



From the late nineteenth century until the mid-twentieth century, the United States acquired the five territories primarily for strategic defense purposes.<sup>5</sup> While the United States continues to maintain a military presence throughout the territories, the federal government also supports economic development, social services, and climate change resiliency projects there.<sup>6</sup> These programs are established by acts of Congress and administered by various executive departments, agencies, and commissions of the federal government.<sup>7</sup>

Individuals born in four of the five territories are U.S. citizens, whereas those born in American Samoa are U.S. nationals.<sup>8</sup> As U.S. citizens or U.S.

4. U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106574, U.S. TERRITORIES: COORDINATED FEDERAL APPROACH NEEDED TO BETTER ADDRESS DATA GAPS 2 fig.2 (2024) [hereinafter COORDINATED FEDERAL APPROACH TO DATA GAPS].

5. See LUM, *supra* note 3, at 1.

6. See *USINDOPACOM: Area of Responsibility*, U.S. INDO-PAC. COMMAND, <https://www.pacom.mil/About-USINDOPACOM/USPACOM-Area-of-Responsibility/> [<https://perma.cc/ZNW8-RF9W>] (last updated Aug. 2024). The United States Indo-Pacific Command area includes some of the United States's closest allies, but also some of its greatest adversaries, and so its presence in Guam, the Northern Marianas, and American Samoa is significant to U.S. economic and military strategy in the region. *Id.*; see also LUM, *supra* note 3, at 1.

7. See Administrative Procedure Act, 5 U.S.C. §§ 500, 551.

8. See *American Samoa*, U.S. DEP'T OF THE INTERIOR (DOI), <https://www.doi.gov/oia/islands/american-samoa> [<https://perma.cc/W3LV-AETN>] (last visited Feb. 8, 2025)

nationals, individuals born in the territories can freely move and work in any of the fifty states and the District of Columbia.<sup>9</sup> Individuals residing in the territories can vote in presidential primaries but cannot vote in presidential general elections.<sup>10</sup> However, territorial citizens and nationals can elect the delegates to Congress who hold non-voting observer status, much like the residents of the District of Columbia.<sup>11</sup> Consequently, whenever Congress

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[*hereinafter American Samoa*, DOI]; MEDICAID & CHIP PAYMENT & ACCESS COMM'N, FACT SHEET: MEDICAID AND CHIP IN THE TERRITORIES 1 (2021). Significantly, in the Supreme Court's 2022 term, a petition for certiorari was denied in *Fitisemanu v. United States*, in which American Samoan nationals sought to establish birthright citizenship. See 143 S. Ct. 362, 362 (2022); Natalie Bravo, *Supreme Court Declines to Hear Constitutional Challenge to Citizenship Law*, SYRACUSE L. REV. LEGAL PULSE (Oct. 27, 2022), <https://lawreview.syr.edu/supreme-court-declines-to-hear-constitutional-challenge-to-citizenship-law/> [<https://perma.cc/AH6C-KXKM>] (contextualizing the case).

9. See MEDICAID & CHIP PAYMENT & ACCESS COMM'N, *supra* note 8; see also *Puerto Rico*, OFF. OF CONG. JENNIFFER GONZALEZ-COLON, <https://gonzalez-colon.house.gov/about/puerto-rico> [<https://perma.cc/S7R3-ACQJ>] (last visited Feb. 8, 2025); see, e.g., *How Do Individuals from American Samoa Complete Form I-9?*, E-VERIFY (Aug. 18, 2023), <https://www.e-verify.gov/faq/how-do-individuals-from-american-samoa-complete-form-i-9> [<https://perma.cc/EBJ3-HBWL>].

10. See *Who Can and Cannot Vote*, USAGOV (Sept. 26, 2024), <https://www.usa.gov/who-can-vote> [<https://perma.cc/Q65Z-VCD6>] (explaining that U.S. citizens can vote in local, state, and federal elections, but that U.S. citizens who have moved and changed their domicile to the territories cannot vote for president in the general election); *Electoral College: Frequently Asked Questions*, NAT'L ARCHIVES (Nov. 6, 2024), <https://www.archives.gov/electoral-college/faq> [<https://perma.cc/2874-M646>]. Further, while citizens of U.S. territories (and U.S. nationals, as in the case of American Samoa) cannot vote in U.S. presidential elections unless they have their official domicile in a U.S. state (American Samoans still are not eligible to vote even if their official domicile is a U.S. state due to their status as U.S. nationals), political parties may allow voters in the U.S. territories to vote in the primaries and select delegates for the party conventions—but this is a process that is distinct from the electoral college process that selects the President after general elections. *Id.*; Cy Neff, *American Samoa Delivered a Primary Surprise but Can U.S. Territories Vote for President?*, USA TODAY (Mar. 6, 2024, 12:13 AM), <https://www.usatoday.com/story/news/politics/elections/2024/03/06/us-territories-voter-elections/72860552007/> [<https://perma.cc/RA9A-QQ3E>] (explaining further that while U.S. citizens who move to the territories and make their residency permanent lose their right to vote in presidential elections, but may vote in presidential elections if they have not changed their residency and vote absentee instead).

11. See STAFF OF COMM. ON HOUSE ADMIN., SUBCOMM. ON ELECTIONS, 116th CONG., REP. ON VOTING RIGHTS AND ELECTION ADMINISTRATION IN THE UNITED STATES OF AMERICA 13 (2020) (prepared by Chairperson Marcia Fudge) (citing Aaron Steckelberg & Chiqui Esteban, *More than 4 Million Americans Don't Have Anyone to Vote for Them in Congress*, WASH. POST (Sept. 28, 2017), <https://www.washingtonpost.com/graphics/2017/national/fair-representation/> [<https://perma.cc/7FS5-NZPU>]). In accordance with the

creates or modifies programs that will be administered in the territories, those voting on final passage of the measures do not represent the impacted communities.<sup>12</sup>

Under Articles I and IV of the Constitution, Congress has the authority to pass legislation establishing or reauthorizing federal programs that can be made available to all fifty U.S. states, the District of Columbia, and the territories.<sup>13</sup> The statutes outline the scope of these programs, but individual agencies are responsible for designing, implementing, and monitoring the programs.<sup>14</sup> The administrative staff are then responsible for developing programs tailored to meet statutory requirements in an administratively efficient manner.<sup>15</sup> Any agency charged by Congress to implement programs throughout the United States has a colossal task of ensuring that the language is inclusive of communities large and small—from the most remote to the most urban—throughout the United States.<sup>16</sup> Unfortunately, whether unintentionally or because of an unconscious mainland U.S. bias, the final language of federal grant programs often functionally excludes the U.S. territories.<sup>17</sup> Unintentional program barriers created during federal program

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Immigration and Nationality Act, all individuals who are U.S. citizens also carry the status of U.S. nationals, but not all U.S. nationals are U.S. citizens. *See* Immigration and Nationality Act, 8 U.S.C. § 1452(b); *see also infra* notes 65–66 and accompanying text (explaining that individuals from American Samoa are U.S. nationals and not U.S. citizens, as are other individuals from the other four U.S. territories).

12. *See* Steckelberg & Esteban, *supra* note 11.

13. *See* U.S. CONST. art. I, § 8, cl. 1; U.S. CONST. art. IV, § 3, cl. 2.

14. *See* TODD GARVEY & SEAN M. STIFF, CONG. RSCH. SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 15 (2023) (citing WHITNEY K. NOVAK, CONG. RSCH. SERV., R44729, CONSTITUTIONAL AUTHORITY STATEMENTS AND THE POWERS OF CONGRESS: AN OVERVIEW 15–16 (2023) (explaining the relationship between the Taxing and Spending Clause and the Appropriations Clause and the limits they place on executive department discretionary spending beyond specific congressional authorization)).

15. *See* NATALIE KEEGAN, CONG. RSCH. SERV., R47928, CONSIDERATIONS FOR CREATING A NEW FEDERAL GRANT PROGRAM: IN BRIEF 7–8 (2024).

16. *See, e.g.*, ANTHONY F. PIPA, LAURA LANDES, & ZOE SWARZENSKI, BROOKINGS INST., MAXIMIZING NEW FEDERAL INVESTMENTS IN BROADBAND FOR RURAL AMERICA 15, 25 (2023), <https://www.brookings.edu/articles/maximizing-new-federal-investments-in-broadband-for-rural-america/> [<https://perma.cc/6ZYK-VE8E>]. *See generally* Nate Luce, *How to Make Notice and Comment Rulemaking More Representative*, VAND. UNIV. (June 1, 2023, 9:25 AM), <https://law.vanderbilt.edu/how-to-make-notice-and-comment-rulemaking-more-representative/> [<https://perma.cc/PAC9-GRDS>] (summarizing the argument that agencies should identify interests they expect to participate in rulemaking before engaging in the comment process, ensuring the process represents those interests).

17. *See, e.g.*, *U.S. Territories Have Faced Challenges Gaining Access to COVID Funds*, SAMOA NEWS (Sept. 22, 2023, 8:30 AM), <https://www.samoanews.com/local-news/us-territories->

draftsmanship may have devastating, compounding effects on the U.S. territories, which are under-resourced compared to states.<sup>18</sup> Furthermore, the U.S. territories may become completely ineligible for programs or require a lengthy waiver process because of unintentionally exclusionary drafting.<sup>19</sup>

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have-faced-challenges-gaining-access-covid-funds [https://perma.cc/68ZA-HGQU] (explaining that financial requirements in federal programs do not align with the structures and banking structures available in the Pacific territories); see also Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1641–42 (2021).

18. See, e.g., Mar-Vic Cagurangan, *U.S. Territories and Freely Associated States Get a Temporary Waiver for Buy America Policy*, PAC. ISLAND TIMES (May 31, 2024), <https://www.pacificisland-times.com/post/us-territories-and-freely-associated-states-get-a-temporary-waiver-for-buy-america-policy> [https://perma.cc/J46T-5UTA] (quoting Christopher Coes, Acting Undersecretary for Policy at the U.S. Department of Transportation (DOT)) (“DOT is concerned that complying with Buy America requirements may increase already elevated project time and costs—particularly in the short run. . . . Materials sourced from the United States lead to additional shipping fees and longer lead times, thus significantly extending construction activity schedules.”). Senior officials at the Pentagon have also recognized the challenge the Department of Defense is experiencing in its own military construction projects in Guam. *Id.* Assistant Secretary of Defense for Energy, Installations, and Environment Brendan Owens, described “the tyranny of distance” that is felt in Guam, the difficulty of getting basic construction materials like cement and steel to the island, and how “problematic [those challenges are] from a construction perspective.” *Id.*; see also Calum Cameron, *Why the Letter of Credit Requirement Could Sink BEAD*, CONNECT HUMAN. (July 19, 2023), <https://connecthumanity.fund/why-the-letter-of-credit-requirement-could-sink-bead/> [https://perma.cc/V8W5-7EEF]; *infra* text accompanying note 140; cf. *Communities Rely on Federal Grants, but May Have Challenges Accessing Them*, GAO (June 7, 2023), <https://www.gao.gov/blog/communities-rely-federal-grants-may-have-challenges-accessing-them> [https://perma.cc/J9UC-XUYA] (explaining that smaller, under-resourced communities that may be most in need of federal funding may be the communities that have the greatest difficulty accessing that assistance).

19. See *infra* Part II.C. *Compare* Letter from Bob Mudge, Chief Exec. Officer, Brightspeed, et al. to Gina Raimondo, Sec’y, U.S. Dep’t of Com. (DOC) & Alan Davidson, Asst. Sec’y for Commc’n, DOC (Oct. 18, 2023), <https://s3.documentcloud.org/documents/24040919/biden-broadband-bead-program-letter-from-small-med-size-isps.pdf> [https://perma.cc/GZX4-UTDU] (explaining that even for mid-size Internet Service Providers (ISPs) located in the contiguous United States the Broadband Equity, Access and Deployment (BEAD) program’s letter of credit (LC) requirement is so financially burdensome that it would require ISPs to “divert funds from ongoing network deployment or not participate in the BEAD program at all” and likely “will force many ISPs out of the program”), *with* Letter from Jochai Ben-Avie, Chief Exec. Officer, Connect Human., et al., to Gina Raimondo, Sec’y, DOC & Alan Davidson, Asst. Sec’y for Commc’n, DOC (Sept. 6, 2023), <https://connect-humanity.shorthandstories.com/bead-letter-of-credit-alternatives/#group-section-Read-the-Letter-43KkAcKLW6> [https://perma.cc/HY7X-DPGL] (explaining further that the BEAD program’s LC requirement “rules risk excluding thousands of providers whose participation is vital to closing America’s digital divide”).

While the territories individually face different challenges to economic development, they all struggle with limited employment opportunities and job training, outmigration, climate change threats, and high costs of energy and imported goods.<sup>20</sup> The results of the 2020 census indicated dramatic declines in territorial population and outward migration to the continental United States.<sup>21</sup> The COVID-19 pandemic demonstrated the vulnerability of territorial communities as tourism was severely reduced and access to testing and treatment lagged (or was nonexistent in the early stages of the pandemic, even once testing was possible in the U.S. mainland).<sup>22</sup>

At the federal level, the Department of the Interior (Interior) coordinates federal activities in the United States's territories of Guam, American Samoa, the Northern Marianas, and the U.S. Virgin Islands.<sup>23</sup> Interior's Office of Insular Affairs (OIA), led by the Assistant Secretary for Insular and International Affairs, is responsible for coordinating policy and providing technical assistance for federal financial assistance in the territories.<sup>24</sup> OIA also oversees federal assistance to the FAS of Micronesia, the Marshall Islands, and Palau.<sup>25</sup> OIA is uniquely expert in the experience of the territories, whereas its counterparts across the rest of the Executive Branch are often more focused on the states.<sup>26</sup>

#### A. *Timeliness of this Work*

This discussion is timely because the federal government is making its largest-ever non-military investments to the territories through the Infrastructure

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20. See COORDINATED FEDERAL APPROACH TO DATA GAPS, *supra* note 4, at 3.

21. See Andrew Van Dam, *People are Fleeing Puerto Rico, Guam and Every Other U.S. Territory. What Gives?*, WASH. POST (Sept. 23, 2022, 6:00 AM), <https://www.washingtonpost.com/business/2022/09/23/american-territories-population-loss/> [<https://perma.cc/7UFG-RHAB>].

22. See COORDINATED FEDERAL APPROACH TO DATA GAPS, *supra* note 4; Peter Georgiev & Adiel Kaplan, *American Samoa's Coronavirus Conundrum: No Way to Test*, NBC NEWS (Mar. 25, 2020, 2:15 PM), <https://www.nbcnews.com/health/health-care/american-samoa-s-coronavirus-conundrum-no-way-test-n1167776> [<https://perma.cc/C75N-Q36Q>]; see also GAO, GAO-23-106045, U.S. TERRITORIES: PUBLIC DEBT OUTLOOK—2023 UPDATE 4, 25, 33, 43 (2023) (explaining that the territory economies are largely dependent on tourism revenues and that recent severe tropical weather and COVID-19 have created untenable financial situations for the territories and have led to difficulties managing territorial debt) [hereinafter U.S. TERRITORIES: PUBLIC DEBT OUTLOOK 2023].

23. See *Who We Are*, DOI, <https://www.doi.gov/oia/who-we-are> [<https://perma.cc/R2YE-P7QS>] (last visited Feb. 8, 2025) [hereinafter *DOI: Who We Are*].

24. See *id.*

25. See *id.*

26. See *id.*

Investment and Jobs Act (IIJA).<sup>27</sup> The IIJA, also known as the Bipartisan Infrastructure Law, was passed by Congress in 2021.<sup>28</sup> The IIJA includes \$65 billion worth of investments in high-speed Internet as well as \$65 billion for climate change mitigation and grid modernization—all critical investments for the territories.<sup>29</sup>

The historic investments across the United States will drive future economic growth, but many of the IIJA programs have never been available or implemented in the territories before.<sup>30</sup> It is crucial that as various federal agencies attempt to administer programs in the territories for the first time, keen attention is paid to the roadblocks that the territories face in accessing available programs so that they are not impeded from participating in any IIJA-related program or any federal programs that might be available to the territories in the future.

During spring 2024, the Government Accountability Office (GAO) issued a report on the adverse effects on the territories of the federal government's failure to collect data in the region.<sup>31</sup> This lack of data collection can make it difficult for Congress and agencies to draft legislation and program guidance that is circumstantially appropriate.<sup>32</sup> As Congress is making historic, widespread investments across the nation, it is essential that data collection is part and parcel of the implementation and monitoring process for federal programs in the territories.

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27. See Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117-58, 135 Stat. 429, 786 (2021). As of publication, at least two federal courts have implemented temporary restraining orders on the Trump Administration's memorandum to freeze trillions of federal funding, including Infrastructure Investment and Jobs Act disbursements. Jordan Rubin, *D.C. Judge Issues Temporary Restraining Order against Trump's Federal Funding Freeze*, MSNBC: DEADLINE (Feb. 3, 2025), <https://www.msnbc.com/deadline-white-house/deadline-legal-blog/trump-federal-funding-freeze-judge-restraining-order-rcna190482> [https://perma.cc/L9W7-8V4C]; W. Barron A. Avery, Alexander B. Hastings, Moshe Klein, Christian Kozlowski, Sarah-Jane Lorenzo & Casey Weaver, *Federal Agencies Ordered to Pause Spending of Inflation Reduction Act, Infrastructure Investment and Jobs Act Funds*, MORGAN LEWIS (Jan. 23, 2025), <https://www.morganlewis.com/pubs/2025/01/federal-agencies-ordered-to-pause-spending-of-inflation-reduction-act-infrastructure-investment-and-jobs-act-funds> [https://perma.cc/6SNT-XQ36].

28. See Press Release, Exec. Off. of the President, Fact Sheet: The Bipartisan Infrastructure Deal (Nov. 6, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/> [https://perma.cc/R4EZ-MYMS] [hereinafter Fact Sheet: The Bipartisan Infrastructure Deal].

29. See *id.*

30. See *Investing in America*, EXEC. OFF. OF THE PRESIDENT (Nov. 25, 2024), [https://biden-whitehouse.archives.gov/invest/?utm\\_source=invest.gov](https://biden-whitehouse.archives.gov/invest/?utm_source=invest.gov) [https://perma.cc/5UH9-HFK6].

31. See COORDINATED FEDERAL APPROACH TO DATA GAPS, *supra* note 4, at 1.

32. See *id.*



Executive agencies that Congress has directed to implement federal programs should not functionally exclude entities that Congress intended those programs to reach. Interior's OIA, under its Executive Order 13,537 authority and in its role as co-chair of the Interagency Group on Insular Areas (IGIA), should issue guidance to be shared both with the President and with all other federal agencies and commissions to ensure that U.S. territories are neither excluded nor deterred from participation in federal programs due to exclusionary agency-level program draftsmanship.<sup>33</sup> This action is especially timely given the significant levels of investment throughout the United States and its territories via the IIJA.<sup>34</sup> The U.S. territories face additional hurdles in accessing federal funding, and the federal government should move proactively to maximize reinvestment in the territories beyond historical national security-related investments.

Part I introduces the experience of the U.S. territories and their historic exclusion from federal funding due to executive branch program draftsmanship. Part II explores the history of the U.S. territories and FAS, Interior, and the IGIA. Part II also discusses the role of other federal territory equities that make up the rest of the ecosystem, including the White House Office of Intergovernmental Affairs (WH-IGA) and territorial liaison offices in Washington, D.C. Part III outlines the IIJA, its current practices and challenges, and uses the Broadband, Equity, Access, and Deployment (BEAD) Program as an example of impacts felt by the territories. Part III also examines how recent Executive Branch actions have helped to close the access gap for the territories and that, while impactful, these actions do not eliminate access concerns. Part IV proposes four near and mid-term solutions to address the access gaps that territories experience. This Comment concludes that OIA and the IGIA should be empowered to issue guidance on best practices for program draftsmanship that prevents the exclusion of territorial governments, that IGIA's annual report to the President should be published to provide greater transparency and establish growth benchmarks, and that a formal recommendation should be made to Congress to fund a GAO report on data gaps in federal reporting that does not require reporting for the territories.

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33. See Exec. Order No. 13,299, 68 Fed. Reg. 25,477 (May 12, 2003) (establishing within the DOI the Interagency Group on Insular Areas (IGIA)); see also Exec. Order No. 13,537, 75 Fed. Reg. 20,237 (Apr. 14, 2010) (clarifying the functions and jurisdiction of the IGIA and establishing the Deputy Assistant to the President and Director of Intergovernmental Affairs as its co-chair).

34. See Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117-58, 135 Stat. 429.

## I. BACKGROUND

### A. *A Brief History of the U.S. Territories & Freely Associated States*

Article IV of the U.S. Constitution grants Congress the power to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>35</sup> Three types of legal statuses have been recognized by the federal government: statehood, territory, or independence (including free association).<sup>36</sup> As of 2024, Congress recognizes the fifty states, the five territories (Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Northern Marianas), three FAS (Micronesia, Palau, and the Marshall Islands), and the federal district of Washington, D.C.<sup>37</sup> Each territory elects an independent Governor and legislative body, as well as non-voting delegates who serve in the U.S. House of Representatives (Puerto Rico’s delegate is referred to as the Resident Commissioner).<sup>38</sup> The lack of voting representation frustrates the ability to incorporate territorial issues into legislation and executive actions.<sup>39</sup>

### B. *National Security Implications*

A detail often overlooked when discussing the attack on Pearl Harbor (and the United States’s subsequent entry into World War II) is that Hawai’i was a territory, not a state, on December 7, 1941.<sup>40</sup> Indeed, throughout its

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35. U.S. CONST. art. IV, § 3, cl. 2.

36. R. SAM GARRETT, CONG. RSCH. SERV., IF11792, STATEHOOD PROCESS AND POLITICAL STATUS OF U.S. TERRITORIES: BRIEF POLICY BACKGROUND 1 (2021).

37. U.S. CITIZENSHIP & IMMIGR. SERVS., M-618, WELCOME TO THE UNITED STATES: A GUIDE FOR NEW IMMIGRANTS 86 (2015), <https://www.uscis.gov/sites/default/files/document/guides/M-618.pdf> [<https://perma.cc/9ENM-GQ8T>] (explaining that the United States is made up of not only the fifty states and Washington, D.C., but also the five territories in the Pacific and Caribbean). See generally *Directory of Representatives*, U.S. HOUSE OF REPRESENTATIVES, <https://www.house.gov/representatives> [<https://perma.cc/45UK-SELH>] (last visited Feb. 8, 2025) (listing the state and territories recognized by the U.S. House of Representatives). See Compact of Free Association Amendments Act of 2024, Pub. L. No.118-42, 138 Stat. 25.

38. See GARRETT, *supra* note 36.

39. STAFF OF H. NAT. RES. COMM., 117TH CONG., HOW THE FOR THE PEOPLE ACT ADVANCES JUSTICE AND DEMOCRACY IN THE U.S. TERRITORIES (2021), <https://democrats-naturalresources.house.gov/imo/media/doc/HR%201%20Territories%20Fact%20Sheet.pdf> [<https://perma.cc/WKC5-QAPP>] (prepared by Chairperson Raúl M. Grijalva).

40. See *The Importance of Hawaii During World War II*, PEARL HARBOR (Nov. 5, 2017), <https://pearlharbor.org/blog/importance-hawaii-world-war-ii/> [<https://perma.cc/N67H-6FW3>]; Franklin D. Roosevelt, Address to the Congress Asking that a State of War Be

history, the United States has acquired territories for strategic national security reasons.<sup>41</sup> In the last century, the five U.S. territories have played a crucial role in national defense, especially during World War II and the Cold War.<sup>42</sup> The United States has maintained diplomatic, economic, and strategic security relationships with the territories and the FAS.<sup>43</sup> In 2022, the Biden Administration referred to the Compacts of Free Association as “the bedrock of the [United States’s] role in the Pacific.”<sup>44</sup> These relationships have allowed the United States to establish a permanent military presence in the Pacific and the Caribbean.<sup>45</sup> This posture is significant, especially in the Pacific, given the increased tension between the United States, the Russian Federation, and the People’s Republic of China.<sup>46</sup>

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Declared Between the United States and Japan (Dec. 8, 1941), [https://www.loc.gov/resource/afc1986022.afc1986022\\_ms2201](https://www.loc.gov/resource/afc1986022.afc1986022_ms2201) [<https://perma.cc/3PQ8-JGSQ>].

41. See LUM, *supra* note 3, at 1 (explaining the strategic significance of federal relations with the Pacific territories and the Freely Associated States (FAS) in countering China’s expanding presence in the Pacific).

42. See *World War II: In the Pacific*, NAT’L PARK SERV. (Feb. 23, 2023), <https://www.nps.gov/subjects/worldwarii/pacificwar.htm> [<https://perma.cc/2QK8-MNPW>]; see also George W. Anderson, Jr., Horacio Rivero, Jr., Kent L. Lee, William P. Mack & William Eucker, *Oral History—The Cuban Missile Crisis*, U.S. NAVAL INST. (Dec. 1992), <https://www.usni.org/magazines/naval-history-magazine/1992/december/oral-history-cuban-missile-crisis> [<https://perma.cc/3NGE-USJH>] (discussing the oral history of Admiral Horacio Rivero, detailing the significance of the amphibious exercises conducted in Puerto Rico in October of 1962, immediately prior to the Cuban Missile Crisis); *Foreign Relations of the United States, 1961–1963, Volume XI, Cuban Missile Crisis and Aftermath: 17. Editorial Note*, OFF. OF THE HISTORIAN, DOS, <https://history.state.gov/historicaldocuments/frus1961-63v11/d17> [<https://perma.cc/DFV2-FLM4>] (last visited Feb. 8, 2025) (explaining in greater detail the PHIBRIGLEX-62 amphibious exercise that took place in Puerto Rico in October 1962).

43. See LUM, *supra* note 3, at 1.

44. EXEC. OFF. OF THE PRESIDENT, *INDO-PACIFIC STRATEGY OF THE UNITED STATES 10* (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/02/U.S.-Indo-Pacific-Strategy.pdf> [<https://perma.cc/M4P5-2K8X>].

45. See *id.* at 4, 10 (explaining that the United States’s largest military presence is in the Pacific and that the Compacts are central to the United States’s Indo-Pacific status); see also *U.S. Army Fort Buchanan Puerto Rico: History*, U.S. ARMY (Oct. 3, 2019, 1:11PM), <https://home.army.mil/buchanan/about/history> [<https://perma.cc/L2DY-WDM9>].

46. Letter from Steve Womack, Rep., 118th Cong., et al., to Mike Johnson, Speaker of the House, 118th Cong. (Feb. 21, 2024), [https://case.house.gov/uploadedfiles/letter\\_to\\_speaker\\_johnson\\_to\\_urge\\_the\\_passage\\_of\\_the\\_cofa\\_amendments\\_act\\_of\\_2023.pdf](https://case.house.gov/uploadedfiles/letter_to_speaker_johnson_to_urge_the_passage_of_the_cofa_amendments_act_of_2023.pdf) [<https://perma.cc/32DE-S32L>]; *U.S. Relations with Russia*, BUREAU OF EUR. & EURASIAN AFFS., DOS (Sept. 3, 2021), <https://www.state.gov/u-s-relations-with-russia/> [<https://perma.cc/C4J7-DJKS>].

### C. *Legal History of the U.S. Territories*

#### 1. *U.S. Virgin Islands*

The United States purchased the U.S. Virgin Islands from Denmark in 1917 for \$25 million.<sup>47</sup> In February 1931, President Herbert Hoover signed Executive Order 5,566, placing the Virgin Islands's government under the supervision of the Secretary of the Interior.<sup>48</sup> The Executive Order also directed that once a Governor was installed in the Virgin Islands, that individual would report to the Secretary of the Interior.<sup>49</sup> That structure continued until the passage of the Virgin Islands Organic Acts of 1936, through which self-government was established in the U.S. Virgin Islands.<sup>50</sup> Self-government was later expanded in the Virgin Islands Organic Acts of 1954, and the first elections were held in 1970.<sup>51</sup>

#### 2. *Guam*

Following the Spanish–American War, Guam was administered by the U.S. Navy.<sup>52</sup> Naval jurisdiction over Guam continued until the Guam Organic Act of 1950, which granted U.S. citizenship to Guamanians and established civilian governance of Guam.<sup>53</sup> Concurrent to the passage of the Guam Organic Act of 1950, President Harry S. Truman signed Executive Order 10,137, which transferred jurisdiction from the U.S. Navy to Interior, where it has remained since 1950.<sup>54</sup> Similar to the U.S. Virgin Islands, the first elections for constitutional officers took place in 1970.<sup>55</sup>

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47. See Act of March 3, 1917, Pub. L. No. 64-389, § 7, 39 Stat. 1132, 1133; see also *U.S. Virgin Islands*, DOI, <https://www.doi.gov/oia/islands/virgin-islands> [<https://perma.cc/QCA3-DM2V>] (last visited Feb. 8, 2025).

48. See Exec. Order No. 5566 (Feb. 27, 1931).

49. See *id.*

50. See Organic Act of the Virgin Islands of the United States, Pub. L. No. 74-749, 49 Stat. 1807 (1936); see also *U.S. Virgin Islands*, *supra* note 47.

51. See Organic Act of the Virgin Islands of the United States, 49 Stat. 1807; *U.S. Virgin Islands*, *supra* note 47.

52. See generally Treaty of Peace (Treaty of Paris), Spain-U.S., Dec. 10, 1898, 30 Stat. 1754 (granting the United States possession over Guam); Exec. Order No. 108-A (Dec. 23, 1898) (placing Guam under the control of the U.S. Navy).

53. See Organic Act of Guam, Pub. L. No. 81-630, 64 Stat. 384 (1950).

54. See Exec. Order No. 10,137, 15 Fed. Reg. 4241 (June 30, 1950); see also Organic Act of Guam, § 3, 64 Stat. at 384.

55. 48 U.S.C. § 1422; see also *Guam*, DOI, <https://www.doi.gov/oia/islands/guam> [<https://perma.cc/LT9Y-GMFX>] (last visited Feb. 8, 2025).

### 3. Puerto Rico

Puerto Rico's path to territorial status also began following the Spanish–American War.<sup>56</sup> In 1900, Congress passed the Foraker Act (Puerto Rico Organic Act of 1900) that created self-governance in Puerto Rico and the role of Resident Commissioner to the U.S. House of Representatives.<sup>57</sup> The Resident Commissioner was to be elected for two-year terms, just as their Representative members from the U.S. mainland.<sup>58</sup> In 1917, Congress passed the Jones Act granting U.S. citizenship to Puerto Ricans.<sup>59</sup> Puerto Rico ratified its constitution in 1952.<sup>60</sup>

Compared to other territories, Puerto Rico is uniquely positioned because it does not fall under the jurisdiction of OIA.<sup>61</sup> The Puerto Rico and Territories Director in WH-IGA, not OIA, serves as the primary liaison to the territory.<sup>62</sup> While this arrangement suggests that Puerto Rican interests have an open line to the White House, there is likely a disadvantage as they are not able to readily access the technical assistance and expertise of the policy staff in OIA, unlike their territorial peers.<sup>63</sup>

### 4. American Samoa

American Samoa had a unique path to territorial status. In 1956, President Truman signed Executive Order 10,264, which moved jurisdiction over

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56. See Treaty of Paris, *supra* note 52.

57. See Foraker Act, Pub. L. No. 56-191, 31 Stat. 77 (1900).

58. See *id.*

59. See Jones Act, Pub. L. No. 64-145, 39 Stat. 953 (1917).

60. Letter from Vernon D. Northrop, Acting Sec'y, DOI, to Oscar L. Chapman, Sec'y, DOS (Oct. 9, 1952), <https://history.state.gov/historicaldocuments/frus1952-54v03/d902> [<https://perma.cc/8UA4-FQQJ>].

61. See *Puerto Rico*, DOI, <https://www.doi.gov/oia/islands/puertorico> [<https://perma.cc/Y7ED-H7DS>] (last visited Feb. 8, 2025).

62. See *Office of Intergovernmental Affairs*, EXEC. OFF. OF THE PRESIDENT, <https://www.whitehouse.gov/iga/> [<https://perma.cc/M53Y-JCZ8>] (last visited Feb. 8, 2025) [hereinafter *White House IGA*]; *Gretchen Sierra-Zorita*, OFF. OF INTERGOVERNMENTAL AFFS., EXEC. OFF. OF THE PRESIDENT, <https://www.whitehouse.gov/iga/meet-the-team/gretchen-sierra-zorita/> [<https://perma.cc/6EKB-FF3H>] (last visited Feb. 8, 2025); *Meet the Team*, OFF. OF INTERGOVERNMENTAL AFFS., EXEC. OFF. OF THE PRESIDENT [hereinafter *White House IGA: Meet the Team*], <https://www.whitehouse.gov/iga/meet-the-team/> [<https://perma.cc/9S53-FHLU>] (last visited Feb. 8, 2025).

63. See *Puerto Rico*, *supra* note 61; see also *U.S. Territories: Coordinated Federal Approach Needed to Better Address Data Gaps*, GAO (May 9, 2024), <https://www.gao.gov/products/gao-24-106574> [<https://perma.cc/9TFK-PGVH>]; *COORDINATED FEDERAL APPROACH TO DATA GAPS*, *supra* note 4.

the territory from the U.S. Navy to Interior.<sup>64</sup> American Samoa again distinguishes itself from the histories of Guam and the Virgin Islands as an Organic Act has not been passed by Congress addressing territorial governance in American Samoa.<sup>65</sup> As a result, American Samoans are U.S. nationals (not U.S. citizens, as their territorial peers), and American Samoa independently manages immigration and border control.<sup>66</sup> Nonetheless, American Samoa adopted a constitution in 1967 and held its first elections for constitutional officers in 1977.<sup>67</sup>

##### 5. *Commonwealth of the Northern Mariana Islands*

Following World War II, the United Nations created the Trust Territory of the Pacific Islands (TTPI), administered by the United States.<sup>68</sup> The Commonwealth of the Northern Mariana Islands was one of the four island chains that made up the TTPI.<sup>69</sup> The Trusteeship Agreement ended with the Northern Marianas in 1986.<sup>70</sup> The Northern Marianas became a territory of the United States in 1975 following the passage of a “Covenant” with the federal government, making it a commonwealth.<sup>71</sup> The Commonwealth’s constitution was adopted in 1977, with the first elections for territorial governor, Congressional representative, and territorial Senate and House taking place that year.<sup>72</sup> In 1986, President Ronald Reagan signed Executive Order 12,572, which recognized the dissolution of the TTPI and granted U.S. citizenship to the people of the Northern Marianas.<sup>73</sup>

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64. Exec. Order No. 10,264, 16 Fed. Reg. 6417 (July 3, 1951).

65. See *American Samoa*, DOI, *supra* note 8.

66. See *id.*

67. See *id.*

68. See *Commonwealth of the Northern Mariana Islands*, DOI, <https://www.doi.gov/oia/islands/cnmi> [<https://perma.cc/S4MG-TJRZ>] (last visited Feb. 8, 2025).

69. See Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986) (explaining that the Trust Territory of the Pacific Islands included the Northern Marianas, the Federated States of Micronesia, the Marshall Islands, and Palau).

70. See *id.*

71. See Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, 90 Stat. 263 (1976).

72. See *Commonwealth of the Northern Mariana Islands*, *supra* note 68; *Camacho-Ada Win Governorship Race*, HIGHLIGHTS, Dec. 15, 1977, at 2 (newspaper produced by the Office of the High Commissioner for the Trust Territory of the Pacific Islands).

73. Exec. Order No. 12,572, 51 Fed. Reg. 40,401 (Nov. 3, 1986).

## 6. *Freely Associated States: Palau, Micronesia, and the Marshall Islands*

The Marshall Islands, the Federated States of Micronesia, and the Republic of Palau comprise the FAS of the United States.<sup>74</sup> Following World War II, the FAS and the Northern Marianas were members of the United Nations TTPI and were administered by the United States.<sup>75</sup> While the Northern Marianas chose to take commonwealth status with the United States in 1978, the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau all rejected U.S. territorial or commonwealth status that same year.<sup>76</sup> Instead, Micronesia and Palau signed Compacts of Free Association with the United States in 1982.<sup>77</sup> President Ronald Reagan signed Executive Order 12,569, defining the roles and responsibilities of key executive departments in administering federal programs in the FAS and in expanding diplomatic and national security efforts in the region.<sup>78</sup>

The FAS are located over 2,500 miles southwest of Hawai'i, consist of more than 1,000 islands and atolls, and have an estimated population of 200,000.<sup>79</sup> FAS citizens have the right to live and work in the United States and its Territories as "habitual residents" and are eligible to serve in the U.S. Armed Forces.<sup>80</sup> Approximately 94,000 FAS citizens live in the United States, including those born in the United States who hold dual citizenship.<sup>81</sup>

In 2024, the United States renewed, for the second time, the Compacts of Free Association with the Marshall Islands, Micronesia, and Palau.<sup>82</sup> The renewed Compacts provide the nations with economic assistance in the form of grants and trust funds.<sup>83</sup> The new Compacts include additional grant funding and veterans' healthcare benefits for FAS citizens, make habitual residents from the FAS eligible for federal programs, and create an Inter-agency Group on the Freely Associated States, IGFAS.<sup>84</sup> The renewed

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74. See LUM, *supra* note 3, at 1.

75. See *id.*

76. See *id.*

77. See *id.* at 2.

78. Exec. Order No. 12,569, 51 Fed. Reg. 37,171 (Oct. 16, 1986).

79. See LUM, *supra* note 3, at 1.

80. See *id.* (explaining that "habitual residents" are also referred to as lawful nonimmigrants).

81. *Id.*

82. See Compact of Free Association Amendments Act of 2024, Pub. L. No. 118-42, § 202, 138 Stat. 419, 419–20.

83. See LUM, *supra* note 3 (explaining the Compacts will provide financial assistance to the Marshall Islands (\$2.3 billion), Micronesia (\$3.3 billion), and Palau (\$0.9 billion) FY2024–FY2043).

84. See *id.*

Compacts of 2024 were significant for federal investment and diplomacy because during the last renewal, Congress narrowed federal programs available within the FAS and to FAS citizens residing within the United States.<sup>85</sup> In fact, during the 2003 Compact renewal, Congress eliminated available federal assistance, including programs such as Head Start.<sup>86</sup> This Comment will not delve into the administration of federal programs in the FAS because their legal status as independent nations is distinct from the territorial status of the five U.S. territories.<sup>87</sup>

#### D. Federal-Territory Equities

##### 1. Department of the Interior

The functions of the Department of the Interior have changed substantially throughout its history, earning it the moniker “the Department of Everything Else.”<sup>88</sup> The precursor to Interior, the Home Department, was formed in 1849.<sup>89</sup> Interior’s initial functions included managing the General Land Office, the Patent Office, the Indian Affairs Office, and the military pension offices.<sup>90</sup> Interior’s responsibilities expanded in 1873 when Congress transferred territorial management from the State Department to Interior.<sup>91</sup> In the early 1930s, the Federal Government transferred oversight of the Virgin Islands and Puerto Rico to Interior.<sup>92</sup> Today, Interior is made up of eleven bureaus, including the Bureau of Indian Affairs, the Bureau of Land Management, the U.S. Geological Survey, the National Park Service, and the U.S. Fish and Wildlife Service.<sup>93</sup>

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85. See Press Release, DOI, Interior Department Applauds Renewed Economic Assistance for Compacts of Free Association (Mar. 11, 2024), <https://www.doi.gov/pressreleases/interior-department-applauds-renewed-economic-assistance-compacts-free-association> [<https://perma.cc/Y43B-GZR9>] (explaining that the recent Compacts expanded the social benefits available to FAS citizens who reside within the United States).

86. See Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, § 102(d)(B)(iii), 117 Stat. 2720, 2751.

87. See generally *Island Areas 101*, ASS’N OF STATE & TERRITORIAL HEALTH OFFS., <https://www.astho.org/topic/territories-freely-associated-states/island-areas-101/> [<https://perma.cc/W8BG-TZS8>] (last visited Feb. 8, 2025) (explaining key administrative and constitutional differences between the U.S. territories and the FAS).

88. ROBERT M. UTLEY & BARRY MACKINTOSH, *THE DEPARTMENT OF EVERYTHING ELSE: HIGHLIGHTS OF INTERIOR HISTORY* 13 (1989).

89. See generally *History of the Department of the Interior*, DOI, <https://www.doi.gov/about/history> [<https://perma.cc/HK46-DZB2>] (last visited Feb. 8, 2025).

90. See *id.*

91. See *id.*

92. See *id.*

93. See *Bureaus & Offices*, DOI, <https://www.doi.gov/bureaus> [<https://perma.cc/8V4B-LFPS>] (last visited Feb. 8, 2025).



a. *Department of the Interior: Legal Authority*

Interior's authorization statute is found within Title 43 of the U.S. Code §§ 1451–77.<sup>94</sup> Interior is directed by the Secretary of the Interior, who is supported in their work by the Deputy Secretary of the Interior and three Assistant Secretaries of the Interior, all of whom are nominated by the President and confirmed to their positions with the consent of the U.S. Senate.<sup>95</sup> The Secretary of the Interior has the authority to “exercise all the powers and perform all the duties in relation to the Territories of the United States that were, prior to March 1, 1873, by law or by custom exercised and performed by the Secretary of State.”<sup>96</sup> This is the only language directly pertinent to the territories in Interior's authorizing statute and provides the Secretary of the Interior with broad discretionary powers to organize Interior and administer to the territories.<sup>97</sup>

b. *Assistant Secretary of the Interior*

Insofar as Interior is the federal government's primary point of contact between the federal government and the territories and the FAS, the Assistant Secretary of Insular and International Affairs directs OIA and oversees Interior's programs in American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, and the FAS.<sup>98</sup> Under the Compacts of Free Association, the Assistant Secretary also oversees federal assistance to the FAS.<sup>99</sup>

In 2009, the role of Assistant Secretary for Insular Areas was created via Secretarial Order 3,287 and was responsible for overseeing all the Secretary's duties in the five territories and the FAS.<sup>100</sup> The Secretarial Order increased

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94. See 43 U.S.C. §§ 1451–77.

95. See §§ 1451–54.

96. § 1458.

97. The Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo* may affect future interpretation of the authorizing legislation for federal departments, agencies, and commissions. See generally 144 S. Ct. 2244 (2024) (overturning *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The scope of specific impacts remains unclear at this time, but DOI and its subcomponents will not be immune from the ripple impacts of this historic decision. See *id.*

98. See *Office of the Assistant Secretary for Insular and International Affairs*, DOI, <https://www.doi.gov/asiia> [<https://perma.cc/W685-3EFQ>] (last visited Feb. 8, 2025).

99. See *id.*

100. See DOI, SECRETARIAL ORD. NO. 3287, ESTABLISHMENT OF ASSISTANT SECRETARY—INSULAR AREAS (July 2, 2009) [hereinafter DOI, SECRETARIAL ORD. NO. 3287], [https://www.doi.gov/sites/doi.gov/files/elips/documents/archived-3287a1-establishment\\_of\\_assistant\\_secretary\\_-\\_insular\\_areas.pdf](https://www.doi.gov/sites/doi.gov/files/elips/documents/archived-3287a1-establishment_of_assistant_secretary_-_insular_areas.pdf) [<https://perma.cc/P32Q-PXN9>].

collaboration and partnership between Interior, other federal agencies, Congress, and the territories.<sup>101</sup> Section 5 of the Secretarial Order designates the Secretary of Interior's authorities in Insular Areas to the Assistant Secretary.<sup>102</sup> The Order also directs the Assistant Secretary to assume the Secretary of Interior's role on IGIA.<sup>103</sup> The Assistant Secretary's duties and title were expanded to Assistant Secretary for Insular and International Affairs in 2018 via Secretarial Order 3,361.<sup>104</sup> The expanded role also directs the Assistant Secretary to manage the Office of International Affairs and the Ocean, Great Lakes, and Coastal Program, beyond their original duties in OIA.<sup>105</sup>

*c. Office of Insular Affairs*

The Office of Insular Affairs, which is overseen by the Assistant Secretary for Insular and International Affairs, manages and administers discretionary funding to American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Virgin Islands (as well as the three FAS).<sup>106</sup> The discretionary funds programs include the Technical Assistance Program, the Maintenance Assistance Program, the Coral Reef and Natural Resources Initiative, the Brown Tree Snake Program, and the Energizing Island Communities Program.<sup>107</sup> TAP short-term grants can be used for a variety of activities in the territories but they are especially important for funding financial management, economic development, capacity building, and accountability programs.<sup>108</sup>

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101. *See id.*

102. *See id.*

103. *See id.*

104. *See* DOI, SECRETARIAL ORD. NO. 3361, RENAMING AND RESTRUCTURING THE OFFICE OF THE ASSISTANT SECRETARY—INSULAR AREAS sec. 1 (Feb. 1, 2018).

105. *See id.*; *Office of the Assistant Secretary for Insular and International Affairs*, *supra* note 98.

106. *See OIA Discretionary Grant Programs*, DOI, <https://www.doi.gov/oia/oia-discretionary-grant-program> [<https://perma.cc/77BT-ZTZ2>] (last visited Feb. 8, 2025). Much of the authorizing language for Interior's Office of Insular Affairs (OIA) is derived from Executive and Secretarial Orders and are therefore more easily subject to revision as compared to authorizing language in statute. *See generally* 43 U.S.C. §§ 1451–77; *supra* text accompanying note 94. *See also* Fact Sheet: The Bipartisan Infrastructure Deal, *supra* note 28; *Office of the Assistant Secretary for Insular and International Affairs*, *supra* note 98; DOI, SECRETARIAL ORD. NO. 3287, *supra* note 100.

107. *See OIA Discretionary Grant Programs*, *supra* note 106.

108. *See id.*

d. *Office of Insular Affairs: Scope of Work*

One of the core functions of OIA is to assist the Secretary of Interior in their position as co-chair of IGIA.<sup>109</sup> IGIA was initially created in 2003 by President George W. Bush and later expanded by President Barack Obama in 2010 via Executive Order 13,537.<sup>110</sup> IGIA is co-chaired by the Secretary of the Interior and the Deputy Assistant to the President and the Director of Intergovernmental Affairs.<sup>111</sup> Executive department heads make up the rest of the task force's membership.<sup>112</sup> They may appoint agency officers to fulfill their duties to IGIA.<sup>113</sup> Those duties include collecting information and advice from territorial Governors and executive departments regarding the territories, reviewing and advising on questions of policy and policy implementation (upon the request of executive departments and agencies), and submitting an annual report to the President with recommendations regarding the territories and federal program practices and implementation.<sup>114</sup> IGIA advises federal departments at the request of that agency rather than acting proactively.<sup>115</sup> The annual report to the President can also be drafted at greater frequency, as needed.<sup>116</sup>

2. *White House Office of Intergovernmental Affairs*

The White House Office of Intergovernmental Affairs serves as the President's liaison between state, local, tribal, and territorial governments and elected officials who serve in those governments.<sup>117</sup> As of summer 2024, WH-IGA had sixteen staff members who serve the nation's state, local, tribal, and territorial governments.<sup>118</sup> The Office has a dedicated staff member who serves as a central point of contact for territorial governors and governments: the Puerto Rico and Territories Director for WH-IGA.<sup>119</sup> This individual is

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109. See Exec. Order No. 13,299, 68 Fed. Reg. 25,477 (May 12, 2003).

110. See *id.*; see also Exec. Order No. 13,537, 75 Fed. Reg. 20,237, 20,237–38 (Apr. 14, 2010).

111. See Exec. Order No. 13,299, 68 Fed. Reg. at 25,477; see also *White House IGA: Meet the Team*, *supra* note 62.

112. See Exec. Order No. 13,299, 68 Fed. Reg. at 25,477.

113. See *id.*

114. See *id.*

115. See *id.*

116. See *id.*

117. See *White House IGA*, *supra* note 62.

118. See *White House IGA: Meet the Team*, *supra* note 62.

119. See *id.*; *Puerto Rico*, *supra* note 61; see also GARRETT, *supra* note 36, at 1 (“Since the Kennedy Administration, the Executive Office of the President has coordinated federal relations with Puerto Rico.”).

specifically responsive to issues affecting Puerto Rico because the territory is not expressly served by OIA.<sup>120</sup> However, OIA maintains a positive and collaborative working relationship with Puerto Rico's government and its Federal Affairs Administration located in Washington, D.C.<sup>121</sup> The Puerto Rico and Territories Director coordinates with territorial governments, their elected officials, the territories' delegates to Congress, and the territories' staff in Washington, D.C.<sup>122</sup>

### 3. *Territorial Liaison Offices in Washington, D.C.*

Puerto Rico operates the Puerto Rico Federal Affairs Administration (PRFAA) (*Administración de Asuntos Federales de Puerto Rico*), an agency of Puerto Rico, with offices in Florida, New York, and Washington, D.C.<sup>123</sup> PRFAA advocates for Puerto Rico to the White House and Congress.<sup>124</sup> PRFAA coordinates federal programs between federal executive agencies and territorial departments.<sup>125</sup> The White House Puerto Rico and Territories Director is PRFAA's primary point of contact in the Executive Branch; although, they maintain a working relationship with OIA.<sup>126</sup> Additionally, PRFAA works closely with Puerto Rico's Resident Commissioner—the territory's delegate to Congress.<sup>127</sup>

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120 See *Puerto Rico*, *supra* note 61.

121. Press Release, DOI, Office of Insular Affairs Hosts 3rd Territorial Climate and Infrastructure Workshop, Highlights Historic Impact of President's Investing in America Agenda on the U.S. Territories (Aug. 5, 2024) [hereinafter Press Release, DOI, 3rd Territorial Climate and Infrastructure Workshop], <https://www.doi.gov/oia/press/Office-of-Insular-Affairs-Hosts-3rd-Territorial-Climate-and-Infrastructure-Workshop> [<https://perma.cc/G6Y9-DJJE>].

122. See *White House IGA*, *supra* note 62.

123. See *About Us*, P.R. FED. AFF. ADMIN. (PRFAA) [hereinafter *PRFAA: About Us*], <https://www.prfaa.pr.gov/about-us> [<https://perma.cc/FB6K-N3ZP>] (last visited Feb. 8, 2025). The offices in Florida and New York also provide vital records and other services to Puerto Ricans living on the mainland. See *Services*, PRFAA, <https://www.prfaa.pr.gov/services> [<https://perma.cc/K38P-Q2KD>] (last visited Feb. 8, 2025). This is significant work as an estimated two-thirds of Puerto Ricans live in diaspora on the mainland United States. Alan Yuhas, *Economic Exodus Means Two-Thirds of Puerto Ricans May Soon Live in States*, GUARDIAN (July 2, 2015, 7:00 AM), <https://www.theguardian.com/world/2015/jul/02/puerto-rico-economy-exodus-us-mainland> [<https://perma.cc/A7WD-DQ8F>].

124. See *PRFAA: About Us*, *supra* note 123.

125. See *id.*

126. See *White House IGA: Meet the Team*, *supra* note 62.

127. See Press Release, Resident Commissioner Jenniffer González Colón, Jenniffer González le da la bienvenida al nuevo director de PRFAA [Jenniffer González welcomes the new director of PRFAA] (Mar. 7, 2023), [https://www.legistorm.com/stormfeed/view\\_rss/2203628/member/3185/title/jenniffer-gonzalez-le-da-la-bienvenida-al-nuevo-director-de-prfaa.html](https://www.legistorm.com/stormfeed/view_rss/2203628/member/3185/title/jenniffer-gonzalez-le-da-la-bienvenida-al-nuevo-director-de-prfaa.html) [<https://perma.cc/B68H-NM84>]; see also *PRFAA: About Us*, *supra* note 123.

4. *Federal Affairs Representatives for the Virgin Islands, the Northern Mariana Islands, Guam, and American Samoa*

The other four territories maintain a leaner administrative presence in Washington, D.C.<sup>128</sup> This may be the result of limited territorial funds available to staff an additional office in the nation's capital.<sup>129</sup> The population of Puerto Rico is 3.3 million, and there is a combined population of 338,000 across the other four territories;<sup>130</sup> the other territories are unable to maintain the robust infrastructure of their PRFAA counterpart with their smaller tax bases.<sup>131</sup> First, the U.S. Virgin Islands has one staff member in Washington, D.C. who is responsible for advocacy and coordination.<sup>132</sup> The Honorable Madeleine Bordallo, the former delegate for Guam from 2003–2019, currently serves as the Washington, D.C. Representative for Governor Leon Guerrero of Guam.<sup>133</sup> The Northern Mariana Islands does not currently maintain a Federal Affairs Office in Washington, D.C.; instead, Governor Palacios's Senior Adviser for Federal, Regional, and International Affairs fulfills the role from Saipan.<sup>134</sup> Similarly, American Samoa does not currently maintain a Federal Affairs Office in Washington, D.C., but rather has Governor Mauga's Chief of Staff serve as the primary nexus from his position in Pago Pago.<sup>135</sup> While these individuals and their support staff are diligent advocates for their constituents, the reduced presence surely impacts their ability to provide detailed input into Congressional legislation and to closely monitor all federal investments into their territory.

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128. See *Governor's State-Federal Affairs Representatives Directory*, NAT'L GOVERNORS ASS'N (Aug. 21, 2024), <https://www.nga.org/wp-content/uploads/2021/02/Governors-State-Federal-Affairs-Representatives.pdf> [<https://perma.cc/H2Z7-X92E>].

129. See, e.g., Thomas Manglona, *CNMI Administration Begins Austerity After First 100 Days*, KUAM NEWS (Apr. 24, 2023, 2:15 PM), <https://www.kuam.com/story/48772377/cnmi-administrations-begins-austerity-after-first-100-days> [<https://perma.cc/SM3V-8NF8>]; *infra* text accompanying note 184 (explaining that Governor Palacios instituted a seventy-two hour pay period schedule under an austerity plan to impede financial losses in the territory).

130. See Van Dam, *supra* note 21.

131. See generally U.S. TERRITORIES: PUBLIC DEBT OUTLOOK 2023, *supra* note 22 (explaining that each territory is carrying a large amount of debt).

132. See *Governor's State-Federal Affairs Representatives Directory*, *supra* note 128.

133. See *id.*

134. See *id.*

135. See *id.*

## II. LEGAL ANALYSIS

### A. *The Infrastructure Investment and Jobs Acts of 2021*

To address long-term underinvestment and deferred maintenance on the nation's critical infrastructure, Congress passed the IIJA in the midst of the COVID-19 pandemic.<sup>136</sup> The bill focuses on improving aging and unsafe infrastructure, promoting domestic production, modernizing the electrical grid, and building a more resilient U.S. supply chain.<sup>137</sup> The legislation includes historic levels of federal investments totaling \$550 billion.<sup>138</sup> The federal agencies with the greatest number of equities in the program include the Department of Agriculture (USDA), the Department of Commerce (DOC), Interior, the Department of Transportation (DOT), the Department of Energy (DOE), and the Environmental Protection Agency (EPA).<sup>139</sup> The Build America Buy America Act (BABA) and Line of Credit (LC) requirements, core elements of the IIJA, have created roadblocks to territorial participation.<sup>140</sup>

### B. *Current Practice—Overview & Global Challenges*

#### 1. *Made-in-America Requirements of the Infrastructure Investment and Jobs Act*

In support of the IIJA, Congress passed BABA to promote domestic production and supply chain resiliency.<sup>141</sup> BABA requires that all “iron, steel,

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136. See Press Release, Exec. Off. of the President, Updated Fact Sheet: Bipartisan Infrastructure Investment and Jobs Act (Aug. 2, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/02/updated-fact-sheet-bipartisan-infrastructure-investment-and-jobs-act/> [<https://perma.cc/JK9V-WMZV>]; Remarks by President Biden at Signing of H.R. 3684, *The Infrastructure Investment and Jobs Act*, EXEC. OFF. OF THE PRESIDENT (Nov. 15, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/11/15/remarks-by-president-biden-at-signing-of-h-r-3684-the-infrastructure-investment-and-jobs-act/> [<https://perma.cc/E2UV-6GNE>].

137. See Updated Fact Sheet: Bipartisan Infrastructure Investment and Jobs Act, *supra* note 136.

138. See *id.*

139. See *IIJA Implementation Resources*, NAT'L GOVERNORS ASS'N (Oct. 3, 2024), <https://www.nga.org/ijja-implementation-resources/> [<https://perma.cc/SAE8-DLAF>].

140. See, e.g., Cameron, *supra* note 18; see *Build America, Buy America Act—Federal Financial Assistance*, EXEC. OFF. OF THE PRESIDENT [hereinafter *Build America, Buy America Act—Federal Financial Assistance*], <https://www.whitehouse.gov/omb/management/made-in-america/build-america-buy-america-act-federal-financial-assistance/> [<https://perma.cc/Z6SM-FSK7>] (last visited Feb. 8, 2025).

141. See *Build America Buy America*, DOC [hereinafter DOC, *Build America, Buy America*], <https://www.commerce.gov/oam/build-america-buy-america> [<https://perma.cc/TZ5Z-DQJJ>] (last visited Feb. 8, 2025).

manufactured products, and construction materials used in infrastructure projects are produced in the United States.<sup>142</sup> The BABA requirement is a powerful tool—backed by historic federal funding—that seeks to jumpstart domestic manufacturing and bring suppliers back to the United States.<sup>143</sup> However, the blanket requirement with limited, immediately available resources and time horizons placed on IIJA programs has created roadblocks not only in the territories but in states across the country.<sup>144</sup> Those roadblocks may feel like cement walls to those in the territories. They have already limited supply chains available to them as compared to the mainland United States.<sup>145</sup>

A waiver process exists for the BABA requirement should the requirement be unduly burdensome in IIJA implementation.<sup>146</sup> However, the process requires exceptions to be made directly by the head of a federal agency after conducting formal public notice of the proposed waiver.<sup>147</sup> The proposed waiver must be posted online for fifteen days so that the public can review and comment before a final waiver is issued.<sup>148</sup> There are currently a dozen executive departments and four independent agencies, including DOE, DOT, and DOC, that have active BABA waivers available to both states and territories.<sup>149</sup>

## 2. *Letter of Credit Compliance*

In the context of federal grant programs, LCs are commonly utilized by agencies to provide cash disbursements to program awardees.<sup>150</sup> Federal award recipients often receive the federal funding as a reimbursement once

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142. See *Build America, Buy America Act—Federal Financial Assistance*, *supra* note 140. DOC, the National Institute for Standards and Technology, and the Hollings Manufacturing Extension Partnership National Network supported this effort by scouting suppliers and U.S. manufacturers. See DOC, *Build America, Buy America*, *supra* note 141.

143. See DOC, *Build America, Buy America Act*, *supra* note 141.

144. See Cameron, *supra* note 18.

145. See, e.g., Cagurangan, *supra* note 18.

146. See EXEC. OFF. OF THE PRESIDENT, *Build America, Buy America Act—Federal Financial Assistance*, *supra* note 140.

147. See *id.*

148. See *id.*

149. See *id.*

150. See *Letter of Credit*, FIN. ADMIN. OFF. FOR SPONSORED PROGRAMS, HARV. UNIV., <https://osp.finance.harvard.edu/letter-credit> [<https://perma.cc/CBZ6-5Z26>] (last visited Feb. 8, 2025). LCs are bank-issued asset liquidity guarantees designed to limit liability should a grant awardee fail to meet requirements and be denied federal fund disbursement. See Cameron, *supra* note 18.

a project is complete.<sup>151</sup> However, for the territories, there is a twofold problem with the use of LCs for award recipients: domestic LCs and additional fees placed on LCs.<sup>152</sup> For the territories, especially those located in the Pacific, this seemingly innocuous finance tool threatens to halt IJA programs altogether.<sup>153</sup>

### C. Test Case: Department of Commerce

The Department of Commerce's National Telecommunications and Information Administration (NTIA) received \$45 billion in IJA funding to implement the "Internet for All" program.<sup>154</sup> The Internet for All program aims to bring high-speed Internet to everyone in America, no matter where they live.<sup>155</sup> The colossal effort required nationwide coordination with the Federal Communication Commission to map and update every "Broadband Serviceable Location" in the United States.<sup>156</sup> "A broadband serviceable location (BSL) is 'a business or residential location in the United States at which mass-market fixed broadband Internet access service is, or can be,

151. See *Letter of Credit*, *supra* note 150.

152. See NAT'L TELECOMMS. & INFO. ADMIN. (NTIA), DOC, NTIA-BEAD-2022, BROADBAND EQUITY, ACCESS, AND DEPLOYMENT PROGRAM NOTICE OF FUNDING OPPORTUNITY 1, 72–73 (2022) [hereinafter BEAD NOTICE OF FUNDING OPPORTUNITY]; see also Cameron, *supra* note 18 (explaining the burden placed on applicants who are required to present a LC for 25% of the grant amount plus an additional 2–5% in annual fees on the total LC amount).

153. See Cameron, *supra* note 18.

154. Press Release, DOC, Biden-Harris Administration Launches \$45 Billion "Internet for All" Initiative to Bring Affordable, Reliable High-Speed Internet to Everyone in America, (May 13, 2022), <https://www.commerce.gov/news/press-releases/2022/05/biden-harris-administration-launches-45-billion-internet-all-initiative> [<https://perma.cc/YW43-X2RF>].

155. See *Getting Connected to Broadband*, FED. COMM'NS COMM'N (FCC) (Mar. 7, 2024), <https://www.fcc.gov/connected> [<https://perma.cc/P2QL-3EHD>]; see also *Internet for All-Programs*, NTIA, <https://www.internetforall.gov/programs> [<https://perma.cc/ZSE7-M5ZJ>] (last accessed Feb. 8, 2025).

156. See *About the Fabric: What a Broadband Serviceable Location (BSL) Is and Is Not*, FCC (Apr. 15, 2024) [hereinafter *About the Fabric*], <https://help.bdc.fcc.gov/hc/en-us/articles/16842264428059-About-the-Fabric-What-a-Broadband-Serviceable-Location-BSL-Is-and-Is-Not> [<https://perma.cc/3KJH-KK56>]; see also *How the FCC National Broadband Map Impacts the BEAD Program, Part 3 of 3: Meeting the Urgent Need*, NTIA (May 10, 2023), <https://www.internetforall.gov/blog/how-fcc-national-broadband-map-impacts-bead-program-part-3-3-meeting-urgent-need> [<https://perma.cc/5UP9-Y9UH>] (explaining that one million locations were added to the broadband serviceable location map between versions one and two).



installed.”<sup>157</sup> This project maps every location, from an apartment building in New York City with 1,500 units to a summer cabin on a lake in Alaska and every home in America’s territories on the other side of the world.<sup>158</sup> In the territories, the process for identifying all BSLs was a particular challenge.<sup>159</sup> The territories risked long-term delay or nonparticipation in the transformational program due to two technical issues with the drafting of the program: LC and BABA requirements.<sup>160</sup>

The limited commercial and retail options in the territories have also impacted the ability of the territories to comply with the BABA requirements that are part of the BEAD program.<sup>161</sup> In the case of the BEAD program, NTIA issued a BABA waiver, not only for the territories, but for all eligible entities.<sup>162</sup> The BABA waiver was issued for all eligible entities where “DOC has determined that certain manufactured products and construction materials are not produced in the United States in sufficient and reasonably available quantities to meet the needs of the [program].”<sup>163</sup> The limited availability waiver is further limited to a five-year period from February 22, 2024, until February 22, 2029.<sup>164</sup>

NTIA’s limited BABA waiver is contrasted with a broader BABA waiver Interior issued in August 2023.<sup>165</sup> Interior’s initial BABA waiver is a “general applicability” waiver that applies to all IJA programs exceeding \$250,000 in

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157. See *About the Fabric*, *supra* note 156.

158. See *Getting Connected to Broadband*, *supra* note 155.

159. See, e.g., *Comment to National Telecommunications and Information Agency on the BEAD Challenge Process: Community Anchor Institution Access and Affordability*, PAC. BROADBAND & DIGIT. EQUITY 1–5 (May 4, 2023), <https://www.pacificbroadband.org/wp-content/uploads/2023/05/PBDE-Comment-NTIA-BEAD-Challenge-Process-Community-Anchor-Institution-Access-and-Affordability.pdf> [<https://perma.cc/265A-V4J6>].

160. See Cameron, *supra* note 18; Cagurangan, *supra* note 18.

161. BEAD NOTICE OF FUNDING OPPORTUNITY, *supra* note 152, at 87–89; see Cagurangan, *supra* note 18.

162. DOC, NOTICE OF FINAL WAIVER: LIMITED GENERAL APPLICABILITY NONAVAILABILITY WAIVER OF THE BUY AMERICA DOMESTIC CONTENT PROCUREMENT PREFERENCE AS APPLIED TO RECIPIENTS OF BROADBAND EQUITY, ACCESS, AND DEPLOYMENT PROGRAM 1–2 (2024) [hereinafter DOC, NOTICE OF FINAL WAIVER], <https://www.commerce.gov/sites/default/files/2024-02/BABA%20Waiver%20Signed.pdf> [<https://perma.cc/2UEG-Y27T>].

163. *Id.* at 1.

164. *Id.* at 2.

165. Compare DOI, PAC. ISLAND TERRITORIES WAIVER 1, 3 (Aug. 15, 2023), <https://www.doi.gov/sites/doi.gov/files/doi-final-pacific-island-territories-waiver-final-081523.pdf> [<https://perma.cc/FQ7D-G4VS>], with DOC, NOTICE OF FINAL WAIVER, *supra* note 162.

the Pacific territories.<sup>166</sup> The waiver was, however, limited to eighteen months and is set to expire on February 15, 2025.<sup>167</sup> Interior explains that the truncated waiver period can be used to assess if the waiver should remain one of general applicability, if it should be somehow narrowed, or if it may no longer be necessary after additional technical assistance is provided to the territories.<sup>168</sup> Additionally, the waiver justification details Interior's research and outreach to the territorial government.<sup>169</sup> This market research showed that while similar costs may be incurred for purchasing American-made goods, as opposed to foreign-made goods, there was a twelve-month delivery time differential.<sup>170</sup>

In the waning days of the Biden Administration, a general applicability public interest waiver was jointly issued by Interior, DOC, USDA, DOE, EPA, the Federal Emergency Management Agency, the Department of Education, and the Department of Housing and Urban Development.<sup>171</sup> The waiver permits the associated agencies to waive the requirements of § 70,914 of BABA, including for all iron, steel, manufactured products, and construction materials funded through the various agencies' IJA programs that are obligated through January 9, 2030.<sup>172</sup> Justification for the issuance of the final waiver was based on agencies' experience managing temporary BABA waivers, engagement with territorial partners, and continued issues with material sourcing, availability, and high transportation costs.<sup>173</sup> The waiver included extensive telecommunications equipment and components, which can be utilized in conjunction with NTIA's preexisting BABA.<sup>174</sup> The agencies cited "concern[s] that failure to provide these remote recipients such flexibilities could perpetuate systemic barriers to opportunities and benefits and limit the agencies' abilities to deliver resources and benefits equitably to all in these Pacific Island territories."<sup>175</sup>

It is unclear how initial executive actions of the second Trump Administration may impact these programs and the applicability of their associated

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166. DOI, PAC. ISLAND TERRITORIES WAIVER, at 1.

167. *Id.*

168. *See id.* at 1, 3.

169. *See id.* at 3.

170. *See id.*

171. DOI, GENERAL APPLICABILITY PUBLIC INTEREST WAIVER BUILD AMERICA, BUY AMERICA ACT WAIVER: PACIFIC ISLAND TERRITORIES (2025) [*hereinafter* DOI, GENERAL APPLICABILITY PUBLIC INTEREST WAIVER], <https://www.doi.gov/sites/default/files/documents/2025-01/multi-agency-pacific-island-territory-public-interest-waiver-1-8-25.pdf> [<https://perma.cc/9J7K-2D5G>].

172. *See id.* at 1.

173. *See id.* at 5–7.

174. *See* DOC, NOTICE OF FINAL WAIVER, *supra* note 162, at 1–2.

175. *See* DOI, GENERAL APPLICABILITY PUBLIC INTEREST WAIVER, *supra* note 171.

waivers in the Pacific territories.<sup>176</sup> However, time is money, especially when a federal program has a planned sunset. The Trump Administration should uphold the general applicability waiver through all IJA program sunset periods. Action to the contrary would otherwise risk territorial exclusion.<sup>177</sup>

As mentioned above, the use of LCs for federal programs is a regular practice, but it is a potential barrier to entry for the territories in the Pacific.<sup>178</sup> The BEAD Program Notice of Funding Opportunities requires eligible entities to get a model LC.<sup>179</sup> Furthermore, in some of the territories, only two banking options are available.<sup>180</sup>

To address these issues, NTIA issued an LC waiver permitting eligible entities to seek LCs from credit unions, so long as credit-granting institutions “(a) [are] insured by the National Credit Union Administration; and (b) [have] a credit union safety rating issued by Weiss of B- of better.”<sup>181</sup> Alternatively, the waiver allows eligible entities to obtain a performance bond to satisfy the requirement.<sup>182</sup>

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176. See Chris Megerian & Lindsay Whitehurst, *Federal Judge Temporarily Blocks Trump Administration Freeze on Federal Grants and Loans*, ASSOCIATED PRESS (Jan. 29, 2025), <https://apnews.com/article/donald-trump-pause-federal-grants-aid-f9948b9996c0ca971f0065fac85737ce> [<https://perma.cc/6N6M-RW82>].

177. See generally GAO, GAO-23-106797, GRANTS MANAGEMENT: OBSERVATIONS ON CHALLENGES WITH ACCESS, USE, AND OVERSIGHT (2023), <https://www.gao.gov/assets/gao-23-106797.pdf> [<https://perma.cc/WDX2-9M7M>] (detailing the capacity, tedious requirements, transparency, and oversight concerns relating to federal grants).

178. *Letter of Credit*, *supra* note 150.

179. See BEAD NOTICE OF FUNDING OPPORTUNITY, *supra* note 152, at 72–73.

180. American Samoa only has two banks active in the territory: Development Bank of American Samoa and Territorial Bank of American Samoa. *About Us*, DEV. BANK OF AM. SAMOA, <https://dbas.as/about-us/> [<https://perma.cc/7P3H-B5UA>] (last visited Feb. 8, 2025); TERRITORIAL BANK OF AM. SAMOA, <https://www.mybas.com/> [<https://perma.cc/N8PY-35FW>] (last visited Feb. 8, 2025); see, e.g., Rob Blackwell, *American Samoa Finally Gets a Public Bank. And U.S. States Are Watching*, AM. BANKER (Apr. 30, 2018, 9:45 PM), <https://www.americanbanker.com/news/american-samoa-finally-gets-a-public-bank-and-us-states-are-watching> [<https://perma.cc/K8XH-K9CQ>] (explaining that the Territorial Bank of American Samoa is the only United States-chartered bank in American Samoa). Larger banks have left some of the territories in recent years as they are risk-adverse to issuing loans in local economies. See, e.g., Andrew Van Dam, *When Banks Abandoned American Samoa, The Islands Found a Solution. Nobody Had Used in a Century*, WASH. POST (May 9, 2018, 7:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2018/05/09/when-banks-abandoned-american-samoa-the-islands-found-a-century-old-solution-that-could-be-the-future-of-finance/> [<https://perma.cc/M2YF-TETX>].

181. NTIA, DOC, NOTICE OF PROGRAMMATIC WAIVER: BEAD LETTER OF CREDIT Waiver (2023), [https://broadbandusa.ntia.gov/sites/default/files/2023-10/BEAD\\_LOC\\_Waiver\\_Notice\\_10.23.23.pdf](https://broadbandusa.ntia.gov/sites/default/files/2023-10/BEAD_LOC_Waiver_Notice_10.23.23.pdf) [<https://perma.cc/BJ95-BA6K>].

182. See *id.*

NTIA's flexibility in granting these necessary waivers is laudable, but the circumstances necessitating their issuance should be examined so future federal program drafters can provide this type of flexibility through an inclusive initial Notice of Funding Opportunity. The process of advocating to a federal agency is not light work. It requires many staff hours—both of federal and state/territorial/tribal staff—and often includes congressional staffers who are asked to facilitate or attend meetings so that they may report progress back to members of Congress.<sup>183</sup> These manpower hours can be draining, but that is not the greatest concern in this case. For the territories that are short-staffed due to available funding or vacancies, the time taken to seek waivers is time taken away from the program planning and implementation.<sup>184</sup> This has a cascading effect on the downstream steps and delays or cuts short business and community engagement, as well as permitting processes. This can be especially devastating for competitive grant programs that have a limited time horizon.

#### D. Recent Executive Branch Action

##### 1. Territorial Climate and Infrastructure Conferences

Following the passage of IIJA, Interior sought to maximize its liaison role to bring stakeholders across the federal government together to holistically provide technical assistance to the territories. In 2022 and 2023, Interior hosted two conferences that brought together territorial government agents and federal staff for general meetings and technical assistance support.<sup>185</sup> These meetings were held in Hawai'i and were a rare opportunity for staff to meet in-person—as compared to more regular travel of government staff within the contiguous United States.<sup>186</sup> During summer 2024, based on the

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183. See, e.g., *Office of Congressional and Legislative Affairs*, DOI, <https://www.doi.gov/ocd> [<https://perma.cc/Z2TB-EY8J>] (last visited Feb. 8, 2025).

184. See, e.g., Manglona, *supra* note 129 (explaining that Governor Palacios of the Northern Marianas instituted a seventy-two-hour pay period schedule under an austerity plan to impede financial losses in the territory).

185. See *Water and Territorial Climate and Infrastructure Workshop*, DOI, <https://www.doi.gov/oa/water-and-Territorial-Climate-and-Infrastructure-Workshop> [<https://perma.cc/6BRY-NWKR>] (last visited Feb. 8, 2025); see also Press Release, DOI, Biden-Harris Administration Awards \$12 Million Through Investing in America Agenda to Combat Climate Change in the U.S. Territories (May 11, 2023), <https://www.doi.gov/pressreleases/biden-harris-administration-awards-12-million-through-investing-america-agenda-combat> [<https://perma.cc/5W6R-PFWW>].

186. See Emmanuel T. Erediano, *NMI Delegation's Travel to Hawaii Mostly Federally Funded*, MARIANAS VARIETY (May 30, 2023), <https://www.mvariety.com/news/nmi-delegation-s>

success of the previous two years, Interior convened a third iteration of the conference in Honolulu.<sup>187</sup>

The conferences have been crucial to developing trust and communications between federal and territorial staff, especially as travel between the territories and the continental United States is limited due to administrative procedures and because travel may be cost-prohibitive for both territorial and federal staff.<sup>188</sup> Federal agencies are hesitant to send staff to the territories due to the cost and time required to travel, but also because of concerns about the appearance of impropriety due to the picturesque tropical settings.<sup>189</sup> Additionally, for Guam and the Northern Mariana Islands, travel

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travel-to-hawaii-mostly-federally-funded/article\_b0785f38-fe24-11ed-8019-7fd9ac233491.html [https://perma.cc/C5V8-43VW]. The meetings have been held in Hawai'i because it is half-way between Washington and the Pacific territories. *Id.* Although closer to the Pacific territories, staff from the U.S. Virgin Islands also travel to the conference to connect with their territorial peers and federal staff. *Id.* DOI provided a travel stipend to the territorial governments to offset travel costs and reduce participation barriers. *Id.*

187. See Press Release, DOI, 3rd Territorial Climate and Infrastructure Workshop, *supra* note 121 (explaining that “[t]he TCIW3.0 convened climate and infrastructure officials from territories and federal agencies, along with others to highlight transformational investments from President Biden’s Investing in America agenda in the U.S. territories and to facilitate conversations on how implementation of the Bipartisan Infrastructure Law and Inflation Reduction Act can be most successful”).

188. See *Frequently Asked Questions, Per Diem*, GEN. SERVS. ADMIN. (GSA) (Jan. 15, 2025), <https://www.gsa.gov/travel/plan-a-trip/per-diem-rates/faqs> [https://perma.cc/6V8E-VSPN]. Per diem rates for the U.S. territories, Alaska, and Hawai'i are not governed by the GSA, as are all other federal travel regulations, but rather by the Department of Defense (rates for foreign countries are set by DOS). *Id.*

189. Following a scandal and congressional investigation into extravagant spending at a training conference for GSA employees in 2010, federal agencies have been especially mindful of travel to popular tourist destinations. The scandal led to the resignation of top GSA officials and the placing of other senior officials on administrative leave. See Lisa Rein & Joe Davidson, *GSA Chief Resigns Amid Reports of Excessive Spending*, WASH. POST (Apr. 2, 2012, 3:45 PM), [https://www.washingtonpost.com/politics/gsa-chief-resigns-amid-reports-of-excessive-spending/2012/04/02/gIQABLNNrS\\_story.html](https://www.washingtonpost.com/politics/gsa-chief-resigns-amid-reports-of-excessive-spending/2012/04/02/gIQABLNNrS_story.html) [https://perma.cc/7HBS-JB5P]. There are concerns that travel to these areas may, in general, draw additional scrutiny from agencies’ inspectors general and congressional oversight committees. Consequently, agencies are reluctant to send staff on travel to these locations even if the same type of work would be done in a non-touristy destination. See Lisa Rein, *What Happened with the GSA in Vegas Stymies Federal Workers*, WASH. POST (Feb. 8, 2015, 10:31 PM), [https://www.washingtonpost.com/politics/clamp-down-after-gsa-scandal-puts-some-federal-workers-in-a-pinch/2015/02/08/d8217240-a5a4-11e4-a7c2-03d37af98440\\_story.html](https://www.washingtonpost.com/politics/clamp-down-after-gsa-scandal-puts-some-federal-workers-in-a-pinch/2015/02/08/d8217240-a5a4-11e4-a7c2-03d37af98440_story.html) [https://perma.cc/55N6-9QDY]. While this is a policy decision that affects federal employee travel, it is Americans on the other end of the travel who are most affected and who are denied the same access to their federal advocates

often requires transiting through Japan, Korea, or other transit hubs in southeast Asia and, as such, also require federal employees to get passports to complete travel.<sup>190</sup>

## 2. 2022 IGIA Presentation

Interior has been realistic about the challenges affecting sustainable development in the territories. Ahead of the 2022 Senior Plenary Session of the Interagency Group on Insular Areas, the Director of OIA presented an update on the Office's work in the Insular areas.<sup>191</sup> The presentation highlighted how a lack of a unified federal development policy for the territories was limiting the OIA's ability to support holistic and sustainable development.<sup>192</sup> The presentation also highlighted how the lack of data collection for federal programs in the Insular Areas adversely affects development efforts, especially as compared to the robust tracking and data collection that

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when optics prevent travel. DOI's press release issued following the most recent Territorial Climate and Infrastructure Conference held in August 2024 "emphasized [the significance of] in-person engagement and maximized productive conversations from *face-to-face* interaction among more than 250 representatives from the territories, federal agencies, and partner organizations participating in person . . . ." Press Release, DOI, 3rd Territorial Climate and Infrastructure Workshop, *supra* note 121 (emphasis added).

190. See *Visitor Information*, MARIANAS VISITORS AUTH., <https://www.mymarianas.com/visitor-information/> [<https://perma.cc/KYB4-ZSS7>] (last visited Feb. 8, 2025); see also *Flights to Guam*, GUAM VISITORS BUREAU, <https://www.visitguam.com/planning/airport/flights/> [<https://perma.cc/B644-TMES>] (last visited Feb. 8, 2025). Moreover, travel to and within territories may frequently require taking non-commercial conveyances (charter boats or planes) that necessitate travel justifications, which agency travel offices approve in very limited circumstances. See *Air Charter Services*, GSA (Apr. 23, 2024), <https://www.gsa.gov/buy-through-us/products-and-services/transportation-and-logistics-services/transportation-programs/transportation-and-logistics-services-schedule/air-charter-services> [<https://perma.cc/594S-8V54>].

191. See Basil Ottley, Pol'y Dir., OIA & Mariana Tintali, Acting Deputy Dir. of Pol'y & OIA Lead for Accountability Pol'y, Audit Liaison Off., & Emergency Mgmt. Coordinator, OIA, Update on the Interagency Group on Insular Areas, Executive Order #13537 (Jan. 19, 2022), <https://www.doi.gov/oia/Jan19%E2%80%93Update-on-the-Interagency-Group-on-Insular-Areas-Executive-Order-13537> [<https://perma.cc/FPT9-R673>]. For the presentation slide, see Basil Ottley, Pol'y Dir., OIA & Marina Tintali, Acting Deputy Dir. of Pol'y & OIA Lead for Accountability Pol'y, Audit Liaison Off., & Emergency Mgmt. Coordinator, OIA, Interagency Group on Insular Areas (IGIA) (Jan. 19, 2022) [hereinafter Ottley & Tintali Presentation], <https://www.doi.gov/sites/default/files/ppt-presentation.pdf> [<https://perma.cc/J9XY-2P4B>].

192. See *id.*

takes place in the states.<sup>193</sup> OIA continues to advocate for data equity in the territories to support future policymaking.<sup>194</sup>

### 3. *Matching Requirements & the Office of Management and Budget's Controller Alert 23-04*

Following reports of challenges accessing federal grant dollars, the Executive Branch responded and eased the burden of cost-sharing provisions on territories for low-dollar projects.<sup>195</sup> In 2023, the Office of Management and Budget (OMB) issued Controller Alert 23-04, instructing Interior to waive any local matching requirements for grant funds, while other executive agencies must waive local matching requirements for amounts less than \$200,000 and may waive local matching requirements for amounts greater than \$200,000 in the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands pursuant to Public Law 96-205.<sup>196</sup> While Controller Alerts are not binding, they elevate fiscal management issues to financial officers at executive agencies and encourage them to take appropriate action to mitigate adverse effects of policy implementation.<sup>197</sup> Concurrent to OMB's Controller Alert release, the Secretary of the Interior announced that Interior would extend the waiver to all local cost-sharing and matching requirements.<sup>198</sup> This is a crucial step in minimizing barriers to access for the territories, as meeting grant matching requirements may be cost prohibitive for the territories due to their relatively small tax base.

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193. *Id.*

194. See *Supporting Territorial Data Equity*, DOI, <https://www.doi.gov/oia/supporting-territorial-data-equity> [<https://perma.cc/YY6B-G8S2>] (last visited Feb. 8, 2025).

195. See Press Release, DOI, Biden-Harris Administration Announces Move to Reduce Financial Burden on U.S. Territories (2023) [hereinafter Press Release, DOI, Move to Reduce Financial Burden], <https://www.doi.gov/pressreleases/biden-harris-administration-announces-move-reduce-financial-burden-us-territories> [<https://perma.cc/X4WW-2HH6>].

196. See OFF. OF MGMT. & BUDGET (OMB), CA-23-04, WAIVING MATCHING FUND REQUIREMENTS FOR INSULAR AREAS (Feb. 6, 2023) [hereinafter WAIVING MATCHING FUND REQUIREMENTS], [https://www.cfo.gov/assets/files/CA-23-4\\_Insular%20Areas%20Match ing%20Funds.pdf](https://www.cfo.gov/assets/files/CA-23-4_Insular%20Areas%20Matching%20Funds.pdf) [<https://perma.cc/X4PM-RWYU>] (matching requirements, generally indicate that a grantee is responsible for providing some additional proportion of funding above what is provided in federal funds); Act of Mar. 12, 1980, Pub. L. No. 96-205, § 601, 94 Stat. 84, 90.

197. See WAIVING MATCHING FUND REQUIREMENTS, *supra* note 196.

198. See Press Release, DOI, Move to Reduce Financial Burden, *supra* note 195.

### III. RECOMMENDATIONS

The Department of Interior, via IGIA, should take the following four steps to address the shortcomings of federal grants program implementation in the territories: (A) development of a guidance framework to be used by executive agencies; (B) create full-time civil servants positions at each department to support the territories; (C) publish its annual report to the President; and (D) develop a Federal Development Policy for each territory.

#### A. IGIA Guidance Development

IGIA should develop a guidance framework to ensure that bureaucratic barriers do not prevent territories from engaging fully in federal programs. The framework IGIA develops can be referenced by federal departments, commissions, and agencies as they create new grant programs or update eligibility requirements for existing programs. During the development of this guidance, IGIA should formally and proactively request information from the territorial governments, the territories' delegates to Congress, and any nonprofit entities in the territories that may be eligible for future federal programs. This process should also allow for a public comment period so that the final guidance may be as all-encompassing as possible. IGIA should allow ample time to receive this feedback. IGIA should request specific input on the difficulty of accessing or implementing federal grant programs and specifically address unique challenges in overcoming the roadblocks to participation.<sup>199</sup>

As IGIA collects this input from the territorial governments, it should also request that each territorial Governor designate a point of contact who can clarify any information provided to IGIA and maintain a robust feedback loop.<sup>200</sup> The development of this guidance should be an iterative process

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199. Now is the time for a holistic review of territorial access and capacity for success in participating in federal grant programs. As GAO's 2023 report found, the territories were faced with numerous barriers in accessing much-needed COVID-19 relief funding. *See* GAO, GAO-23-106050, COVID-19: U.S. TERRITORY EXPERIENCES COULD INFORM FUTURE FEDERAL RELIEF 34 (2023).

200. This point of contact would be modeled on Infrastructure Investment and Jobs Act's implementation scheme whereby each state and territory was required to appoint an infrastructure coordinator who would "coordinate efforts in a state along with serving as a single point of contract for the White House Infrastructure Implementation Team." Press Release, Exec. Off. of the President, Fact Sheet: Biden-Harris Administration Hits the Ground Running to Build a Better America Six Months into Infrastructure Implementation (May 16, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/16/fact-sheet-biden-harris-administration-hits-the-ground-running-to-build-a-better-america-six-months-into-infrastructure-implementation/> [https://perma.cc/N9E3-VHAQ].



where the proposed guidance is presented to the territorial governments for critique and improvement prior to finalization. The guidance should also be reviewed every five years to ensure that it reflects current conditions. OMB and GAO should provide insight into any large-scale implications of the guidance to ensure that it does not conflict with existing federal law and support guidance development broadly.

*B. Creation of Full-Time Civil Servants Based at Each Executive Department to Support the Territories*

IGIA should also recommend the creation of a dedicated full-time civil servant position at each executive department to support the territories. This individual would provide high-touch support to the territories as they navigate federal programs. Currently, OIA is expected to serve as the primary federal administrative expert for the territories.<sup>201</sup> While the skillful OIA team has adeptly filled this role, this arrangement is insufficient and unworkable to achieve necessary whole-of-government reform that serves Americans in the territories. Federal departments must dedicate at least one staff member to support the territories and serve as a bureaucratic translator, as OIA cannot be expected to be expert navigators of each Executive Branch department, its agencies, and programs. This is an important equity measure as the territories are understaffed and under-resourced, and this type of support may be critical in facilitating their access to available funding.<sup>202</sup> This action would likely require Congressional appropriations; however, agencies should explore preexisting flexibility in their budgets to provide additional support.

Congressional leaders have recognized the need for this type of assistance for the territories. U.S. Representative Raúl Grijalva of Arizona, as the Ranking Member of the House Natural Resources Committee, introduced the Special Advisors for Insular Areas Act in July 2023.<sup>203</sup> Representative Grijalva introduced the bill with support from the territories' Congressional Representatives—Representative Gregorio Kilili Camacho Sablan (Northern Mariana Islands), Representative James “Jim” Moylan (Guam), Representative Jenniffer González Colón (Puerto Rico), and Representative Stacey Plaskett (U.S. Virgin Islands).<sup>204</sup> The bill recognizes the difficulty of

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201. See DOI: *Who We Are*, *supra* note 23.

202. See Manglona, *supra* note 129.

203. See H.R. 5001, 118th Cong. (2023); see also *All Information (Except Text) for H.R. 5001—Special Advisors for Insular Areas Act*, CONGRESS.GOV, <https://www.congress.gov/bill/118th-congress/house-bill/5001/all-info> [<https://perma.cc/6FT4-G3FT>] (last visited Feb. 8, 2025).

204. See Press Release, U.S. House of Representatives Nat. Res. Comm. Democrats, Grijalva, Congressional Delegation Representing U.S. Territories Introduce Bipartisan

implementing federal programs in the territories if no individuals are based in each executive branch department to coordinate programs in the territories.<sup>205</sup> The bill is intended to “help improve the coordination, direction, and appropriateness of federal policies to better fulfill the U.S. government’s responsibilities to the Territories and FAS.”<sup>206</sup> While the Special Advisors for Insular Areas Act has been introduced and referred to the House Committee on Natural Resources, it remains undocketed for a hearing.<sup>207</sup>

### C. *Publication of IGIA’s Annual Report to the President*

IGIA is required, via its presidential mandate, to present the President with an annual report.<sup>208</sup> However, the most recent annual report available on IGIA’s website dates back to 2019.<sup>209</sup> IGIA should post its annual report to IGIA’s landing page to increase transparency.<sup>210</sup> The public posting of this report will promote a robust feedback loop so that the governments, citizens, and the private sectors in the territories may effectively communicate additional challenges and successes they are experiencing with federal program implementation. The public posting of the annual reports to the President is also essential for the success of the first recommendation. The framework guidance will be more impactful if there is a continuous record of progress and critical assessment during the five years between the framework’s republications.

Despite not publishing IGIA’s annual reports to the President on its landing page, OIA’s technical assistance team has developed a webpage, which links to all IJA programs ongoing in the territories.<sup>211</sup> This is a valuable resource, but it is important for the public to see how IGIA is evaluating

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Legislation to Place Insular Areas Advisors in Federal Agencies (July 31, 2023), <https://democrats-naturalresources.house.gov/media/press-releases/grijalva-congressional-delegation-representing-us-territories-introduce-bipartisan-legislation-to-place-insular-areas-advisors-in-federal-agencies> [<https://perma.cc/M2M4-DFCK>].

205. *See id.*

206. *See id.*

207. *See* H.R. 5001.

208. *See* Exec. Order No. 13,299, 68 Fed. Reg. 25,477 (May 12, 2003).

209. *See Interagency Group on Insular Areas (IGIA) Documents and Archives*, DOI, <https://www.doi.gov/oia/igia/documentsandarchives> [<https://perma.cc/W6AB-G2AE>] (last visited Feb. 8, 2025).

210. *See Interagency Group on Insular Areas*, DOI, <https://www.doi.gov/oia/igia> [<https://perma.cc/63BL-SYRE>] (last visited Feb. 8, 2025).

211. *See Infrastructure Investment and Jobs Act (P.L. 117-58), aka The Bipartisan Infrastructure Law*, DOI, <https://www.doi.gov/oia/BIL> [<https://perma.cc/E3JZ-MWWJ>] (last visited Feb. 8, 2025).

federal investments holistically and how that evaluation develops into recommendations to the President. The collection of this data, transparency, and policy development is crucial to affecting impactful investment in the territories.<sup>212</sup>

*D. IGIA Should Develop a Federal Development Policy for the Territories*

IGIA's 2022 annual review presentation noted how a lack of "federal development policy" in the territories affects the creation and implementation of federal programs in the territories.<sup>213</sup> IGIA, with OIA, should develop a federal development policy for the territories. The creation of such a policy would outline existing federal programs that are ongoing in the territories and examine how federal investment in the territories can more strategically support sustainable economic development. This policy should explore unique opportunities for workforce development and higher education expansion based in each territory to improve economic vitality and reduce local brain drain.<sup>214</sup>

This policy may require the collection of additional data and analysis by other executive branch agencies and from the territorial governments themselves. Any data deficiency should be specifically outlined within the policy or in a supporting publicly available report.<sup>215</sup> While GAO cannot conduct independent research at the request of an agency or department,<sup>216</sup> these data deficiencies can be presented to the congressional committees with jurisdiction over the OIA—the House Committee on Natural Resources, the Subcommittee on Indian and Insular Affairs, and the Senate Committee on Energy and Natural Resources—to catalyze congressional action.<sup>217</sup> In accordance with Title 31 of the U.S. Code, Congress would then have to either pass legislation, or otherwise, the committees could formally request that GAO conduct the necessary research and analysis to fill the existing data gaps.<sup>218</sup>

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212. See COORDINATED FEDERAL APPROACH TO DATA GAPS, *supra* note 4, at 12.

213. See Ottley & Tinali Presentation, *supra* note 191.

214. See generally U.S. TERRITORIES: PUBLIC DEBT OUTLOOK 2023, *supra* note 22.

215. A 2024 GAO report found there are large data gaps in statistical information regarding the territories because most federal agencies are not required to collect territorial data, face barriers in collection, or otherwise collect data on a case-by-case basis. See COORDINATED FEDERAL APPROACH TO DATA GAPS, *supra* note 4, at 1–2, 8–9. GAO concluded that because of the large gaps in data, it is difficult to estimate what the impact is to the territories and "recommend[ed] that the [OMB] develop a coordinated, government-wide approach for federal statistical agencies to use, in consultation with territories and stakeholders, to . . . identify ways to address any data gaps." *Id.* at 1.

216. See *What GAO Does*, GAO, <https://www.gao.gov/about/what-gao-does> [<https://perma.cc/5FYQ-LQWZ>] (last visited Feb. 8, 2025).

217. See *id.*

218. See 31 U.S.C. §§ 712, 717(b).

## CONCLUSION

America's territories are essential to the fabric of our nation. Despite territorial citizens' federal disenfranchisement, when Congress designates the territorial eligibility for federal financial assistance, agencies in the federal Executive Branch must work proactively to ensure that funding reaches the territories.<sup>219</sup> The Department of Interior and the Interagency Group on Insular Areas are pivotal in this effort. These entities must create and distribute guidance to all federal departments, agencies, and commissions to ensure that a failure to comprehend the territorial experience does not preclude access. These two entities must also work proactively to help close the territorial data gaps that deny territories additional federal funding due to a lack of benchmarking. Interior is doing superior, collaborative work despite limited resources. With more careful attention paid to program draftsmanship and by drawing on hard lessons learned during the implementation of the IIA, the federal government can ensure that when the sun rises in America's territories, the forecast isn't cloudy.

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219. Congressman Andy Harris's 2022 letter to Secretary Gina Raimondo underscored that "[t]he process under these [NTIA] grant programs should not preordain potential winners or losers, but rather give . . . a fair chance to participate in these programs." Letter from Andy Harris, U.S. Representative, to Gina M. Raimondo, Sec'y, DOC (Sept. 14, 2022), <https://connecthumanity.fund/wp-content/uploads/2023/07/01-2022-09-14-Letter-to-Commerce-Secretary-Raimondo-BEAD-MM-09-14-2022.pdf> [<https://perma.cc/4RZX-KLY4>]. When federal grant programs' structures function, they contravene congressional intent.