

**Public Hearing on Resolution 56-36 Supporting U.S. House Resolution 279
May 4, 2021**

**Christina D. Ponsa-Kraus
Testimony***

Good morning and thank you, Vice Speaker Muña-Barnes, for the invitation to speak today. My name is Christina D. Ponsa-Kraus. I am a law professor at Columbia University and I study the constitutional history and law of American empire, with a particular focus on Puerto Rico, which is where I am from. I am honored to be here today to discuss the *Insular Cases* and Resolution 56-36 supporting U.S. House Resolution 279.

My bottom line is that I agree with Resolutions 279 and 56-36. The *Insular Cases* are, to use Professor Sanford Levinson's words, echoed by many who have spoken here today, "central documents in the history of American racism." The federal government should stop relying on them. Ideally, the Supreme Court would overrule them.

Dr. Underwood stated that that beating up racism would not solve every problem, and that there are problems that could and should be solved even with the *Insular Cases* in place, and that there is much more to be done even if the *Insular Cases* were overruled. I agree completely. But it is worth beating up the racism of the *Insular Cases*, because, as Dr. Underwood himself said, these cases implanted into the DNA of the United States the idea that colonies are OK. It is important to recognize that that idea was rooted in racism and to demand that the United States reject it.

I understand that the *Insular Cases* have their defenders. And their defenders, of course, do not condone racism. Instead, as I understand their view, defenders of the *Insular Cases* believe that it is possible to rescue these decisions from their racist past and put them to use for a good purpose: namely, that of accommodating cultural practices in U.S. territories that might be in tension with the U.S. Constitution. With all due respect to their views, and to the rich and varied cultures of the U.S. territories, I disagree with this view, for three reasons: First, I disagree that it's possible to remove the racism from the *Insular Cases*. Second, I disagree that one needs the *Insular Cases* to accommodate most, if not all, of the cultural practices at issue. Third, I believe that, even if there is anything of value to be salvaged from the *Insular Cases*, they still do more harm than good.

As H.R. 279 explains and we have heard today, the *Insular Cases* invented the doctrine of territorial incorporation, distinguishing between incorporated and unincorporated territories. There has been a great deal of scholarly debate about exactly what "unincorporated" means, legally. According to the standard account, the Constitution applies in full to incorporated territories but only in part to unincorporated territories.

* As noted below in the text, I delivered the first two-and-a-half pages of this testimony orally, and expanded on this written submission to respond to testimony submitted by Julian J. Aguon.

Although there is some truth to this description, in my own scholarship I have argued that this understanding of the doctrine is overly simplistic and therefore not entirely accurate. The difference between what parts of the Constitution apply to these different kinds of territories is not as great as the standard account suggests.

However, for purposes of today's hearing, what matters is this: The *Insular Cases* created two classes of territories for one purpose only: to place unincorporated territories in a subordinate position. That is what the doctrine was for. Period. And the reason for it was racism.

The *Insular Cases* were explicit about their racism, referring to the people of the territories as "alien races" and reasoning that the inhabitants of the territories were incapable of governing themselves and must therefore be governed according to "Anglo-Saxon" principles. The relationship between racism and the doctrine of territorial incorporation is not a coincidence.

Incorporated territories were on a path to statehood. Unincorporated territories were not. The result could be independence, as it was for the Philippines. But it could also be effectively permanent colonialism, as it has been for the current territories. The Supreme Court invented the doctrine to make sure that the United States would never have to grant constitutional equality or equal representation to the territories. It gave constitutional endorsement to colonialism—not as a temporary stage on the way to statehood, as territorial status had always been, but as a status that could last indefinitely, which is what territorial status has become. The doctrine served this purpose then and—whatever else one can say about it—it serves this purpose today.

As noted earlier, these days there are courts and scholars who in no way endorse racism but who nevertheless argue that the doctrine of territorial incorporation can serve the valuable purpose of accommodating cultural practices that might be in tension with the U.S. Constitution. But I'm not sure the *Insular Cases* are necessary for this.

Consider the debate over whether the Citizenship Clause of the Fourteenth Amendment applies in American Samoa. Relying on the *Insular Cases*, the government of American Samoa has argued that that the phrase "United States" as used in the Citizenship Clause does not include American Samoa. A federal appeals court in Washington, D.C., agreed with this proposition, though the same issue is currently on appeal in the Tenth Circuit.

The government of American Samoa has argued against birthright citizenship on the ground that it might threaten certain cultural practices. But the cultural practices in at issue have nothing to do with citizenship. For example, they include land alienation restrictions intended to protect native land ownership, which are in tension with the Equal Protection Clause. However, that Clause protects persons generally, not citizens

specifically. If these restrictions violate equal protection, it would not be because of citizenship.

Moreover, American Samoans are already U.S. nationals. It is not clear why U.S. citizenship would threaten local cultural practices any more than U.S. nationality does. The American Samoan government's filings in the relevant litigation do not answer this question.

Prof. Cuison-Villazor observed earlier in this hearing that these land alienation rules would not likely survive strict scrutiny. That may be right. Or it may not. I believe that instead of trying to rehabilitate the *Insular Cases*, scholars should apply their creative legal minds to developing arguments that certain cultural practices survive strict scrutiny. It may seem like a stretch, but it is less of a stretch than the doctrine of territorial incorporation – and much less of a stretch than the idea that one can remove the racism from the *Insular Cases*.

Finally, if that's wrong – if there are cultural practices in the U.S. territories that cannot be accommodated without resort to the doctrine of territorial incorporation – my own view is that it is *still* not worth the cost of sustaining that doctrine. Even when it is cited in support of accommodating culture, the doctrine still makes possible the subordination of unincorporated territories. It still constitutionalizes permanent colonialism. The United States should find a way to accommodate the cultural traditions of its territories that does not give constitutional endorsement to permanent colonialism.

For these reasons, I support Resolution 56-36 and its endorsement of H.R. 279.

I delivered the testimony above orally at the hearing on Resolution 56-36 on May 4. The following responds to the written testimony submitted by Julian J. Aguon.

Julian J. Aguon's written testimony cites an article of mine, *Untied States: American Expansion and Territorial Deannexation*, 72 UNIVERSITY OF CHICAGO LAW REVIEW 797 (2005), in support of the argument that the *Insular Cases* should not be rejected wholesale. I'm honored to be cited and appreciative of Mr. Aguon's description of my work, and I believe he accurately captures the core of my argument in that article: namely, that the *Insular Cases* "effectively smuggled a theory of secession into American law" (or to quote partially from the passage of my article quoted by Mr. Aguon, that "a deannexationist interpretation of the doctrine of territorial incorporation serves the aims of self-determination, by preserving the option of separation for any territory subject to U.S. sovereignty and federal law but denied equal representation through statehood"). However, I wish to clarify what my argument in *Untied States* implies for whether there is anything of value to be salvaged from the *Insular Cases* for purposes of the protection or accommodation of cultural practices in the U.S. territories. I do not believe there is, and I believe this view is consistent with my argument in *Untied States*.

Although Mr. Aguon agrees with the unanimous criticism of the *Insular Cases* as racist, he shares the view of some that the *Insular Cases* should not be rejected wholesale because they can serve as a “shield” to protect and/or accommodate territorial cultural practices rather than as a “sword” to threaten those practices. If I understand Mr. Aguon’s argument concerning my article, it is a version of a “greater includes the lesser” argument: namely, that if the *Insular Cases* allow for the deannexation of territories (meaning their separation and independence), then surely they allow for cultural accommodation (which appears to be a less extreme form of self-determination than deannexation). But in my view, the greater does not include the lesser here.

According to the standard account of the *Insular Cases*, the difference between incorporated and unincorporated territories is that the “entire” Constitution applies in the former but only its “fundamental” provisions apply in the latter. The argument that the *Insular Cases* allow for cultural accommodation rests on the standard account: The idea is that because most of the Constitution supposedly does not apply to the unincorporated territories, Congress has the flexibility to allow cultural practices there that might be in tension with the Constitution. However, my argument in *Untied States* rejected the standard account of the *Insular Cases*. In my view, the constitutional difference between incorporated and unincorporated territories is actually quite small, and the real work the doctrine of territorial incorporation does is *not* to withhold constitutional provisions from the unincorporated territories, but rather to preserve the option of deannexation. This interpretation does not support the “cultural accommodation” view of the *Insular Cases*, which depends on the idea that most constitutional provisions do not apply in the unincorporated territories. Instead, it supports the view that if the people of the territories can decide that they do not wish to endure the cultural assimilation that results from being a U.S. territory, they have the option of becoming independent.

To be clear, nothing would happen to the right of independence if the *Insular Cases* were overturned because the *Insular Cases* did not create this right. They simply made clear that deannexation of a territory did not run afoul of the Constitution. Also, my argument is not that the United States could not have deannexed territory without the doctrine of territorial incorporation: No clear answer to that question exists, though I believe it is likely that if the question had been posed before 1898 the answer would have been that it could. Instead, my argument is that the doctrine dispelled doubts as to whether it could. Those doubts arose during the debate over imperialism at the turn of the twentieth century, as Americans discussed the annexation of Puerto Rico, Guam, and the Philippines, and a close reading of Justice White’s concurring opinion in *Downes* (which articulated the doctrine) reveals that his central concern was to respond to those doubts by establishing that the deannexation of territory was constitutionally possible.

While I respect the goal of those who seek to protect territorial cultural practices, my own view is that as long as the *Insular Cases* remain good law, they will continue to entrench permanent colonialism in the U.S. territories, while their vaunted “benefits” will remain largely illusory – as they were, for example, in *Davis v. Guam*, 932 F.3d 822 (9th Cir. 2019). I believe it would be preferable to explore ways in which the Constitution and the Court’s jurisprudence on equality and rights apply in the territories yet can be capacious enough to accommodate varied cultural practices. One example of such an approach is that taken by three federal judges sitting by designation on the American Samoa High Court in *Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10 (1980), which upheld American Samoa’s racially restrictive land ownership laws. The *Craddick* Court applied standard equal protection analysis, which requires a court reviewing a racial classification to apply “strict scrutiny” by asking whether a classification is narrowly tailored to achieve a compelling end. Applying that framework, the *Craddick* Court recognized the critical importance of cultural preservation (a “compelling” end) and upheld the classification American Samoa used to achieve it (as “narrowly tailored” means). The Court saw no need to rely on the *Insular Cases* as an escape hatch from the Constitution; in fact, it expressly rejected the relevance of the distinction between incorporated and unincorporated territories to the applicability of the Fifth Amendment’s equal protection guarantee in American Samoa.

If we treat the *Insular Cases* as necessary for cultural accommodation in the U.S. territories, we cannot help but perpetuate the problematic idea that the only way to make room for the territories within the U.S. constitutional framework is to carve them out of it, while at the same time leaving U.S. sovereignty intact. This idea serves the interests of the United States, since it leaves power over these questions with the federal government, but it does a disservice to the people of the territories, since it allows for the indefinite continuation of an arrangement that disenfranchises them. If history is any guide, the *Insular Cases* will always be the cornerstone of an imbalanced power dynamic, and reliance on them will always come at too high a cost.