

Congress of the United States
Washington, DC 20515

April 15, 2024

The Honorable Merrick B. Garland
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Garland:

We are writing to express our deep concerns with the Department of Justice's continued reliance on and defense of the *Insular Cases*. The *Insular Cases* broke from the anti-colonial values of our nation's founding to hold that the "half-civilized," "savage," "alien races" living in Puerto Rico, Guam, and other U.S. territories were not entitled to the same constitutional rights and democratic participation afforded to people in the continental United States because they were "unfit" and could not understand "Anglo-Saxon principles." As Justice Sotomayor recently emphasized, the *Insular Cases* "were premised on beliefs both odious and wrong," with Justice Gorsuch declaring that "[t]hey deserve no place in our law."¹ **The Justice Department should similarly recognize the racist logic that the *Insular Cases*' doctrine of territorial incorporation represents and expressly reject this case law.**

The *Insular Cases* were decided between 1901 and 1922 by many of the same Justices that blessed "separate but equal" racial segregation in *Plessy v. Ferguson*. In the *Insular Cases*, the Court held that the Constitution does not apply in full to so-called "unincorporated" U.S. territories, whose inhabitants, it declared, could permanently be denied any democratic rights or self-determination. Reasoning that the new territories were "inhabited by alien races," the Court broke from longstanding precedent to justify colonial rule over the millions of people living in these island territories.² The colonial system established by the *Insular Cases* was based on the Court's judgment that the people residing in the territories were racially and culturally inferior to Anglo-Saxon white Americans and, therefore, unfit for the protections of the Constitution, self-government, or self-determination.³

The people in these territories have been denied essential constitutional protections and human rights for the last 125 years. The key historical moment for this shift away from America's anti-colonial founding was the signing of the Treaty of Paris ending the Spanish-American War and its subsequent ratification by the U.S. Senate on February 6, 1899. Today, residents of the territories pay over \$3 billion in federal taxes and serve in the military at rates that exceed any state, but are excluded from life-saving federal benefits, including Supplemental Security Income ("SSI") and the Supplemental Nutrition Assistance Program ("SNAP").⁴ Poverty rates in the U.S. territories range from approximately 23 percent to 60 percent, compared to the national poverty rate of approximately 11 percent.⁵ All of this has contributed to double-digit population declines across the territories, disrupting communities and separating families.⁶

A coalition of Members of Congress previously wrote to you about this issue in 2021 (see attached). Since then, the Department has at times seemed to criticize the *Insular Cases*, while at others, it has actively relied upon and continued defending them.⁷ This problematic dynamic will likely continue repeating itself, absent the Department taking clear action to condemn the *Insular Cases* and their doctrine of territorial incorporation.

President Biden has addressed continued discrimination against citizens in U.S. territories by declaring that “there can be no second-class citizens in the United States of America”⁸ and that they should have “the opportunity to determine their own political future.”⁹ But the 3.6 million residents of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands—98 percent of whom are racial or ethnic minorities—will continue to be denied democracy, equity, and self-determination so long as the *Insular Cases* define their relationship with the United States.

The Department has already taken steps towards turning the page on the *Insular Cases*. It should now go further, much as it did in 2011 when it condemned the Supreme Court’s infamous decision in *Korematsu v. United States*.¹⁰

One hundred twenty-five years ago, the United States turned away from the democratic and constitutional principles our nation was founded on to embrace what Justice Gorsuch has characterized as “American colonialism.”¹¹ **Today, the Department of Justice has the opportunity to redress this historic error by unequivocally rejecting the discriminatory and racist doctrine of territorial incorporation established by the *Insular Cases*.**

We appreciate your attention to this matter and request a meeting to discuss this further with the Department.

Sincerely,



Raúl M. Grijalva
Member of Congress



Stacey E. Plaskett
Member of Congress



Gregorio Kilili Camacho
Sablan
Member of Congress



Martin Heinrich
United States Senator



Eleanor Holmes Norton
Member of Congress



Henry C. "Hank" Johnson, Jr.
Member of Congress



Barbara Lee
Member of Congress



Ritchie Torres
Member of Congress



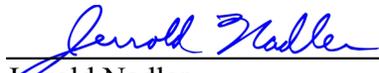
Rashida Tlaib
Member of Congress



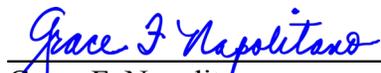
Shri Thanedar
Member of Congress



Melanie Stansbury
Member of Congress



Jerrold Nadler
Member of Congress
Ranking Member, Committee
on the Judiciary



Grace F. Napolitano
Member of Congress



James P. McGovern
Member of Congress



Greg Casar
Member of Congress



Nydia M. Velázquez
Member of Congress



Jesús G. "Chuy" García
Member of Congress



Valerie P. Foushee
Member of Congress



Jared Huffman
Member of Congress



Yvette D. Clarke
Member of Congress



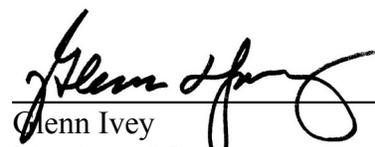
Darren Soto
Member of Congress



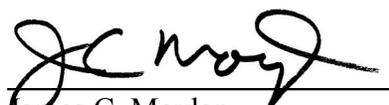
Summer Lee
Member of Congress



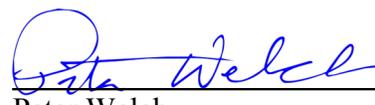
Jenniffer González-Colón
Member of Congress



Glenn Ivey
Member of Congress



James C. Moylan
Member of Congress



Peter Welch
United States Senator



Deborah K. Ross
Member of Congress



Adam B. Schiff
Member of Congress



Bernard Sanders
United States Senator



Elizabeth Warren
United States Senator



Sheldon Whitehouse
United States Senator



Jan Schakowsky
Member of Congress



Raphael Warnock
United States Senator



Richard J. Durbin
United States Senator



Alexandria Ocasio-Cortez
Member of Congress



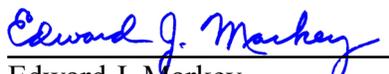
Alex Padilla
United States Senator



Brian Schatz
United States Senator



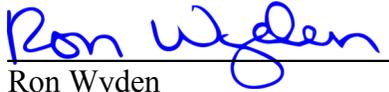
Christopher S. Murphy
United States Senator



Edward J. Markey
United States Senator



Raphael Warnock
United States Senator



Ron Wyden
United States Senator



Richard Blumenthal
United States Senator



Kirsten Gillibrand
United States Senator

Cc:

The Honorable Tom Perez, Director for the White House Office of Intergovernmental Affairs

The Honorable Benjamin C. Mizer, Acting Associate Attorney General

The Honorable Elizabeth Prelogar, Solicitor General of the United States

The Honorable Kristen Clarke, Assistant Attorney General for Civil Rights

¹ *United States v. Vaello Madero*, 596 U.S. 159, 188 (2022) (Gorsuch, J., concurring); *id.* at 194 n.4 (Sotomayor, J., dissenting).

² *Id.* at 182 (Gorsuch, J. concurring); *Downes v. Bidwell*, 182 U.S. 244 (1901); *De Lima v. Bidwell*, 182 U.S. 1, 219 (1901).

³ See Brief Amici Curiae of the American Civil Liberties Union and the ACLU of Puerto Rico, Supporting the First Circuit’s Ruling on the Appointments Clause Issue at 4–5, *Fin. Oversight & Mgmt. Bd. For P.R. v. Aurelius Inv., LLC*, 140 S.Ct. 1649 (2019) (describing, with citations to cases and other authorities, the race-based reasoning underlying the *Insular Cases*’ doctrine of territorial incorporation).

⁴ Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 Mich. L. Rev 1639 (2021).

⁵ Karl A. Racine and Leevin T. Camacho, [Dear Supreme Court: 3.5 million Americans in territories deserve same federal benefits](#), USA Today (Nov. 9, 2021),.

⁶ Jae June Lee, Cara Brumfield and Neil Weare, [Advancing Data Equity for U.S. Territories](#), November 29, 2022.

⁷ For example, at oral argument in *United States v. Vaello Madero*, the Department took a step in the right direction by acknowledging that “the reasoning and rhetoric [in the *Insular Cases*] is obviously anathema, has been for decades, if not from the outset,” but ultimately the Department declined to reject the *Insular Cases*, arguing that the Supreme Court should not “say anything” about the *Insular Cases* in deciding the case. Transcript of Oral Argument at 9-11, *United States v. Vaello Madero*, 596 U.S. 159 (2022). In *Fitisemanu v. United States*, the Department told the Supreme Court that “the government in no way relies on the indefensible and discredited aspects of the *Insular Cases*’ reasoning and rhetoric,” but in the lower courts it cited some of the most racist passages of the *Insular Cases* to argue in support of “Congress’s power to determine the citizenship status of those in unincorporated territories.” Brief for the Federal Respondents in Opposition at 16, *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (No. 21-1394); Response to Petition for Rehearing at 9–10, *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (Nos. 20-4017 & 20-4019).

⁸ Statement by President Joseph R. Biden, Jr. on Puerto Rico (June 7, 2021).

⁹ Statement by the Executive Office of the President, Office of Management and Budget, on H.R. 8393, the Puerto Rico Status Act (Dec. 15, 2022).

¹⁰ Statement by the U.S. Dep’t of Justice, Office of the Solicitor General, Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases (May 20, 2011).

¹¹ *United States v. Vaello Madero*, 596 U.S. 159 (2022) (Gorsuch, J., concurring).