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Dear General Garland and General Fletcher,

We write to ask that the U.S. Department of Justice consider addressing what we believe is a dark and shameful stain in American legal history: the widely criticized *Insular Cases*, which held 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 protections afforded to other Americans because they could not understand "Anglo-Saxon principles." Much like the infamous *Plessy v. Ferguson*, which justified "separate but equal" racial segregation, and *Korematsu v. United States*, which upheld the mass internment of Japanese Americans during World War II, the *Insular Cases* represent a shameful legacy our nation would do well to move past. **We hope you will consider rectifying this moral wrong by expressly condemning the *Insular Cases* and the territorial incorporation doctrine, both in future court filings and through an unequivocal public statement.**

The time is now for the Justice Department to reject the *Insular Cases* and the racism they and the territorial incorporation doctrine represent. In January, President Biden recognized that the violent death of George Floyd "marked a turning point in this country's attitude toward racial justice," one "forcing us to confront systemic racism and white supremacy."[1]

Attorney General Garland, as you stated during your confirmation hearing, "[W]e do not yet have equal justice. Communities of color and other minorities still face discrimination."[2] Earlier this summer, President Biden 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."[3] But residents of the territories—98 percent of whom are racial or ethnic minorities—will remain second-class citizens so long as the *Insular Cases* remain good law.

The *Plessy*-era *Insular Cases* created two distinct classes of Americans: full citizens living in the states and second-class citizens living in U.S. territories. As the late First Circuit Judge Juan R.

[1] Remarks by President Biden at Signing of an Executive Order on Racial Equity, January 26, 2021.
[2] Statement of the Hon. Merrick Brian Garland, Hearing Before the U.S. Senate Committee on the Judiciary, February 22, 2021.
[3] Statement by President Joseph R. Biden, Jr. on Puerto Rico, June 7, 2021.

Torruella remarked, the *Insular Cases* ended a "century-old tradition and practice that the Constitution automatically attached to all territories over which the United States gained sovereignty."[4] The Supreme Court's rulings rejected the notion that the Constitution "followed the flag" to overseas territories based on offensive, racist stereotypes about those territories' inhabitants, inventing from whole cloth a novel distinction between "incorporated" and "unincorporated" U.S. territories.

The territorial incorporation doctrine was wrong from the start. Justice John Marshall Harlan, the lone *Plessy* dissenter, wrote in a powerful dissent to *Downes v. Bidwell*—the most infamous of the *Insular Cases*— that "this idea of 'incorporation' … is enveloped in some mystery which I am unable to unravel." He concluded: "[t]he idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces—the people inhabiting them to enjoy only such rights as Congress chooses to accord to them—is wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution."

Downes unabashedly warned against the "evils" of admitting "millions of inhabitants" of "unknown islands, peopled with an uncivilized race," who Justice Edward White believed were "absolutely unfit" for citizenship.[5] Judge Torruella—a lifetime critic of the *Insular Cases*—spent his career arguing that they "represent classic *Plessy v. Ferguson* legal doctrine that should be eradicated from present-day constitutional reasoning."[6] And prominent constitutional law scholar Sanford Levinson has called the decisions "central documents in the history of American racism."[7] In short, the *Insular Cases* amount to a "doctrine of separate and unequal" for residents of U.S. territories.[8]

Without the racism that underlies the *Insular Cases*, there would be no territorial incorporation doctrine. Racism infects their doctrine just as it infected *Korematsu* and *Plessy*. Yet notwithstanding the *Insular Cases*' explicitly racist foundations, the Justice Department has long relied on them to address a range of constitutional questions facing residents of U.S. territories.

However, notably, the Department's recent reliance on the *Insular Cases* has been more mixed, even hesitant at times.

In litigation over the Financial Oversight and Management Board for Puerto Rico's constitutionality, DOJ initially relied on the *Insular Cases* for the far-reaching view that "the Constitution is 'suggestive of no limitations upon the power of Congress in dealing with [the Territories]' and gives no indication 'that the power of Congress in dealing with [the Territories]

[4] Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 300 (2007).
[5] 182 U.S. 244 (1901).
[6] Juan R. Torruella, *The Insular Cases: A Declaration of Their Bankruptcy*, *in* Reconsidering the Insular Cases: The Past and Future of the American Empire, 61, 62 (G. Neuman and T. Brown-Nagin Eds., 2015).
[7] Sanford Levinson, *Why the Canon Should Be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 Const. Comment. 241, 245 (2000).
[8] Juan R. Torruella, The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal (1985).

was intended to be restricted by any of the [Constitution's] other provisions.'"[9] By the time the case reached the Supreme Court, however, DOJ tempered its view to argue that "the *Insular Cases* are not relevant."[10]

In a case currently pending before the Supreme Court, *United States v. Vaello-Madero*, which considers whether the denial of Supplemental Security Income to residents of Puerto Rico violates the guarantee of equal protection, DOJ argued to the First Circuit that "neither the incorporation doctrine nor the *Insular Cases* are relevant."[11] That was a welcome development. But at the *certiorari* stage, DOJ backtracked, approvingly citing the idea that under "the doctrine of territorial incorporation . . . the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories."[12]

In another pending case being considered for *en banc* review by the Tenth Circuit, *Fitisemanu v. United States*, which considers whether the Constitution's guarantee of birthright citizenship extends to people born in U.S. territories, DOJ's panel stage briefs relied extensively on the *Insular Cases*. However, even then, the Department cautioned against determining the application of the Citizenship Clause "under the doctrine of territorial incorporation."[13]

The Justice Department's increasing reluctance to rely on the *Insular Cases* and the territorial incorporation doctrine is well grounded. The Supreme Court has shown growing skepticism towards the territorial incorporation doctrine in U.S. territories. Last year, in *FOMB v. Aurelius*, the Court questioned the "continued validity" of the *Insular Cases*, calling them "much-criticized," and affirmatively cited a plurality opinion "indicating that the *Insular Cases* should not be further extended."[14] Earlier, in *Boumediene v. Bush*, the Court suggested that "over time the ties between the United States and any of its unincorporated Territories [may] strengthen in ways that are of constitutional significance,"[15] emphasizing that "[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, *not* the power to decide when and where its terms apply."[16] Yet even as the Supreme Court has narrowed and criticized the *Insular Cases*, to date it has stopped short of overruling them altogether.[17]

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[9] Memorandum of Law filed by the United States in Support of the Constitutionality of PROMESA, Dkt. No. 1929, In re: The Commonwealth of Puerto Rico, No. 17-3283-LTS (D.P.R. Dec. 6, 2017), at 9, quoting *Downes*, 182 U.S. at 285-86.

[10] Brief for the United States at 25, *FOMB v. Aurelius Investment, LLC*, 140 S.Ct. 1649 (2020).

[11] Reply Brief for Appellant at 11, *United States v. Vaello Madero*, 956 F.3d 12 (1st Cir., 2020).

[12] Reply Brief for the United States at 9, *United States v. Vaello Madero* (No. 20-303).

[13] Reply Brief for Defendants-Appellants at 20, *Fitisemanu v. United States*, No. 20-4017 (10th Cir., June 26, 2020). A divided Tenth Circuit panel did not heed this caution, applying the territorial incorporation doctrine to rule both that "citizenship" is not a "fundamental" right for people born in so-called "unincorporated" territories and that recognizing a right to citizenship would be "impractical and anomalous." *Fitisemanu v. United States* at 33, 38, No. 20-4017 (10th Cir. June 26, 2020).

[14] *Aurelius*, 140 S.Ct. 1649, 1665 (2020) (citing Reid).

[15] 553 U.S. 723, 758 (2008).

[16] *Id.* at 765.

[17] *See* Adriel Cepeda-Derieux and Neil Weare, *After Aurelius: What Future for the* Insular Cases*?* 130 YALE L.J.F. 284 (2020).

In the coming weeks, the Justice Department will twice be able to weigh in on the *Insular Cases* and the territorial incorporation doctrine—a first during the Biden-Harris administration. In its Reply Brief to the Supreme Court in *Vaello-Madero* (due Sept. 29, 2021), DOJ will have a chance to address Respondent's contention that the government's arguments are "an attempt to rewrite history and wash the Incorporation Doctrine with polite language."[18] In its response to a petition for *en banc* review before the Tenth Circuit in *Fitisemanu* (due Sept. 15, 2021), DOJ will be able to address the Tenth Circuit panel's broad expansion of the territorial incorporation doctrine and whether racially offensive language in *Downes* should continue to be relied upon to deny birthright citizenship in U.S. territories. In both cases, a politically and ideologically diverse array of national organizations, legal scholars, and elected officials from the territories are calling on the federal government to turn the page on the *Insular Cases*.

We would like to see DOJ stop defending the constitutionality of federal statutes that discriminate against people born or living in U.S. territories. But *at minimum*, DOJ should consider joining the chorus of criticism against the *Insular Cases*. That is, even if DOJ continues to defend these discriminatory federal laws, it should not just disclaim reliance on the *Insular Cases* and the territorial incorporation doctrine, as it has already done. **DOJ should contemplate going further: it should consider expressly calling for the Supreme Court and Tenth Circuit to act to help place the *Insular Cases* and the territorial incorporation doctrine in the dustbin of history alongside *Plessy* and *Korematsu* where they belong.**

DOJ should also consider publicly condemning the *Insular Cases* and the territorial incorporation doctrine, much as it did in 2011 with *Korematsu*.[19] House Resolution 279, which a majority of the authors of this letter have co-sponsored, offers a model for such a statement.[20]

Today more than ever, the Justice Department has a moral responsibility to help right this historic wrong. The trust the people of the United States place in the Justice Department, *including* those born or living in U.S. territories, comes with a special obligation to uphold the nation's core values.

Attorney General Garland, at your confirmation hearing you invoked the mission of DOJ's Civil Rights Division: "[T]o uphold the civil and constitutional rights of all Americans, particularly some of the most vulnerable members of our society." The *Insular Cases* and the territorial incorporation doctrine simply cannot be squared with our nation's core values or any notion of equal justice under law.

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[18] Brief for Respondent at 4, *United States v. Vaello Madero*, No. 20-303 (August 30, 2021).

[19] In 2011, the Office of the Solicitor General confessed error in *Korematsu* and recognized that the Office had relied on "gross generalizations about Japanese Americans, such as that they were disloyal and motivated by 'racial solidarity.'" Department of Justice, "Confession Of Error: The Solicitor General's Mistakes During The Japanese-American Internment Cases" (May 20, 2011). This confession of error did not go unnoticed. In 2018, the Supreme Court formally condemned the decision in *Korematsu* in *Trump v. Hawaii*, 138 S.Ct. 2392 (2018).

[20] *See* H.Res.279 - Acknowledging that the United States Supreme Court's decisions in the Insular Cases and the "territorial incorporation doctrine" are contrary to the text and history of the United States Constitution, rest on racial views and stereotypes from the era of Plessy v. Ferguson that have long been rejected, are contrary to our Nation's most basic constitutional and democratic principles, and should be rejected as having no place in United States constitutional law.

The Justice Department should ask itself whether it wants to remain complicit in the racism inherent in the *Insular Cases* by continuing to perpetuate the "separate and unequal" status facing residents of U.S. territories. Our nation deserves better, and the people of the territories deserve better.

Sincerely,

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