February 10, 2022

Attorney General Merrick Garland
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Solicitor General Elizabeth Prelogar
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Garland and Solicitor General Prelogar:

There comes a time when certain prior U.S. Supreme Court decisions are recognized as falling so far outside the canon of accepted law that they become utterly discredited as sound doctrine upon which responsible advocates can rely. The Court recognized this when it described the *Korematsu* case as "overruled in the court of history."[1] The *Insular Cases* represent another example. We, the undersigned civil rights groups, therefore write this letter to encourage the Department of Justice ("DOJ") to reject the *Insular Cases* and the racist assumptions they represent.

The *Insular Cases*, as you know, are a line of Supreme Court cases that held that the "alien races"[2] and "savage tribes"[3] in Guam, Puerto Rico, and other U.S. territories acquired as a result of the Spanish-American War were not entitled to the same constitutional rights and protections afforded to residents of the states, nor were they on a path to full political participation. This perspective is best encapsulated by the "territorial incorporation doctrine," a term that belies the overt racism it represents. Like the infamous *Plessy v. Ferguson*, which justified "separate but equal" racial segregation, and *Korematsu v. United States*, which endorsed the mass internment of Japanese Americans during World War II, the *Insular Cases* represent a shameful legacy in our Nation's history. **We call on the Justice Department to help dismantle this egregious example of systemic racism by publicly condemning the *Insular Cases* and bringing an end to any reliance on them in future court filings.**

[1] *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (citing *Korematsu v. United States,* 323 U.S. 214, 248 (Jackson, J., dissenting)).
[2] *Downes v. Bidwell*, 182 U.S. 244, 286–87 (1901) (Brown, J.).
[3] *DeLima v. Bidwell*, 182 U.S. 1, 219 (McKenna, J., dissenting).

The DOJ's filings and statements related to the *Insular Cases* in at least two pending lawsuits are indefensible and contravene the values expressed by senior leaders in this administration.

In *United States v. Vaello-Madero*, the Supreme Court is considering whether the denial of Supplemental Security Income to residents of Puerto Rico based solely on where they live violates the Constitution's guarantee of equal protection. At oral argument in *Vaello-Madero*, DOJ was repeatedly invited to address the *Insular Cases*, but did not disavow them. First, Chief Justice John Roberts asked whether the *Insular Cases* had anything to do with the case. The Deputy Solicitor General answered:

> We don't think that they affect the analysis that the Court needs to apply here because we acknowledge that the equal protection component of the Fifth Amendment is applicable . . . therefore, we don't think that the Court needs to address the *Insular Cases* here anymore than it did last year in *Aurelius*, where it noted that the Court has repeatedly declined to extend the *Insular Cases*.[4]

Later, Justice Neil Gorsuch asked: "Counsel, if that's true, why . . . shouldn't we just admit the *Insular Cases* were incorrectly decided?"[5] This was a perfect opportunity for DOJ to expressly disavow, if not condemn, the *Insular Cases*. Instead, DOJ answered: "Well, I—I think . . . that would not be the Court's normal course to just say that several cases were incorrect."[6]

After Justice Gorsuch twice more pressed the issue, DOJ was finally forced to acknowledge that "some of the reasoning and rhetoric" the *Insular Cases* stand for "is obviously anathema, has been for decades, if not from the outset." But, in the same breath, the Department expressly urged the Court to *avoid* addressing them:

> The government's position [is that] that they are not at issue in this case because the conclusion that parts of the Constitution wouldn't apply to Puerto Rico doesn't decide anything that is relevant to this case.
>
> The equal protection component applies here, and . . . therefore . . . the Court doesn't need to say anything else about the *Insular Cases* in order to decide this case.[7]

While DOJ did not expressly rely on the *Insular Cases* in *Vaello-Madero*, it is doing exactly that in another case that is likely headed to the Supreme Court, *Fitisemanu v. United States*. In *Fitisemanu*, a deeply divided panel of the Tenth Circuit relied on the *Insular Cases* to rule that American Samoa—a U.S. territory since 1900—is not "in the United States" for purposes of the Fourteenth Amendment's Citizenship Clause, and thus people born there have no constitutional guarantee of U.S. citizenship. Two circuit judges dissented from the denial of *en banc* review in a compelling 27-page opinion, and the district court judge in the case also ruled in favor of

[4] Tr. of Oral Argument at 9, *United States v. Vaello-Madero*, No. 20-303 (S. Ct. argued Nov. 9, 2021).
[5] *Id*.
[6] *Id*.
[7] Tr. of Oral Argument at 11, *Vaello-Madero*.

recognizing a right to citizenship to those born in U.S. territories—all concluding that the *Insular Cases* were irrelevant to the question of citizenship in U.S. territories.

In *Fitisemanu*, DOJ relied extensively on the *Insular Cases* to argue that the Citizenship Clause does not apply to people born in American Samoa, despite the fact that people born there are fully subject to U.S. sovereignty, owe permanent allegiance to the United States, and have military service rates higher than any U.S. jurisdiction.[8] Indeed, DOJ affirmatively cited the opinions of Justices Brown and White in *Downes v. Bidwell*,[9] which include some of the most problematic dicta from the *Insular Cases* that expressly pointed to the race of the inhabitants of island territories as a reason to deny them citizenship. Justice Brown, whose opinion DOJ relied on to argue that territories are not "a part of the United States,"[10] wrote that annexed territories might be populated by "alien races, differing from us," and expressed concern that the "children" of "savages" born in such territories would "immediately" be "entitled to all the rights, privileges and immunities of citizens" under a constitutional interpretation that differed from his.[11] And Justice White, whose concurrence DOJ cited throughout its briefing,[12] objected to the "the immediate bestowal of citizenship on "members of "uncivilized race[s]," who were "absolutely unfit to receive it."[13]

If the parties ask the Supreme Court to review the Tenth Circuit's decision, DOJ will be called on to more directly articulate its position on the *Insular Cases*. It should use this opportunity to expressly reject any continued reliance on the *Insular Cases* to answer the question of citizenship for people born in U.S. territories, or to deny residents of these areas any other constitutional rights.

As President Biden stated in January 2021 at the signing of the Executive Order for Advancing Racial Equity, "this nation and its government need to change their whole approach to the issue of racial . . . equity," which will require action from "every agency," including DOJ.[14] Attorney General Garland, you further stated during your confirmation hearing that "we do not yet have equal justice" because "[c]ommunities of color and other minorities still face discrimination."[15] DOJ's embrace of the *Insular Cases* and the racist doctrine they represent, while simultaneously acknowledging their reasoning as "obviously anathema," contravenes this administration's stated views on racial justice. It is unacceptable for the DOJ to endorse or acquiesce in the perpetuation

[8] Br. for Defs.-Appellants at 1, 10, 12, 16–17, 18–19, 20–22, *Fitisemanu v. United States*, No. 20-4017 (10th Cir. Apr. 14, 2020); Reply Br. for Defs.-Appellants at 12–14, 18, 20–21, *Fitisemanu*, No. 20-4017 (10th Cir. May 26, 2020).
[9] 182 U.S. 244 (1901).
[10] Br. for Defs.-Appellants at 18, *Fitisemanu*, No. 20-4017 (10th Cir. Apr. 14, 2020) (citing *Downes*, 182 U.S. at 250–51 (op. of Brown, J.)); *see also id.* (citing *Downes*, 182 U.S. at 263, 277–78, 287) (op. of Brown, J.)).
[11] *Downes*, 182 U.S. at 287, 279–80 (op. of Brown, J.).
[12] *See* Br. for Defs.-Appellants at 10, 12, 16, 18, 19, *Fitisemanu*, No. 20-4017 (10th Cir. Apr. 14, 2020); Reply Br. for Defs.-Appellants at 3, 7, 12, 17, 20–21, *Fitisemanu*, No. 20-4017 (10th Cir. May 26, 2020); Resp. to Pet. for Rehearing at 9, 13, *Fitisemanu*, No. 20-4017 (10th Cir. Sept. 15, 2021).
[13] *Id.* at 306 (White, J., concurring).
[14] Remarks by President Biden at Signing of an Executive Order on Racial Equity, January 26, 2021.
[15] Judiciary Committee Releases Judge Garland's Opening Remarks Ahead of Hearing to be Attorney General, Sen. Comm. on the Jud. (Feb, 21, 2021), https://www.judiciary.senate.gov/press/releases/judiciary-committee-releases-judge-garlands-opening-remarks-ahead-of-hearing-to-be-attorney-general.

of a doctrine that was historically intended to enable race-based discrimination against the residents of U.S. territories—who now number over 3.5 million people and are overwhelmingly people of color.

DOJ's continued embrace of the *Insular Cases* cannot be reconciled with this administration's pledge to affirmatively advance equity and racial justice. **We urge you to immediately cease relying on the *Insular Cases* in any present or future cases, and to publicly condemn the *Insular Cases* and the territorial incorporation doctrine, much as DOJ did in 2011 with respect to *Korematsu*.**[16]

This year marks a century since the Supreme Court ruled in *Balzac v. Porto Rico*—the last of the *Insular Cases*—to extend the racist doctrine of territorial incorporation, despite the fact that Congress had by then recognized the people of Puerto Rico as U.S. citizens. DOJ should use this unfortunate anniversary to make clear that the *Insular Cases* and the racism they represent are no longer sanctioned by the federal government.

For follow up, please contact Alejandro Ortiz, Senior Staff Attorney with the ACLU's Racial Justice Program, at ortiza@aclu.org; Laura Esquivel, Vice President, Federal Policy and Advocacy, with the Hispanic Federation, at lesquivel@hispanicfederation.org; or Lía Fiol Matta, Senior Counsel with LatinoJustice PRLDEF, at lfiol-matta@latinojustice.org.

Sincerely,

American Civil Liberties Union
Asian American Legal Defense and Education Fund
Ayuda Legal Puerto Rico
Brennan Center for Justice
Dēmos
Hispanic Federation
Human Rights Campaign
Lambda Legal
LatinoJustice PRLDEF
Lawyers' Committee for Civil Rights Under Law
NAACP Legal Defense and Education Fund, Inc.
OCA – Asian Pacific American Advocates
Washington Lawyers' Committee for Civil Rights and Urban Affairs

Cc:

[16] 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.'" Dep't 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).

Julie Chavez Rodriguez, Director for the White House Office of Intergovernmental Affairs
Vanita Gupta, Associate Attorney General
Kristen Clarke, Assistant Attorney General for Civil Rights