

August 22, 2023

The Honorable Joseph R. Biden, Jr.
President of the United States
1600 Pennsylvania Ave.
Washington, DC 20500

Dear President Biden:

As we mark 125 years since the United States invaded Puerto Rico and reneged on its professed commitment to self-governance to embrace an overseas empire, you have an historic opportunity to publicly affirm that what Justice Neil Gorsuch described as “American colonialism”¹ grounded in “ugly racial stereotypes”² has no place in this country. In 1898, Puerto Rico and Guam were acquired by the United States as a result of the Spanish-American War, with American Samoa, the U.S. Virgin Islands, and the Northern Mariana Islands to follow. As we assess the relationship between the United States and its territories 125 years later, one conclusion is inescapable: they were colonies then and effectively remain colonies today. The people in the U.S. territories should have the same right to self-determination as people anywhere in the world. At present, they do not. We call upon you to put an end to this gross inequity.

The legal foundation for the colonial relationship between the U.S. and its territories is supported by a series of explicitly racist Supreme Court decisions known as the *Insular Cases* that broke from precedent to deny self-determination and justify colonial rule over Puerto Rico and other territories. Last year, a coalition of civil rights organizations called on the United States Department of Justice “to reject the *Insular Cases* and the racist assumptions they represent.”³ But after Justice Sotomayor called the *Insular Cases* “odious and wrong,”⁴ the Justice Department urged the Supreme Court *not* to hear a case that could have presented an opportunity to overrule the *Insular Cases*.⁵ We appreciate the Justice Department’s recent condemnation of “the indefensible and discredited aspects of the *Insular Cases*’ reasoning and rhetoric”⁶—which makes the Department’s continued reliance on these cases all the more bewildering. We, the undersigned organizations, which represent millions of United States citizens, are petitioning you to **publicly condemn the racist *Insular Cases* and the colonial framework they established.**

Almost immediately after the United States captured Puerto Rico, Guam, and other islands as spoils of war in 1898, questions arose about the applicability of the Constitution to the newly acquired territories and their residents. These included whether certain provisions on tariffs and taxation apply to Puerto Rico and whether the Fifth and Sixth Amendment rights to indictment and trial by jury apply in Puerto Rico and the Philippines. In answering these questions, the Supreme Court ignored the Constitution’s text, history, and tradition in service of naked prejudice and racial bias.⁷ The *Insular Cases*, as they are known, held that the residents of Puerto Rico and other territories acquired during 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 as states or to freedom as independent sovereigns. The “alien races”⁸ and “savage tribes”⁹ living in territories such as these would not have these guarantees, said the justices,

because they were perceived as racially and culturally inferior to Anglo-Saxon whites and therefore unfit to enjoy equality or political rights.¹⁰

U.S. territories remain subordinate to federal rule today in many of the ways they did then, as the United States Supreme Court recently re-emphasized in a series of often troubling decisions.¹¹ In each of these cases, the Department of Justice has defended a sweeping view of federal power over people in U.S. territories with no clear limits. In doing so, it has repeatedly relied on the *Insular Cases*, and even actively discouraged the Supreme Court from reconsidering them.

In 2017, for example, the Justice Department defended the constitutionality of the Financial Oversight and Management Board for Puerto Rico by quoting *Downes v. Bidwell*—the most prominent of the *Insular Cases*—for the troubling proposition 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] was intended to be restricted by any of the [Constitution’s] other provisions.”¹² In 2021, the Justice Department argued that Congress has the power to deny birthright citizenship in U.S. territories, affirmatively citing *Downes* for the idea “that the Constitution should not be read to automatically confer citizenship on inhabitants of U.S. territories.”¹³

The Justice Department has also consistently opposed any attempts to reconsider the *Insular Cases*. As last year’s letter explained in more detail, during oral argument before the Supreme Court in 2021, the Deputy Solicitor General repeatedly dissuaded the Justices from reconsidering the *Insular Cases*, refusing to even take a position on whether they should be overruled.¹⁴ And last year the Department expressly opposed calls to overrule the *Insular Cases* when the Court was provided a vehicle for doing so.¹⁵

The Administration’s continued reliance on and defense of the *Insular Cases* undermines your publicly stated policy positions towards U.S. territories and the people who call them home. This year, you made history by including “persons who live in U.S. territories” within your Administration’s definition of “equity,” helping ensure greater visibility for the territories in federal agencies.¹⁶ This follows a Statement of Administration Policy in December 2022 recognizing that “[f]or far too long, the residents of Puerto Rico—over 3 million U.S. citizens—have been deprived of the opportunity to determine their own political future and have not received the full rights and benefits of their citizenship because they reside in a U.S. territory.”¹⁷ You also declared in a June 2021 statement responding to discrimination against residents of U.S. territories in federal benefits programs that “there can be no second-class citizens in the United States of America.”¹⁸ You made great strides towards that goal by helping to close Medicaid funding disparities in U.S. territories, extending the Child Tax Credit, expanding the Earned Income Tax Credit, promoting better federal disaster response, and addressing many economic and infrastructure needs in the territories. Publicly condemning the *Insular Cases* would help realize both your stated commitment to the peoples of U.S. territories and your broader commitments to racial justice.

Your leadership is needed if the United States is to turn the page on the racist *Insular Cases* and the undemocratic colonial framework they created. It is time to acknowledge this often overlooked and shameful aspect of United States history. Denouncing the *Insular Cases* should not be controversial—indeed, cross-ideological consensus exists on these issues,¹⁹ even among Supreme Court Justices.

For example, last year Supreme Court Justices Neil Gorsuch and Sonia Sotomayor joined to express “hope [that] the Court will soon recognize that the Constitution’s application should never turn on . . . the misguided framework of the *Insular Cases*.”²⁰

As Justice Gorsuch explained:

A century ago in the *Insular Cases*, this Court held that the federal government could rule Puerto Rico and other Territories largely without regard to the Constitution. It is past time to acknowledge the gravity of this error and admit what we know to be true: The *Insular Cases* have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.²¹

In parsing the main opinions of the leading *Insular Cases*, Justice Gorsuch accurately discerned their through-line: “both rested,” he said, “on a view about the Nation’s ‘right’ to acquire and exploit an ‘unknown island, peopled with an uncivilized race . . . for commercial and strategic reasons’—a right that ‘could not be practically exercised if the result would be to endow’ full constitutional protections ‘on those absolutely unfit to receive [them].’”²² Justice Sotomayor agreed, acknowledging the *Insular Cases* are “premised on beliefs” of the racial inferiority of the territories’ residents that are “both odious and wrong.”²³

Ultimately, the racist legacy of the *Insular Cases* cannot be squared with the stated values of your Administration to support racial justice, equity, democracy, indigenous rights, and self-determination. The 3.6 million people living in the territories of American Samoa, Guam, Northern Mariana Islands, Puerto Rico, U.S. Virgin Islands—overwhelmingly people of color—deserve better. This is also an issue for the territorial diasporas throughout the United States, which now exceed 6 million, with more than 2.5 million living in states such as Florida, Pennsylvania, and Georgia.

As the United States approaches 125 years of American colonialism, we ask you to publicly condemn the racist *Insular Cases* and the colonial framework they established.

Thank you for considering our views. We would appreciate an opportunity to engage with your staff about these important issues. We are eager to collaborate with you and we can be reached at: Alejandro A. Ortiz, Senior Staff Attorney with the ACLU’s Racial Justice Program at ortiza@aclu.org; Lolimar Escudero-Rodríguez, Policy Counsel with the ACLU of Puerto Rico at lolimarer@aclu.org; Lía Fiol-Matta, Senior Counsel at LatinoJustice PRLDEF at lfiol-matta@latinojustice.org; and Adi Martínez-Román, Co-Director of Right to Democracy at adi@righttodemocracy.us.

Sincerely,

American Civil Liberties Union
ACLU of Puerto Rico
Asian American Legal Defense and Education Fund
Brennan Center for Justice
Center for Popular Democracy
Dēmos
Human Rights Campaign
Lambda Legal Defense and Education Fund, Inc.
LatinoJustice PRLDEF
NAACP Legal Defense and Education Fund, Inc.
Right to Democracy
Washington Lawyers' Committee for Civil Rights and Urban Affairs

Encl. February 10, 2022 Letter from Civil Rights Coalition to Attorney General Merrick Garland and Solicitor General Elizabeth Prelogar Re: Insular Cases

Cc:

Merrick Garland, U.S. Attorney General
Vanita Gupta, Associate Attorney General
Elizabeth Prelogar, U.S. Solicitor General
Kristen Clarke, Assistant Attorney General for Civil Rights
Tom Perez, Director for the White House Office of Intergovernmental Affairs
Neera Tanden, Domestic Policy Advisor
Stuart Delery, White House Counsel

¹ *United States v. Vaello Madero*, 142 S. Ct. 1539, 1553 (2022) (Gorsuch, J., concurring).

² *Id.* at 1554.

³ Kimberly Strawbridge Robinson, *Biden Urged to Help Fight Cases Treating Territories as Inferior*, Bloomberg Law (July 12, 2022), <https://news.bloomberglaw.com/us-law-week/biden-urged-to-help-fight-cases-treating-territories-as-inferior>.

⁴ *Vaello Madero*, 142 S. Ct. at 1560 n.4 (Sotomayor, J., concurring).

⁵ Robert Barnes, *Biden Administration Urges Supreme Court Not to Take Citizenship Case*, Washington Post (Aug. 29, 2022), <https://www.washingtonpost.com/national-security/2022/08/29/insular-cases-samoa-supreme-court>.

⁶ *Id.*

⁷ See *Vaello Madero*, 142 S. Ct. at 1555 (Gorsuch, J., concurring) (“[t]he Insular Cases’ departure from the Constitution’s original meaning has never been much of a secret”); *Downes v. Bidwell*, 182 U.S. 244, 380 (1901)

(Harlan, J., dissenting) (notion that territories could be held “as mere colonies” was “inconsistent with the spirit and genius, as well as with the words, of the Constitution”).

⁸ *Bidwell*, 182 U.S. at 286-87 (Brown, J.).

⁹ *De Lima v. Bidwell*, 182 U.S. 1, 219 (1901) (McKenna, J., dissenting).

¹⁰ See Brief of ACLU and ACLU of Puerto Rico as Amici Curiae at 4–5, *Fin. Oversight & Mgmt. Bd. For Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020) (Nos. 18-1334, 18-1475, 18-1496, 18-1514, 18-1521), 2019 WL 4192294, at *4–5 (describing, with citations to cases and other authorities, the race-based reasoning underlying the *Insular Cases*’ doctrine of territorial incorporation).

¹¹ *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339 (2023) (disregarding provisions in Puerto Rico’s Constitution that guarantee a right of access to public records in favor of protecting the Financial Oversight and Management Board from public scrutiny); *Vaello Madero*, 142 S. Ct. (ruling that Congress could deny low-income disabled and elderly citizens Supplemental Security Income based solely on the fact that they reside in a United States territory); *Aurelius*, 140 S. Ct. at 1661 (upholding the federally imposed Financial Oversight and Management Board as “local officers . . . with primarily local duties,” despite its absolute lack of any democratic accountability to Puerto Rico residents); *Puerto Rico v. Franklin California Tax-Free Trust*, 579 U.S. 115 (2016) (ruling that federal law preempts Puerto Rico from creating a legislative fix to federal bankruptcy statutes that arbitrarily exclude it from certain bankruptcy protections); *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 60 (2016) (concluding that Puerto Rico cannot enforce its own criminal laws if the same act is prosecuted by federal authorities given Puerto Rico’s lack of “inherent sovereignty”).

¹² Memorandum of Law filed by the United States in Support of the Constitutionality of PROMESA at 9, *In re: The Commonwealth of Puerto Rico*, No. 17 BK-3283-LTS (Bankr. D.P.R. Dec. 6, 2017) (quoting *Downes*, 182 U.S. at 285-86).

¹³ Response to Petition for Rehearing En Banc at 9, *Fitisemanu v. United States*, Nos. 20-4017, 20-4019 (10th Cir. Sept. 15, 2021).

¹⁴ Marcia Coyle, *In Puerto Rico Case, Justice Gorsuch Asks: If the Insular Cases are Wrong, Why Don’t We Admit It?*, National Law Journal (Nov. 9, 2021), <https://www.washingtonpost.com/national-security/2022/08/29/insular-cases-samoa-supreme-court>.

¹⁵ Damon Root, *Why Won’t the Biden Administration Join Gorsuch in Seeking to Overrule These Racist SCOTUS Precedents?*, Reason (Sept. 1, 2022), <https://reason.com/2022/09/01/why-wont-the-biden-administration-join-gorsuch-in-seeking-to-overrule-these-racist-scotus-precedents>.

¹⁶ Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

¹⁷ Off. of Mgmt. & Budget, Exec. Off. of the President, Statement of Administrative Policy: H.R. 8393 – Puerto Rico Status Act (December 15, 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/12/HR8393-SAP.pdf>.

¹⁸ Presidential Statement on Federal Government Benefits for Residents of Puerto Rico, Daily Comp. Pres. Docs., 2021 DCPD No. 00474 (June 7, 2021), <https://www.govinfo.gov/app/details/DCPD-202100474>.

¹⁹ See Christina Ponsa Kraus, *Insular Cases Run Amok*, 131 Yale L.J. 2449 (2022); Michael Ramsey, *Another Shot at the Insular Cases*, Originalism Blog (October 13, 2022), <https://originalismblog.typepad.com/the-originalism-blog/2022/10/another-shot-at-the-insular-casesmichael-ramsey.html>; RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015); Gary Lawson and Michael Seidman, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY (2004).

²⁰ *Vaello Madero*, 142 S. Ct. at 1552 (Gorsuch, J., concurring); *Id.* at 1560 n.4 (Sotomayor, J., dissenting).

²¹ *Id.* at 1552 (Gorsuch, J., concurring).

²² *Id.* at 1553 (quoting *Downes*, 182 U.S. at 306) (White, J., concurring).

²³ *Id.* at 1560 n.4 (Sotomayor, J., dissenting).