MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI**	**AE 251I (AMI)** **AMICUS BRIEF** **FILED BY** The Human Rights Clinic, Inter-American University of Puerto Rico, School of Law **8 March 2017**

1. We, Annette M. Martínez Orabona, Esq. and Diego H. Alcalá Laboy, Esq. certify that we are licensed to practice before the courts of the Commonwealth of Puerto Rico. We further certify that:

   a. We are not a party to any Commission case in any capacity, we do not have an attorney-client relationship with any person whose case has been referred to a Military Commission, are not currently nor are seeking to be habeas counsel for any such person, and are not currently nor am seeking to be next-friend for such person, and we further state the submission is only to be considered for its value as an *amicus* brief and not for any other purpose to include as a brief on behalf of any specific party to any Commission proceeding.

   b. We certify our good faith belief as licensed attorneys that the law in the attached brief is accurately stated, we have read and verified the accuracy of all points of law cited in the brief, and we are not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

2. **Issue(s) Presented.**

   In its Order, this Military Commission asked the parties to brief the question "[w]hether

the Ex Post Facto prohibition of Article I, section 9, clause 3 of the Constitution applies to this military commission proceeding such that it would prohibit revival of a time-barred offence."

3. Statement of Facts.

This Amicus presents a pure question of law. The only pertinent facts are:

a. Charges III and V allege an offense date of September 11, 2001.

b. The Military Commissions Act of 2006 became effective October 17, 2006.

c. Charges against the defendants were originally leveled under the Military Commissions Act of 2006 on 11 February 2008.[1]

4. The law.

I. The U.S. Constitutional prohibition of Ex Post Facto Laws apply to Guantanamo Detainees

A. The prohibition of Ex Post Facto law is a fundamental principle of US Constitutional Law, ensuring separation of powers and protecting universally recognized rights to individual liberty and life.

Art. I of the U.S. Constitution explicitly sets restrictions on the powers of Congress and States, providing in section 9 that "[n]o…ex post facto Law shall be passed", and in section 10, that "[n]o State shall…pass any…ex post facto Law." These constitutional provisions incorporated an ancient doctrine, which has "timeless and universal appeal".[2] As explained in *Landgraf v. USI,*[3] the principle of Ex Post Facto "embodies a legal doctrine centuries older than our Republic" that "flatly prohibits retroactive application of penal legislation."[4]

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[1] The original charges were withdrawn on 21 January 2010. Subsequently, new charges (including Counts III and V) were sworn against defendants on 31 May 2011 pursuant to the new Military Commissions Act of 2009. The new Act included the following language:

> [A]ny charges or specifications sworn or referred pursuant to [the Military Commission Act of 2006] ... shall be deemed to have been sworn or referred pursuant to [the Military Commissions Act of 2009]. National Defense Authorization Act for Fiscal Year 2010, Pub. L. 111 -84, 123 Stat. 2190, 2612, §1804(b)(l) (28 October 2009).

[2] Kaiser v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J. concurring).

[3] Landgraf v. USI, 511 U.S. 244, 265 (1994).

[4] *Id.* at 266.

The prohibition of Ex Post Facto laws and the non-retroactivity of their application are derived from the *nullum crimen, nulla poena sine previea lege poenali* principle[5] and are part of the principle of legality.[6] This principle has been known in most of the criminal systems of the World since World War II,[7] and can be traced to the 900's.[8] In 1800, in the midst of European political struggle, the principle of legality "became the means by which to limit the absolute power of monarchical regimes and to curb abuse of power."[9]

Although the principle of legality was well known since the thirteenth century, the Framers of the Constitution of the United States of America understood that they needed to include a precise restraint to Congress[10] and the States.[11] In the words of Alexander Hamilton:

> ...the prohibition of ex-post-facto laws, [...], are perhaps greater securities to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.[12]

The Framers' discussions suggest that the prohibition of ex post facto laws is a "basic principle –one that the People from the beginning have believed should command near universal assent in a free republic."[13] From its inception, it was considered by the Framers to be of fundamental value to "the social compact, and to every principle of sound legislation".[14] According to the Supreme Court, the prohibition against ex post facto laws was adopted to

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[5] ANTONIO CASSESE ET AL., THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 733 (2002) (The *nullum crimen sine lege* principle and its counterpart *nullum poena sine lege* propose that in order for an individual to be penalized for a crime, acts must have been clearly defined by law at the moment they were committed and sentencing must be made in accordance with the proscription such law).
[6] M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW, 73 (3rd Ed. 2008).
[7] *Id.* at 83.
[8] *Id.* at 79.
[9] *Id.* at 78.
[10] U.S. CONST. art. I, § 9, cl. 3.
[11] U.S. CONST. art. I, § 10, cl. 1.
[12] THE FEDERALIST NO. 84 (Alexander Hamilton).
[13] Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 97 (2000).
[14] THE FEDERALIST NO. 44 (James Madison).

protect individuals from arbitrary deprivation of their rights to liberty and life,[15] but also with the purpose of guaranteeing "the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to the application of existing penal law."[16] Notably, the Constitutional prohibition sets no exceptions with regards to groups of persons or places; that is, the ex post facto clause imposes a strict limitation on the exercise of legislative powers, precluding Congress from enacting an ex post facto law regardless of the territory where it is meant to apply.

In *Bouie v. Columbia*, while interpreting the principle of legality, the Supreme Court indicated that neither the judicial branch nor the legislature would be exempt from the principle of *nullum crimen sine lege*.[17] With this reasoning, the Court looked to further the purposes of the *Ex Post Facto* clause by making sure it gave "fair warning" to individuals and that it served as a restraint on the government.[18] As indicated in *Collins v. Youngblood*, "legislature may not retroactively alter the definition of crimes or increase the punishment for criminal acts."[19] According to Justice Chase, in *Calder v. Bull*, there are four manifestations of an ex post facto law[20], what all of them have in common is the fact that in "...each instance, **the government refuses, after the fact, to play by its own rules**[...]."[21] [*Emphasis added*].

In *Stogner v. California*, the Court defined "[t]he statute [of limitations] [as] ... an

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[15] Weaver v. Graham, 450 U.S. 24, 28-29 (1981).
[16] *Id.* at 29.
[17] Bouie v. Columbia, 378 U.S. 347, 352 (1964) (*stating that* "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post* facto law, such as Art. I, § 10, of the Constitution forbids").
[18] *Weaver*, 450 U.S. at 28-29.
[19] Collins v. Youngblood, 497 U.S. 37, 43 (1990).
[20] Calder v. Bull, 3 U.S. 386, 390-391 (1798) (According to *Calder*, the four manifestations of Ex Post Facto Laws are: 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action; 2d. Every law that aggravates a crime, or makes it greater than it was, when committed; 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed; and, 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender).
[21] Carmell v. Texas, 529 U.S. 513, 533 (2000).

amnesty, declaring that after a certain time ... the offender shall be at liberty to return to his country ... and ... may cease to preserve the proofs of his innocence" and determined that a prosecution after a statute of limitations has expired is contrary to the purposes of the *Ex Post Facto* clause.[22]

B. Under the Insular Cases Doctrine, the prohibition of Ex Post Facto Law applies to overseas territories, which are under the jurisdiction and control of the United States

The *Insular Cases Doctrine* began with a series of cases decided by the Supreme Court regarding the applicability of the U.S. Constitution with respect to its newly acquired overseas territories.[23] The *Insular Cases Doctrine* was developed between 1900 and 1922 and has not been overruled, despite dramatic changes in constitutional law, international law, and human rights conceptions afterward.[24]

The *Insular Cases* reshaped how the protections of the Constitution of the United States would apply to the newly acquired territories of the United States after the ratification of the Treaty of Paris of December 10, 1898, at the end of the Spanish-American War.[25] These cases addressed whether the territories should benefit from any or all the rights guaranteed by the U.S. Constitution, or from only a selective amount of the constitutional rights.

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[22] Stogner v. California, 539 U.S. 607, 611 (2003) ("If the legislature repeals the statute of limitations with respect to criminal prosecutions, or extends the time previously limited for such prosecutions, the new rule cannot constitutionally apply to any offense previously committed and as to which the period prescribed by the law in force at the time of its commission has already run. This would be, in such application, an ex post facto law; because an act condoned by the expiration of the statute of limitations is no longer a punishable offense"). *See also* Handbook of American Constitutional Law § 273 at 713.

[23] *Does the Constitution follow the flag?* HARVARD UNIVERSITY PRESS BLOG (May 13, 2015), http://harvardpress.typepad.com/hup_publicity/2015/05/reconsidering-the-insular-cases.html (*last visited* Feb. 25, 2017) ¶ 6.

[24] *Id.* at ¶ 6.

[25] Treaty of Peace, U.S. - Spain, art. 2, 3, Dec. 10, 1898, 30 Stat. 1754, T.S. No. 343; Harvard University Press Blog *supra* note 23 ¶ 6.

In the first of the so-called *Insular Cases, DeLima v. Bidwell*[26], the Supreme Court determined that although Puerto Rico was not a "foreign country [...] but a territory of the United States"[27], it was not entitled to the constitutional protections afforded to states and other territories regarding imposition of taxes. Then in *Downes v. Bidwell*, for the first time, the Supreme Court distinguished between incorporated and unincorporated territories of the United States[28] while examining the applicability of the Uniformity Clause of the Constitution in Puerto Rico[29]. Incorporated territories are part of and are considered to be on their way to becoming a state of the Union, and hence were entitled to the full application of the constitutional protections.[30] On the other hand, the non-incorporated territories belong to, but are not part of, the United States.[31]

The Supreme Court reiterated in *Downes* that Puerto Rico "is a territory [...] belonging to the United States, but not part of the United States"[32] and that the island was still "foreign to the United States in a domestic sense."[33] The Court decided that through the Territorial Clause of the U.S. Constitution[34] Congress enjoys plenary (or exclusive) powers over the United States territories.[35] The Supreme Court calls it the "general powers of government".[36] In contrast,

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[26] DeLima v. Bidwell, 182 U.S. 1 (1901).
[27] *Id.* at 200.
[28] Downes v. Bidwell, 182 U.S. 244, 287 ¶ 3- 291 (1901) (Mr. Justice White concurrence opinion); Balzac v. Porto Rico, 258 U.S. 298, 305 (1922) (*stating that* The Insular Cases revealed much diversity of opinion in this Court as to the constitutional status of the territory acquired by the Treaty of Paris ending the Spanish War, but the Dorr Case shows that the opinion of Mr. Justice White of the majority, in *Downes v. Bidwell*, has become the settled law of the court.); Efrén Rivera Ramos. *A Discussion of Recent Supreme Court Decisions Regarding Puerto Rico.* (First Circuit Judges' Workshop in San Juan, Puerto Rico, October 20, 2016) ¶ 3.
[29] U.S. CONST. art. I, § 8 (*stating that* The Congress shall have the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States).
[30] Efrén Rivera Ramos, *supra* note 28 ¶ 3; Balzac v. Porto Rico, 258 U.S. 298, 304-305 (1922).
[31] *Balzac*, 258 U.S. at 304-305; *Downes*, 182 U.S. at 287 ¶ 2, 287 ¶ 3 -291 (Mr. Justice White concurrence opinion); *DeLima*, 182 U.S. at 197; Efrén Rivera Ramos, *supra* note 28 ¶ 3.
[32] *Downes*, 182 U.S. at 287 ¶ 2.
[33] *Downes*, 182 U.S. at 341 ¶ 3.
[34] U.S. CONST. art. IV, § 3.
[35] *Downes*, 182 U.S. at 285 ¶ 2 -286; Efrén Rivera Ramos, *supra* note 28 ¶ 3.

Congress has limited authority over States because States have general powers of government over themselves. No such limitation exists when addressing territories.

However, Congress's authority is not without bounds. In *Downes* the Court also recognized that the inhabitants of these territories "are entitled under the principles of the Constitution to be protected in life, liberty, and property"[37] and affirmed that they are free to enjoy those "natural rights" protected by the Constitution.[38] Amongst these, "the right to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government".[39]

This conclusion recognizes a hierarchy of the Constitutional rights, were natural rights – those inherent to every person - are superior to the particular rights of the American tradition of jurisprudence.[40] Since *Downes*, these constitutional provisions are applicable and are in force in Puerto Rico, whether the island be incorporated into the United States or not.[41]

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[36] *Downes,* 182 U.S. at 250 ¶ 2, 266 (*stating that* [...] [A]s we observed in *De Lima* v. *Bidwell*, the power to establish territorial governments has been too long exercised by Congress and acquiesced in by this court to be deemed an unsettled question. *Id.* at 250 ¶ 2; [...] [I]n virtue of the territorial clause of the Constitution; that the jurisdiction with which they are invested is not a part of judicial power of the Constitution, but is conferred by Congress in the exercise of those general powers which that body possesses over the territories of the United States; and that in legislating for them Congress exercises the combined powers of the general and of a state government. *Id.* at 266).

[37] *Id.* at 283 (*citing* Yick Wo v. Hopkins, 118 U. S. 356 (1886); Fong Yue Ting v. United States, 149 U. S. 698 (1893); Lem Moon Sing, 158 U. S. 538, 547 (1895); Wong Wing v. United States, 163 U. S. 228 (1896)).

[38] *Id.* at 280 ¶ 2.

[39] *Id.* at. 282-83.

[40] *Id.* at 282 ¶ 4.

[41] *Id.* at 283 ¶ 2 (*stating that* Whatever may be finally decided by the American people as to the status of these islands and their inhabitants, —whether they shall be introduced into the sisterhood of states or be permitted to form independent governments, —it does not follow that in the meantime, a waiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary

In *Balzac v. Porto Rico,*[42] the Court described these "natural rights" as "fundamental rights" and reaffirmed that only fundamental rights apply to unincorporated territories like Puerto Rico. Also, these fundamental rights were identified as follows:

> The guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in the Philippines and Porto Rico, and, as this guaranty is one of the most fruitful in causing litigation in our own country, provision was naturally made for similar controversy in Porto Rico.[43]

Using the *Insular Cases Doctrine*, the Supreme Court extended and afforded additional fundamental rights worthy of the constitutional protections to the people of Puerto Rico. For example, the Court recognized the applicability of the First Amendment Free Speech Clause,[44] the Due Process Clause of the Fifth and Fourteenth Amendment[45], the Equal Protection guarantee of the Fifth or Fourteenth Amendment,[46] and the Fourth Amendment protection against unreasonable search and seizures[47]. And in *Califano v. Torres*[48], without deciding the issue, the Supreme Court concluded, "there is a virtually unqualified constitutional right to travel between Puerto Rico and any of the 50 States of the Union".[49]

More recently the Court decided *Commonwealth v. Sánchez-Valle*[50] and again reaffirmed the *Insular Cases Doctrine* in the context of applicability of the double jeopardy clause. The fact that the *Sánchez-Valle* analysis of the double jeopardy clause emerged from the *Insular Cases*

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control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property.).

[42] Balzac v. Porto Rico, 258 U.S. 298, 312-313 (1922).

[43] *Id.* at 312-13.

[44] Posadas de Puerto Rico Associates v. Tourism Co. of P.R., 478 U.S. 328, 331 (1986) (*citing* Balzac v. Porto Rico, 258 U.S. 298, 314 (1922)).

[45] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668-669 (1974).

[46] Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 599 – 601 (1976); Harris v. Rosario, 446 U.S. 651 (1980).

[47] Torres v. Puerto Rico, 442 U.S. 465, 471 (1979).

[48] Califano v. Torres, 435 U.S. 1 (1978).

[49] *Id.* at 4 (footnote 6).

[50] Commonwealth v. Sánchez-Valle, 136 S. Ct. 1863 (2016).

Doctrine, affirms that every time there is a controversy about a specific fundamental right in an unincorporated territory of the United States, the Court must consult the *Insular Cases Doctrine*. The analysis made by the Court suggests it is not intended to be limited exclusively to the double jeopardy clause.[51]

The Supreme Court through the *Insular Cases Doctrine* has made clear that unincorporated territories are subject to the Territorial Clause of the Constitution but that Congress in enacting this authority cannot impede its people from enjoying their fundamental rights, as protected by the United States Constitution. Those rights, which are consistent with the "American understanding of fairness"[52], apply with equal force in Puerto Rico.[53] Those fundamental rights are defined as "all the rights inherent to all free governments."[54] Therefore, the *Insular Cases Doctrine* established the basis for examining the extraterritorial application of the Constitutional protections to all unincorporated territories of the United States.

The ex post facto clause likewise the double jeopardy clause are provisions primary applicable to criminal matters.[55] As exposed in the *Sánchez-Valle* case, the double jeopardy

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[51] Efrén Rivera Ramos, *supra* note 28 ¶ 6 (*stating that* Moreover, the Court made expressions that may lead to the conclusion that its rationale in *Sánchez*, however narrow it may have been intended to be, could be applied in larger contexts. For example, the Court emphasized the role that Congress played in the enactment of the Constitution of Puerto Rico: authorizing its adoption, amending it in significant ways, and stamping its final approval on the text. This is true regarding all the provisions of the existing constitution and not only those referring to the authority of the Puerto Rican government to initiate prosecutions).

[52] Small v. US, 544 U.S. 385, 385 (2005).

[53] United States v. Laboy-Torres, 614 F. Supp. 2d 531 (2007).

[54] Downes v. Bidwell, 182 U.S. 244, 290 - 91 (1901) (Mr. Justice White concurrence opinion) (*stating that* While, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended.).

[55] *Id.* at footnote 54 (*stating that* Double Jeopardy protection shields an accused from: (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. [...] An ex post facto law punishes as a crime an act previously committed that was innocent when done, increases the punishment for a crime after its commission, or deprives an accused of any defense which was available by law at the time the act was committed) (*citing* Jenine E. Elco, *Constitutional Law – Substantive Due Process – Double Jeopardy – Ex Post Facto*, 36 DUQ. L. REV. 471, 476 ¶ 3 (1998); Brown v. Ohio, 432 U.S. 161, 165 (1977) (*regarding* double jeopardy clause); Collins v. Youngblood, 497 U.S. 37, 42 (1990); regarding ex post facto clause) in Care and Treatment of Hendricks, 912 P. 2d. 129, 153-54 (1996)).

constitutional guarantee is a recognized fundamental right, inherent to the due process of law and explicitly encompassed in the Constitution of United States.[56] On the other hand, the ex post facto clause is inherent to the Principle of Legality and is also expressly guaranteed in the United States Constitution.[57] The Principle of Legality prevents arbitrary and excessive intromission of Congress and State legislatures with personal constitutional rights; thus, it is a right to secure the constitutional separation of powers.[58] Hence, the ex post facto clause (Principle of Legality) is to the legislative power as the double jeopardy clause (Due Process of Law) is to the judicial branch.[59] Both constitutional clauses protect the same fundamental rights of life, liberty, and property of people against Federal and State's governments, and as we have previously established, fundamental rights are guaranteed in unincorporated territories via the *Insular Cases Doctrine*.[60]

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[56] U.S. CONST. amend V (*stating that* [n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.).

[57] U.S. CONST. art. I, § 10 (*stating that* No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.).

[58] J. Richard Broughton, *On Straddle Crimes and the Ex Post Facto Clauses*, 18 GEO. MASON L. REV. 719, 722 (2011) (*citing* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 79-80 (1968); Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality,* 154 U. PA. L. REV. 335, 341-45 (2005); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190-95 (1985) (discussing attributes of legality) (*stating that* the ex post facto prohibition is a constitutional component of the principle of legality—*nullum crimen sine lege, nulla poena sine lege* (no crime or punishment without law)—which Herbert Packer described as the first principle of American criminal law. [...] Legality expresses the view that persons may be subject to criminal punishment only when their conduct offends pre-existing law. The legality principle also operates to restrain courts from expanding the scope of the criminal law.).

[59] Broughton, *supra* note 58 at 722 (*citing* Bouie v. Columbia, 378 U.S. 347, 353-54 (1964) (*stating that* And although the ex post facto bar is a limit upon legislative power, **the Due Process Clauses forbid courts from doing anything that the Ex Post Facto Clauses would forbid the Congress or the State legislatures from doing** (*emphasis added*).

[60] Broughton, *supra* note 58 p. 722 (*citing* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION, 79-80 (1968); Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 341-45 (2005); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190-95 (1985) (discussing attributes of legality); Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964))

The analysis employed by the courts with respect to Puerto Rico will be appropriate to Guantanamo every time a fundamental constitutional provision has been allegedly violated. The Supreme Court has recognized that Guantanamo, as Puerto Rico, is a territory over which the United States exercises "complete jurisdiction and control"[61], with no intention for annexation to the United States.[62] As explained by Justice Kennedy in his Concurring opinion in *Rasul v. Bush*[63], although still uncategorized as an unincorporated territory of the United States, Guantanamo is "in every practical respect" a U.S. territory, "a place that belongs to the United States, extending the "implied protection" of the United States to it."[64] Therefore, following the *Insular Cases Doctrine* (which apply to territories that belong to but are not part of the United States), fundamental constitutional rights, such as Due Process guarantees and the Principle of Legality are applicable to Guantanamo detainees.

C. The Military Commissions Act of 2006 Law Violates the Constitutional Ex Post Facto Principle in the Revival of a Time-Barred Offense

The controversy surrounding the application of the *Ex Post Facto* clause to the detainees in Guantanamo Base was addressed in *Al Bahlul v. United States*[65] by the Circuit Judge Rogers, who in a concurring and dissenting opinion, comparing *Al Bahlul* and *Boumediene* case stated:

> Like the Suspension Clause at issue there, the *Ex Post Facto* Clause is "one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights and serves both to protect individuals and to preserve the Constitution's separation-of-powers structure. "Because the Constitution's separation-of-powers structure . . . protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles." The Court's analysis of the extraterritorial reach of the Suspension Clause applies to the *Ex Post Facto* Clause because the detainees' status and

[61] Rasul v. Bush, 542 U.S. 466, 480 (2004).
[62] *Id.* at 487 (Justice Kennedy's concurring opinion *citing* Johnson v. Eisentrager, 339 U.S. 763, 777-778 (1950)) (*stating that* "First, Guantanamo Bay is in every practical respect a United States territory" [...] "[f]rom a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it.").
[63] *Id.* at 487.
[64] *Id.* at 487.
[65] Ali Hamza Ahmad Suliman Al Bahlul v. United States, 767 F. 3d 1 (2014).

> location at Guantanamo Bay are the same, and the government has pointed to no distinguishing "practical obstacles" to its application.[66]

It is deep rooted that "[t]o fall within the *Ex Post Facto* prohibition, a law must be retrospective - that is, it must apply to events occurring before its enactment and it must disadvantage the offender affected by it, by altering the definition of criminal conduct or increasing the punishment for the crime."[67] In the case before this Commission, the prisoners are being detained by "unjust and oppressive retroactive effects", the same effects that the *Ex Post Facto* clause looks to avoid.[68]

The *Insular Cases Doctrine,* discussed above, was reaffirmed in 2008 with the decision of *Boumediene v. Bush.*[69] The Court, in this case, applied the *Insular Cases Doctrine*, granting the petition of habeas corpus because "detainees were entitled to prompt habeas corpus hearing, and could not be required to first exhaust review procedures"[70]. In this case, the Court stated:

> In the so-called Insular Cases, the Court held that the Constitution had independent force in the territories that was not contingent upon acts of legislative grace. Yet because of the difficulties and disruption inherent in transforming the former Spanish colonies' civil-law system into an Anglo–American system, the Court adopted the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories.[71] [...] The

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[66] *Id.* at 49.

[67] Collins v. Youngblood, 497 U.S. 37, 50 (1990) ("The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."); Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994).

[68] Stogner v. California, 539 U.S. 607, 611 (2003) ("These provisions demonstrate that retroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."); Landgraf, 511 U.S. at 266; ("Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves... from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment...") Fletcher v. Peck, 10 U.S. 87, 137-38 (1810).

[69] Boumediene v. Bush, 553 U.S. 723, 726, 764-65 (2008); Judge Gelpí cited in Efrén Rivera Ramos, *supra* note 28 ¶ 7.

[70] *Boumediene,* 553 U.S. at 723.

[71] *Id.* at 726 (*citing* Dorr v. United States, 195 U.S. 138 (1904).

> formal legal status of a given United States territory affects, at least to some extent, the political branches' control over that territory, and de jure sovereignty is a factor that bears upon which constitutional guarantees apply there.[72] [...] The 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.[73]

Therefore, the plenary powers of Congress over its overseas territories are not arbitrary, as stated before. The Court has identified three factors that are relevant in determining the reach of the Suspension Clause:

> (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made, (2) the nature of the sites where apprehension and then detention took place, and (3) the practical obstacles inherent in resolving the detainee's entitlement to the writ of habeas corpus.[74]

In addition, the Supreme Court has established that the U.S. Constitution's separation of powers protects persons, regardless of their legal status, thus foreign nationals can seek to enforce separation-of-powers principles.[75] Meaning that in *Boumediene*, even though the petitioners were captured in foreign countries and detained in Guantanamo, they have the constitutional right to be guaranteed a due process of law, specifically the requirements for a writ of *habeas corpus* established in the Suspension Clause. This constitutional right was also affirmed in the extraterritoriality context brought up in *Boumediene* "Even when the United States acts outside its borders, its powers are not absolute and unlimited but are subject to such restrictions as are expressed in its Constitution."[76] Therefore, in *Boumediene*, the Court concluded that:

> [The] Constitution has full effect at United States Naval Station at Guantanamo Bay, Cuba, and, if the privilege of habeas corpus is to be denied to aliens detained as enemy combatants there, Congress must act in accordance with requirements of

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[72] *Id.* at 764.
[73] *Id.* at 765.
[74] *Id.* at 766 (*citing* Rasul v. Bush, 542 U.S. 466, 476, 487 (2004) and Johnson v. Eisentrager, 339 U.S. 763, 777 (1950)).
[75] *Id.* at 743 (*citing* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) and INS v. Chadha, 462 U.S. 919, 958–959 (1983)).
[76] *Id.* at 765 (*citing* Murphy v. Ramsey, 114 U.S. 15, 44 (1885)).

> Suspension Clause. Supreme Court could not impose de facto suspension of writ of habeas corpus by abstaining in cases in which aliens detained as enemy combatants at United States Naval Station at Guantanamo Bay, Cuba, sought to challenge the legality of their detention.[77]

In the case before us, the constitutional ex post facto disposition is a requirement of the principle of legality, analog to the writ of habeas corpus in the *Boumediene* case. The question of whether the United States has extraterritorial jurisdiction for the guarantee of fundamental constitutional rights - referring specifically to the principle of legality - in Guantanamo has to be answered in the affirmative by way of the *Insular Cases Doctrine* as interpreted by the United States Supreme Court. As previously discussed, the plenary powers of Congress on overseas territories have limitations similar to the limitations that operate with respect to the states. Consequently, the fundamental constitutional right "no person shall be deprived of life, liberty or property without due process of law"[78] has to be recognized in Guantanamo as it is extended in all territories, including those that only belong to, but are not part of, the United States.

5. Argument.

The question before this Military Commission is "[w]hether the Ex Post Facto prohibition of Article I, section 9, clause 3 of the Constitution applies to this military commission proceeding such that it would prohibit revival of a time-barred offence." This Amicus Brief argues that it does apply, and focuses on the extraterritorial application of the *Ex Post Facto* Clause, a fundamental question for the adjudication of the instant case, with broader effects on the extent to which this protection applies to other overseas territories, such as Puerto Rico.

The prohibition of *Ex Post Fac*to laws is a bedrock principle of U.S. Constitutional law and one of the most important "securities to liberty and republicanism". THE FEDERALIST NO. 84

[77] *Id.* at 771 ¶ 2 (*citing* U.S. CONST. art. I, § 9, cl. 2; Hamdi v. Rumsfeld, 542 U.S. 507, 564, 585 (2004)).
[78] U.S. CONST. amend. V, § 3; U.S. CONST. amend. XIV, § 1, cl. 2.

(Alexander Hamilton). The U.S. Constitution expressly precludes the federal government, and State's legislatures from extending criminal liability for conduct that was not expressly forbidden at the time of its alleged commission, but also prohibits the extension of the statute of limitations for criminal liability "after the fact." In the words of James Madison doing so runs contrary "to the first principles of the social compact, and to every principle of sound legislation."[79]

Simply put, the Military Commissions Act of 2006 cannot apply a rule of prosecutorial limitation retroactively for conduct that was already defined and limited under US law. This blanket prohibition applies as a limitation to Congress authority over persons and territories where it exercises jurisdiction and control.

The *Ex Post Facto* principle is both a constitutional and international guarantee. The United States has committed itself, through its ratification of international treaties containing this principle and through the guarantees of its own U.S. Constitution, to protect all individuals within their jurisdiction. As established above, this protection expands to the individuals under the United States' jurisdiction, be it because they are situated within their territory or because they are under their control.

In the context of Guantanamo, the US Supreme Court already determined in *Boumediene vs. Bush*, 553 U.S. 723 (2008), that fundamental provisions such as the Suspension Clause apply to Guantanamo detainees. The prisoners of Guantanamo Bay are under the United States' control and jurisdiction, being Guantanamo a recognized but uncategorized territory of the United States, and similarly situated in its political relation with United States as it is the territory of Puerto Rico. Under the *Insular Cases Doctrine*, the fundamental constitutional right of Due Process of Law is guaranteed to every territory of the United States, including those that belong to, but are not part of the union. According to the *Insular Cases Doctrine*, the guarantee of *Ex Post Facto* is

[79] THE FEDERALIST NO. 44 (James Madison).

also a fundamental constitutional right and therefore must be recognized to apply in overseas territories, including Guantanamo.

In conclusion, the MCA of 2006 violates the U. S. Constitution and the international treaties entered into by the United States as it implements an *Ex Post Facto* law. Furthermore, the crimes charged in this case were clearly defined and time-barred under the USC at the time of the passing of the MCA of 2006. Altering the statute of limitations "after the fact" is a clear violation of the Constitutional prohibition of Ex Post Facto Laws.

6. Conclusion.

For the foregoing reasons, *amicus* respectfully requests that the Court hold that the Constitutional Ex Post Facto Clause applies to Petitioner and other individuals detained at Guantanamo.

Respectfully submitted,

Annette Annette M. Martínez Orabona, Esq.
Diego H. Alcalá Laboy, Esq.
Human Rights Clinic
Inter-American University, School of Law
Calle Federico Acosta, No. 170
Hato Rey, P.R. 00918
amartinez@icadh.org
(787) 565-8175
Counsel for Amicus Curiae

Aliceber Rivera (student attorney)
Benjamin Cortes (student attorney)
Cristina N. Otaño (student attorney)
Luis Oquendo (student attorney)
Frances Collazo (student attorney)

Dated: March 1st, 2017

ATTACHMENT A

CERTIFICATE OF SERVICE

We certify that on the 8th day of March 8, 2017, we electronically filed the foregoing document with the Office of Military Commissions Trial Judiciary by email.

//s//
Annette M. Martínez-Orabona, Esq.
Diego H. Alcalá-Laboy, Esq.