**NOS. 15-1023, 15-5020**
**[ORAL ARGUMENT SCHEDULED FOR FEBRUARY 17, 2016]**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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ABD AL-RAHIM HUSSEIN AL-NASHIRI

*Petitioner/Appellant,*

v.

BARACK OBAMA, *et al.*,

*Respondents/Appellees.*

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On Appeal from the United States District Court
for the District of Columbia
No. 08-Civ-1207 (RWR)
The Honorable Chief Judge Richard W. Roberts, Presiding

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# BRIEF OF *AMICI CURIAE*—RETIRED MILITARY ADMIRALS AND GENERALS—IN SUPPORT OF APPELLANT AND REVERSAL

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## CERTIFICATION PURSUANT TO CIRCUIT RULE 28

Although *Amici Curiae* have not yet seen the Brief for Appellant because it is currently under seal pending classification review, counsel for Appellant has advised counsel for *Amici Curiae* of the following:

1. All parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellant;
2. References to the rulings at issue appear for the Brief for Appellant; and
3. Any related cases are identified in the Brief for Appellant.

Dated: December 7, 2015

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ALL PARTIES HAVE CONSENTED TO THE FILING OF THIS *AMICI CURIAE* BRIEF.[1]

## INTERESTS OF *AMICI CURIAE*[2]

*Amici Curiae* are retired Admirals and Generals of the U.S. Armed Forces. They include officers who have served in senior commanding positions during war and as senior judge advocates. They have dedicated their careers to exemplary legal and military services for the United States. *Amici Curiae* are:

- **Lieutenant General Robert G. Gard, Jr., USA (Ret.):** General Gard currently serves as a consultant on international security and education and serves as senior military fellow at the Center for Arms Control and Non-Proliferation. He was president of the Monterey Institute of International Studies and director of the Johns Hopkins University Bologna (Italy) Center. He retired from the U.S. Army as a lieutenant general in 1981. His assignments during his 31-year military career included Assistant to the Secretary of Defense and president of the National Defense University. He earned a PhD in Political Economy and Government from Harvard University.

- **Lieutenant General Charles Otstott, USA (Ret.):** General Otstott served 32 years in the Army. As an Infantryman, he commanded at every echelon including command of the 25th Infantry Division

[1] *Amici Curiae* file this brief pursuant to Federal Rule of Appellate Procedure 29 and D.C. Circuit Rule 29. Under FED. R. APP. P. 29(a), given that all parties consent to the participation of *Amici Curiae*, no motion for leave to file this brief is necessary. Further, pursuant to FED. R. APP. P. 29(c)(5), *Amici Curiae* state that no counsel for any party has authored this brief in whole or in part; no party, party's counsel, or person—other than the *Amici Curiae* or its counsel—contributed money that was intended to fund preparing or submitting this brief.

[2] *Amici Curiae* would like to thank Michael S. Divine, J.D., University of Minnesota Law School, and David C. Morine, J.D., University of Minnesota Law School, for significant contributions to this submission.

(Light) from 1988-1990. His service included two combat tours in Vietnam. He completed his service in uniform as Deputy Chairman, NATO Military Committee, 1990-1992.

- **Rear Admiral Don Guter, JAGC, USN (Ret.):** Admiral Guter served in the U.S. Navy for 32 years, concluding his career as the Navy's Judge Advocate General from 2000 to 2002. Admiral Guter currently serves as President and Dean of the South Texas College of Law in Houston, TX.

- **Rear Admiral John D. Hutson, JAGC, USN (Ret.):** Rear Admiral John D. Hutson served in the U. S. Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson is Dean Emeritus & Philosopher in Residence at the University of New Hampshire School of Law in Concord, New Hampshire.

- **Major General Michael R. Lehnert, USMC (Ret.):** General Lehnert served as Commanding General, Marine Corps Installations West and graduated from Central Michigan University with an undergraduate degree in History, the U.S. Army Advanced Engineer School at Fort Belvoir, Virginia, the Armed Forces Staff College, and the Naval War College. He has served as commander of Joint Task Group Bulkeley (JTF 160) at Guantanamo Bay, Marine Wing Support Group 27 at Cherry Point, North Carolina, and Joint Task Force 160 at Guantanamo Bay, which constructed and operated the detention facilities for Taliban and Al Qaeda detainees. General Lehnert also served as Commander, Marine Logistics Command for Operation Iraqi Freedom, and was assigned as Chief of Staff, U.S. Southern Command.

- **Major General Margaret H. Woodward, USAF (Ret.):** General Woodward served in the U.S. Air Force for 32 years, having flown in nine named operations. She commanded the 17th Air Force, serving as the Combined Forces Air Component Commander, the first female to do so in Air Force history, during the U.N.-sanctioned 2011 military intervention in Libya. She holds a BS in aerospace engineering from Arizona State University, a Master's degree in aviation science from Embry-Riddle Aeronautical University, and a

Master's degree in national security strategy from the National War College.

- **Brigadier General John Adams, USA (Ret.):** General Adams retired from the U.S. Army in 2007 following more than thirty years on active duty in a variety of command and staff assignments worldwide, culminating in an assignment as Deputy United States Military Representative to the NATO Military Committee from 2005 to 2007. He served as an Army Foreign Area Officer, intelligence officer, and aviator. He is a graduate of North Carolina State University and a former faculty member at the U.S. Military Academy at West Point. He holds graduate degrees in international relations from Boston University, English from the University of Massachusetts, and strategic studies from the U.S. Army War College.

- **Brigadier General David M. Brahms, USMC (Ret.):** General Brahms served in the Marine Corps from 1963-1988. He served as the Marine Corps' senior legal adviser from 1983 until his retirement in 1988. General Brahms currently practices law in Carlsbad, California, and sits on the board of directors of the Judge Advocates Association.

- **Brigadier General Stephen A. Cheney, USMC (Ret.):** Brigadier General Steve Cheney served nine years on the Marine Corps' two Recruit Depots, including a tour as the commanding general at Parris Island. He was also the inspector general for the Marine Corps. He is the president of the Marine Military Academy in Harlingen, Texas, and serves on the board of directors for the American Security Project.

- **Brigadier General James P. Cullen, USA (Ret.):** Mr. Cullen is a retired Brigadier General in the United States Army Reserve Judge Advocate General's Corps and last served as the Chief Judge (IMA) of the U.S. Army Court of Criminal Appeals. He currently practices law in New York City.

- **Brigadier General Leif H. Hendrickson, USMC (Ret.):** General Hendrickson served as the Commanding General, Marine Corps Base, Quantico, as President of the Marine Corps University and as Commanding General, Education Command. His personal decorations include the Distinguished Service Medal, Defense Superior Service Medal, Defense Meritorious Service Medal,

Meritorious Service Medal with two gold stars, Air Medal and the Joint Staff Badge.

- **Brigadier General David R. Irvine, USA (Ret.):** Brigadier General Irvine enlisted in the 96th Infantry Division, United States Army Reserve, in 1962. He received a direct commission in 1967 as a strategic intelligence officer. He maintained a faculty assignment for 18 years with the Sixth U.S. Army Intelligence School, and taught prisoner of war interrogation and military law for several hundred soldiers, Marines, and airmen. He retired in 2002, and his last assignment was Deputy Commander for the 96th Regional Readiness Command. General Irvine is an attorney and practices law in Salt Lake City, Utah. He served four terms as a Republican legislator in the Utah House of Representatives, has served as a congressional chief of staff, and served as a commissioner on the Utah Public Utilities Commission.

- **Brigadier General Murray G. Sagsveen, USA (Ret.)**: Brigadier General Sagsveen entered the U.S. Army in 1968, with initial service in the Republic of Korea. He later joined the North Dakota Army National Guard, where his assignments included Staff Judge Advocate for the State Area Command, Special Assistant to the National Guard Bureau Judge Advocate, and Army National Guard Special Assistant to the Judge Advocate General of the Army (the senior judge advocate position in the Army National Guard).

- **Brigadier General Stephen N. Xenakis, USA (Ret.):** Dr. Xenakis served 28 years in the United States Army as a medical corps officer. He held a wide variety of assignments as a clinical psychiatrist, staff officer, and senior commander including Commanding General of the Southeast Army Regional Medical Command. Dr. Xenakis has published widely on medical ethics, military medicine, and the treatment of detainees. Dr. Xenakis has an active clinical and consulting practice and currently is working on the clinical applications of quantitative electroencephalography to brain injury and other neurobehavioral conditions.

*Amici Curiae* understand both war and military justice. Since the terrorist attacks of 9/11, they have advocated that the detention, interrogation, and trial of

suspected terrorists must comply with applicable international and domestic law so as to uphold American values, preserve the legitimacy of counterterrorism operations, and ensure that American servicemembers are afforded the protections to which they are entitled in current and future conflicts.

*Amici Curiae* have an interest in ensuring that counterterrorism policies pursued by the military conform to the rule of law, in maintaining the integrity of the judicial system, and in protecting the safety of American soldiers and citizens. They also have an interest in ensuring that military justice is held in high regard, that military commissions and the laws of war are appropriately limited to situations of armed conflict, and that the scope of armed conflict and the laws of war are not expanded beyond what is legally permitted. These interests are directly implicated in this case, which involves serious questions regarding the scope and application of the laws of war and military commissions.

## SUMMARY OF THE ARGUMENT

*Amici Curiae* support reversal of the stay below (1) to ensure that the Department of Defense cannot create military commission jurisdiction through a revision of U.S. history by declaring an historical time of peace, as demonstrated by the contemporaneous historical record, to now be deemed a time of war; (2) to avoid the fundamentally unfair consequences of altering substantive and procedural rights by revising the historical period of hostilities; and (3) to protect

the integrity of the military justice system and the safety of U.S. soldiers and citizens around the world. These issues are so central that they should be answered by the courts in the first instance, rather than upon review from lengthy and indeterminate proceedings before the military commission.

Here, the petitioner Abd Al-Rahim Hussein Al-Nashiri ("the accused" or "the appellant"), was arrested in 2002 in Dubai and has been held as a prisoner in Guantanamo Bay by the United States. (Appellant's Appendix ("App.") 3.) In September 2011, an administrative officer within the Department of Defense, issued orders to create a military commission empowered to try charges against the accused. (App. 10.) He charged the accused with crimes in connection with events in Yemen in early 2000 concerning the USS THE SULLIVANS attempted attack and the subsequent USS COLE bombing in October 2000. (App. 7-8.)[3]

The military commission was established under the Military Commissions Act, 10 U.S.C. § 948 *et seq.* (2009) ("2009 Act"). The 2009 Act's subject matter jurisdiction provision for a military commission provides, "An offense specified . . . is triable by military commission . . . only if the offense is committed in the context of and associated with hostilities." 10 U.S.C. § 950p(c) (2009).

[3] Petitioner had also been charged in connection with an attempted attack on a French tanker, the *M/V Limburg*, in October 2002, but those charges have been dismissed. (App. 68.)

"Hostilities" is defined as "any conflict subject to the laws of war." 10 U.S.C. § 948a(9) (2009).

The Petition in this action alleges that the military commission established by the appellees here lacked subject matter jurisdiction because the laws of war did not apply in Yemen in 2000. (App. 7-8.) Thus, the underlying charges against the accused should be brought in federal court. As described below and in the Petition, the President and Congress stated that the United States was not at war in Yemen in and around 2000. (App. 8-9.) By instituting a military commission here, the Department of Defense has attempted to revise history by asserting that the United States was at war in Yemen during the relevant time—contrary to contemporary pronouncements by the President and Congress.

By staying this action on procedural grounds, the district court declined to address the important and threshold question of whether the law of war applied in Yemen at any time relevant to the allegations against the accused. As a result, the appellees' election to unilaterally alter history by revising "peace" into "war" through a decree by an administrative officer of the Department of Defense continues unabated. The Court should not allow this result to stand.

The appellees' historical revision has profound implications on diplomatic relations, the application of numerous laws, and the constitutional authority of the branches of government. It significantly restricts the accused's rights in violation

of rules against retroactivity, the Ex Post Facto clause, and Due Process. It calls into question the integrity of the civil and military justice system, threatens the safety of U.S. soldiers and citizens, and contravenes international law. It sets a precedent for other countries to pluck U.S. citizens out of a civil justice system—depriving them of core substantive and procedural protections and subjecting them to summary military trial—simply by arbitrarily declaring that a previously determined time of "peace" is now deemed to have been a time of "war."

The success of our national endeavors and the safety of our servicemembers all benefit from the perception that our actions are consistent with the rule of law. Conversely, our nation's moral capital is degraded when we fail to adhere to our own standards. The appellees' revision of the historical dates of hostilities undermines the integrity of the commissions, diminishes our ability to accomplish military objectives, and increases the risk faced by members of our armed forces.

This Court should not allow a revision of history of this magnitude along with the profound implications it poses to remain. Instead, the Court should reverse the stay, so the merits of the important statutory and constitutional issues raised in the Petition can be addressed.

## ARGUMENT

### I. ALLOWING THE MILITARY COMMISION TO PROCEED WOULD PERMIT APPELLEES TO REVISE THE HISTORICAL RECORD BY CONVERTING AN HISTORICAL TIME OF PEACE INTO A TIME OF WAR

Allowing the military commission to proceed here would permit the Department of Defense to alter U.S. history by declaring a period of peace to have been a period of war in order to establish jurisdiction over the appellant. Here, the President and Congress made contemporaneous historical declarations that the United States was not in a state of war in and around Yemen in 2000. Here are the facts:

- After the USS COLE bombing in October 2000, President Clinton stated that "America is not at war" and that it "was a time of peace" in and around Yemen. *The President's Radio Address*, 36 WEEKLY COMP. PRES. DOC. 2464 (Oct. 14, 2000) ("This tragic loss should remind us all that even when America is not at war, the men and women of our military risk their lives every day in places where comforts are few and dangers are many. No one should think for a moment that the strength of our military is less important in times of peace, because the strength of our military is a major reason we are at peace.").

- President Clinton submitted a report to Congress that he had deployed military personnel to Aden for the sole purpose of assisting in the recovery effort. *Letter to Congressional Leaders Reporting on the Deployment of United States Forces in Response to the Attack on the U.S.S. COLE*, 36 WEEKLY COMP. PRES. DOC. 2482 (Oct. 14, 2000).) President Clinton's report to Congress stated that the troops were abroad for the purpose of assisting in the recovery effort and not for the purpose of entering hostilities. *See id.*
- President Clinton elected not to consult with Congress to engage in hostilities, which the War Powers Resolution, 50 U.S.C. §§ 1541 *et seq.*, required him to do if he chose to engage in hostilities.
- Congress held hearings but declined to take any action that would have triggered the application of the laws of war. *See, e.g.*, *The Attack on the U.S.S. Cole: Hearing Before the Subcomm. On Armed Services*, 106th Cong. (2000).
- Congress did not pass a declaration of war or authorization for the use of military force in Yemen.
- Neither the President nor Congress certified the existence of hostilities in Yemen until September 2003. *Letter to Congressional Leaders Reporting on Efforts in the Global War on Terrorism*, 39 WEEKLY

COMP. PRES. DOC. 1247 (Sept. 19, 2003) (reporting to Congress on the efforts in the Global War on Terrorism, Bush stated that "Combat-equipped and combat support forces also have been deployed to [Djibouti to provide] command and control support as necessary for military operations against al-Qaida and other international terrorists in the Horn of Africa region, including Yemen.").

- The first Congressional recognition of armed conflict in Yemen was not until 2009 and concerned a rebel insurgency that began in 2004. A resolution supporting peace, security, and innocent civilians affected by conflict in Yemen, S. Res. 341, 111th Cong. (2009) (enacted).

The officials who initiated the military commission are not authorized to revise the historical record. They cannot alter the historical facts to establish military commission jurisdiction over the appellant. This is not a minor matter. Determining when the United States is in a state of hostilities in another country has broad diplomatic and legal implications. Among other things:

- The existence of a war implicates severe consequences under international law. Jennifer K. Elsea & Richard F. Grimmett, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, Congressional

Research Service, March 17, 2011, p. 20. Recognition changes the character of the involved states from subject to the laws of peace, to subject to the laws of war. Under the laws of war, "enemy combatants can be killed, prisoners of war taken, the enemy's property seized or destroyed, enemy aliens interned, and other measures necessary to subdue the enemy and impose the will of the warring state." *Id.* The existence of such hostilities is traditionally understood as "terminat[ing] diplomatic and commercial relations and most of the treaty obligations existing between the warring States." *Id.*

- The War Powers Resolution, 50 U.S.C. §§ 1541 *et seq.*, requires *inter alia* that the President consult with Congress before engaging U.S. troops in hostilities, and regularly thereafter. *See* 50 U.S.C. §§ 1543(a) and 1455(b).
- Under the Trading with the Enemy Act, 50 U.S.C. Appx. §§ 1 *et seq.*, and the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.*, the President has extraordinary power to control foreign-owned property and foreign trade during times of war and when the President declares a national emergency.

- Guarantees of privacy from unlawful surveillance are greatly relaxed. *See* The Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 *et seq*.
- Many criminal statutes apply only during war (e.g., assisting a prisoner of war in escaping, 18 U.S.C. § 757, and unauthorized transmission of national defense information, 18 U.S.C. § 793). The statute of limitations for certain crimes against the United States can be extended during hostilities. 18 U.S.C. § 3287.

The Department of Defense does not have the authority to alter history.

In addition, this historical revision cannot be used to justify the military commission as necessary when the facts plainly demonstrate otherwise. As the Supreme Court has long recognized, law of war military commissions may be used only out of strict necessity during wartime. *See, e.g.*, *Ex Parte Milligan*, 71 U.S. 2, 124 (1866). One reason the use of such commissions must be so carefully circumscribed is that they concentrate judicial functions into a single branch of government, deviating from our foundation of divided government and threatening both structural and substantive Constitutional protections. *See, id.* "Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts." *Reid v. Covert*, 354 U.S. 1, 21 (1957). As there was no war at the time of the conduct alleged here, there was no wartime-based necessity for relying on

military commissions to bring such individuals to justice, rather than charging them in ordinary courts.

With regard to other similar cases, several indictments arising out of the USS COLE bombing were filed in the Southern District of New York. Moreover, our federal courts have a proven track record for prosecuting similar cases and remain available to this day for prosecuting the types of charges at issue here. Recent actions against alleged al-Qaeda operatives asserted in civilian courts demonstrate the capacity of these courts to try the most high-profile, terrorism-related cases, *even when* the charged conduct occurred during armed hostilities and in the theater of war. Among other many examples:

- On February 6, 2015, in the U.S. District Court for the Southern District of New York, Adel Abdel Bary pled guilty to three counts related to his involvement in the 1998 bombings of U.S. embassies in Kenya and Tanzania. Bary was sentenced to 25 years in prison. *United States of America v. Hage et al.*, No. 98-cr-01023-LAK-17 (S.D.N.Y. Feb. 6, 2015).

- On February 26, 2015, in the U.S. District Court for the Southern District of New York, Khalid al-Fawwaz, a London-based spokesman for al Qaeda and Osama bin Laden in the 1990s, was charged with participating in several al-Qaeda conspiracies, including those that resulted in the 1998 bombings of U.S. embassies in Kenya and Tanzania. After conviction, the court sentenced him to life in prison on May 15, 2015. *United States of America v. Hage et al.*, No. 98-cr-01023-LAK-15 (S.D.N.Y. May 15, 2015).

- On April 26, 2015, in the U.S. District Court for the Eastern District of New York, Saddiq al-Abbadi pled guilty to charges arising out of his activities against U.S. military troops in Afghanistan and Iraq

between 2003 and 2008. *United States of America v. Al-Abbadi*, No. 15-cr-00124-NGG-1 (E.D.N.Y. filed Mar. 19, 2015).

- On March 26, 2014, the U.S. District court for the Southern District of New York convicted Sulaiman Abu Ghayth, Osama bin Laden's son-in-law, of charges stemming from his role in the events of 9/11, and later sentenced him to life in prison. *United States of America v. Hage et al.*, No. 98-cr-01023-LAK-26 (S.D.N.Y. Sept. 23, 2014).

As these examples and the original USS COLE bombing indictment demonstrate, federal courts are able to handle the charges leveled against the accused. There was and is no need to encroach on the jurisdiction of the federal courts.

Revising the historical record to try the accused before a military commission also contravenes the United States' international legal obligations concerning trials for offences against the laws of war, embodied in the principle of legality. The principle of legality, set out in Article 15 of the International Covenant on Civil and Political Rights[4] provides that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."[5] The laws of war only apply during times of armed conflict. As such, any offenses that violate the laws of war can also only occur during times of armed

[4] UN General Assembly, *International Covenant on Civil and Political Rights*, 6 December 1966, United Nations.

[5] International Covenant on Civil and Political Rights, Art. 15.

conflict.[6] Given that the conduct for which the accused is being prosecuted occurred during peacetime, the laws of war do not apply. Accordingly, the military commission lacks jurisdiction to try the accused for such crimes as a matter of international law.

## II. ALLOWING THE COMMISSION TO PROCEED WOULD VIOLATE PRINCIPLES OF RETROACTIVITY, EX POST FACTO PROHIBITIONS, AND DUE PROCESS

The effect of revising the dates affixed to hostilities in Yemen amounts to a retroactive application of the 2009 Act's statutory scheme. This revision alters core substantive and procedural rights of the accused regarding conduct in 2000 by altering the historical predicate for that statutory scheme. As a result, the application of the 2009 Act here is improperly retroactive and violates Due Process and prohibitions against Ex Post Facto laws.

### A. The Law and Due Process Abhor Retroactivity

A "presumption against retroactive legislation" is deeply rooted in our jurisprudence and "embodies a legal doctrine centuries older than our Republic."

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[6] *See* Organization for Security and Co-operation in Europe, Office for Democratic Institutions & Human Rights, *Report: Human Rights Situation of Detainees at Guantanamo* 135 & n. 706 (2015), *available at* http://www.osce.org/odihr/198721 (*citing* International Committee of the Red Cross, *Customary International Humanitarian Law*, Rule 3: Definition of Combatants n.11, https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule3; International Committee of the Red Cross, *Customary International Humanitarian Law*, Rule 156: Definition of War Crimes, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule156; *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); 10 U.S.C. § 950p(c).

*Landgraf v. Usi Film Prods.*, 511 U.S. 244, 265, 270 (1994) (stating that "[s]ince the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent"). This is because "elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.* at 265. In determining if a statute operates retrospectively, courts must employ "familiar considerations of fair notice, reasonable reliance, and settled expectations" to determine if its application "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability, in respect to transactions or considerations already past." *Id.* at 268-69 (*citing Soc'y for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (C.C.D. N.H. 1814)). This anti-retroactivity principle is germane to the American concept of fairness, appearing in several different provisions of the Constitution. *Id.* at 266 (citing the Ex Post Facto Clause, prohibiting retroactive application of penal legislation, the prohibition on states passing retroactive legislation to impair the Obligation of Contracts, the Takings Clause of the Fifth Amendment, preventing the government from depriving persons of vested property rights except with certain exceptions, and Bills of Attainder, which single out persons to punish them for past conduct). Similarly, the Fifth Amendment's Due Process Clause shields individuals from application of retroactive laws. *Landgraf*,

511 U.S. at 266; U.S. Const. Amend. V; *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 972 (2d Cir. 1985) ("due process generally does not permit retrospective application of statutes that cause especially 'harsh and oppressive' consequences").

Here, no accused could have had notice that the laws of war applied in Yemen in 2000. To the contrary, the President and Congress's pronouncements that the United States was not at war in Yemen provided notice that the *laws of war did not apply*. The appellees' application of the 2009 Act here violates this fundamental requirement for notice embodied in these legal principles.

### B. The Appellees' Decision Violates the Ex Post Facto Clause

An Ex Post Facto law is a retrospective law, and every Ex Post Facto law is prohibited by the Constitution. *Calder v. Bull*, 3 U.S. 386, 391 (1798); U.S. Const. art. I, § 9. The Supreme Court has identified four different types of Ex Post Facto laws:

1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.

2. Every law that aggravates a crime, or makes it greater than it was, when committed.

3. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.

> 4. 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 offense, in order to convict the offender.

*Calder*, 3 U.S. at 390.

Accordingly, if an act is retrospective and it has a disadvantageous effect on the offender by altering the definition of criminal conduct or increasing the penalty by which a crime is punishable, that law is unconstitutional. *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 506 n.3 (1995). The Ex Post Facto Clause not only ensures that individuals have "fair warning" about the effect of criminal statutes, but also "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981) (overruled on other grounds by *California Dep't. of Corrections v. Morales*, 514 U.S. 499 (1995). The Supreme Court has *specifically cautioned* against using retroactive statutes "as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 U.S. at 267.

Courts have applied the Ex Post Facto Clause to myriad situations where the spirit of the clause is violated. For example, the Ex Post Facto Clause has been expanded by the Supreme Court to include not only specific penal laws, but also instances where governmental actions closely resemble Ex Post Facto laws.[7]

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[7] *See Landgraf*, 511 U.S. at 281 (declining to retroactively apply a statute authorizing punitive damages, finding that the "very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that

Further, when the practical effect of a law, rather than the black letter of the law, results in a greater punishment, such has been deemed an Ex Post Facto law. *See Lindsey v. Wash*, 301 U.S. 397 (1937).

Here, by changing the dates affixed to hostilities in Yemen, the appellees have by administrative fiat and through the guise of "jurisdiction" retroactively changed the substantive law and constitutional rights applicable to the accused. Redefining a time period as one of "hostilities" suspends certain constitutional protections and creates criminal liability (i.e., that is, makes certain conduct criminal that was not). The accused is being charged with violation of 10 U.S.C. §§ 950t(2), (3), (13), (15), (17), (23), (24), (28), and (29), all of which are triable only if they are committed during a period of hostilities. One cannot violate the laws of war—substantive crimes—if there was no war. In short, the appellees converted conduct that could not have constituted war crimes in 2000 into war crimes now in 2015.

To the extent the accused's alleged conduct violated other laws, such as the criminal laws generally applicable to civilians, the accused should be charged with

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they share key characteristics of criminal sanctions [and retroactive imposition] would raise a serious constitutional question"); *Louis Vuitton S.A.*, 765 F.2d at 972 (finding that a retroactive application of punitive treble damages provision of the Trademark Counterfeiting Act of 1984 "would present a potential *ex post facto* problem"); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (noting that courts have applied the prohibition on Ex Post Facto laws to civil cases where the civil disabilities of a law disguise criminal penalties).

those crimes in a civilian court. Charging the accused with violating the laws of war, however, violates the Ex Post Facto Clause. This conduct sets a dangerous precedent, placing American lives at risk, as further discussed below.

## III. THE PERCEPTION OF LEGITIMACY ENABLES U.S. MILITARY OBJECTIVES AND PROMOTES THE SAFETY OF OUR SERVICEMEMBERS ABROAD

The security of Americans defending our nation's interests abroad depends, in part, on the perception that our actions are consistent with the rule of law. An unlawful military tribunal that expands the military's jurisdiction into alleged peacetime offenses sets a dangerous precedent and places American lives at risk. If appellees are permitted to proceed with the military commission here, enemies of the United States will be emboldened to do the same to Americans abroad. They would be emboldened to apply the laws of war to U.S. armed forces and civilians even though no hostilities were declared or deemed to have existed during the relevant time. The precedent would permit other countries to pluck U.S. citizens out of a civilian justice system by simply deeming their conduct to have been in the context of war. In order to encourage the continued cooperation of our allies and to promote proper treatment of detained American military personnel, the United States must afford captured enemies a legitimate judicial process consistent with both U.S. domestic law and international law.

### A. Process Consistent with the Rule of Law Increases the Likelihood Our Enemies Will Accord the Same to Our Captured Servicemembers

U.S. leaders have long recognized the importance of perception and reciprocity with respect to the treatment of captured individuals. In conversations to ratify the Geneva Conventions,[8] U.S. leaders looked to the reciprocal effects that ratification would have in terms of protections for U.S. soldiers. Secretary of State Dulles argued that "participation [in the Geneva Conventions] is needed to . . . enable us to invoke them for the protection of our nationals." Secretary of State Dulles, *Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations*, 84th Cong., 1st Sess. 3-4, 61 (1955). The Ratifying Report proclaimed:

> [i]f the end result [of ratification] is only to obtain for Americans caught in the maelstrom of war a treatment which is 10 percent less vicious than what they would receive without these conventions, if only a few score of lives are preserved because of the efforts at Geneva, then the patience and laborious work of all who contributed to that goal will not have been in vain.

18 S. Rep. No. 84-9, 32 (1955).

[8]Today, the Geneva Conventions reflect the international standards relating to enemy citizens captured during times of conflict. Specifically, the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (Geneva III) provides "[i]n no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized." *Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949*, 6 U.S.T. 3316, art. 84, 74 U.N.T.S 135.

Adherence to these standards has benefited our troops in international conflicts. After World War II, General Eisenhower explained to Soviet Marshal Zhukov why German prisoners held by U.S. forces received the same rations as American soldiers. In addition to the Geneva Conventions' requirements, Eisenhower said: "the Germans had some thousands of American and British prisoners and I did not want to give Hitler the excuse or justification for treating our prisoners more harshly than he was already doing." Dwight D. Eisenhower, CRUSADE IN EUROPE 469 (1949). Accordingly, "[t]he American Red Cross attributed the fact of the survival of 99 percent of the American prisoners of war held by Germany . . . to compliance with the [1929] Convention." Howard S. Levie, *Prisoners of War in International Armed Conflict*, 10, n.44 (1977).

Even with non-governmental entities, the promise of reciprocal treatment has proved beneficial. As part of its negotiations for the release of Warrant Officer Michael Durant, captured by forces loyal to Somali warlord Mohamed Farrah Aideed in 1993, the United States promised that captured Somali fighters would be granted all the protections of the Geneva Conventions even though Somalia at the time was not considered a state for Convention purposes. *See* Paul Lewis, *U.N., Urged by U.S., Refuses to Exchange Somalis*, N.Y. Times, Oct. 8, 1993, at A16. Such assurances were made in order to secure the same treatment for Durant, and the plan worked. Eventually, heavy-handed interrogations of Durant appeared to

cease, the Red Cross was allowed to visit him and observe his treatment, and he was ultimately released. Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Conventions and the "War on Terror,"* 44 HARV. INT'L L.J. 301, 310 (2003).

For more than 200 years, the United States has "been a leader in . . . bettering the humanitarian principles invoked in the treatment of prisoners of war." Gen. J.V. Dillon, *The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War*, 5 MIAMI L.Q. 40, 41 (1950). We serve as an example to other nations as to how detainees should be treated. The use of legitimate and fair military commissions to try violations of the laws of war, thus, has the potential to raise international standards. Conversely, the failure to do so may lower them. Providing prisoners in Guantanamo Bay with fair judicial process, as consistent with the rule of law, is the best way to promote similar treatment of our own servicemembers in the event they are captured. Failure to do so would implicitly endorse other nations' subjecting captured U.S. servicemembers to military commissions that unlawfully expand jurisdiction, as the accused's military commission has purported to do.

### B. For Military Commissions to Serve Effectively Their Intended Purpose, They Must Comply with the Law

Altering the dates of a recognized hostility for the purpose of trying one man delegitimizes our military commissions and frustrates their purpose. Despite

criticisms of them, military commissions arguably serve an important function: To fill in the jurisdictional holes left by Article III and courts-martial. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 624 (2006) (noting that military commissions developed "as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter"); David Glazier, *The Laws of War: Past, Present, and Future: Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 9-10 (2006) ("The commissions' original purpose was gaining criminal jurisdiction over U.S. soldiers for crimes beyond the reach of American civil justice").

The recent systems of military commissions, however, have been roundly criticized—even by those intimately involved with them—as "flawed." Brigadier General Mark Martins, Chief Prosecutor of Military Commissions, Remarks to the New York City Bar Association (Jan. 10, 2012). Convening military commissions in excess of the 2009 Act's jurisdictional limits exposes the system to yet further criticism.

## IV. CONCLUSION

*Amici Curiae* respectfully request that the Court rule in favor of Appellant and reverse the stay entered by the district court below.

Respectfully submitted,

Dated: December 7, 2015 MORRISON & FOERSTER LLP

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## CERTIFICATE OF COMPLIANCE

I, Somnath Raj Chatterjee, certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), the typeface requirement of Fed. R. App. P. 32(a)(5), and the typestyle requirements of Fed. R. App. P. 32(a)(6). This brief contains 6,181 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and is prepared in a proportionally spaced typeface (14-point Times New Roman).

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## CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2015, a copy of the foregoing was filed electronically with the Court. Notice of his filing will be sent to all parties by operation of this Court's electronic filing system. Parties may access this filing through the Court's system.

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