Appeal No. 12-35475

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ABD AL-RAHIM HUSSEIN AL-NASHIRI,

Plaintiff/Appellant,

vs.

BRUCE MACDONALD,

Defendant/Appellee.

On Appeal From the United States District Court
for the Western District of Washington
The Honorable Robert J. Bryan Presiding
(Case No. 3:11-cv-05907-RJB)

BRIEF OF *AMICUS BRIEF*, RETIRED MILITARY ADMIRALS AND GENERALS, IN SUPPORT OF REVERSAL IN SUPPORT OF APPELLANT

MORRISON & FOERSTER LLP
James J. Brosnahan (CA Bar #34555)
Somnath Raj Chatterjee (CA Bar # 177019)
Megan C. Kiefer (CA Bar # 268607)
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000

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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 a group of retired Admirals and Generals who served as lawyers for the United States Armed Forces: Rear Admiral Don Guter, JAGC, USN (Ret.); Rear Admiral John D. Hutson, JAGC, USN (Ret.); Brigadier General James P. Cullen, USA (Ret.); Brigadier General David Irvine, USA (Ret.); and Brigadier General Richard O'Meara, USA (Ret.) (collectively, "Retired Military Admirals and Generals").

Amici Curiae have all served as senior judge advocates of their respective services of the U.S. Armed Forces. They have dedicated their careers to legal and military services for the United States and have provided exemplary public service.

- 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. He

[1] *Amici Curiae* file this brief pursuant to Federal Rule of Appellate Procedure 29 and Ninth Circuit Rule 29-1. 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 or a party's counsel has contributed money that was intended to fund preparing or submitting this brief; no 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.

currently serves as President and Dean of the South Texas College of Law in Houston, Texas.

- Admiral 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 at the University of New Hampshire School of Law in Concord, New Hampshire.

- Brigadier General 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 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 to several hundred soldiers, Marines, and airmen. He retired in 2002, and his last assignment was as Deputy Commander for the 96th Regional Readiness Command. He served four terms as a Republican legislator in the Utah House of Representatives and has served as a Congressional chief of staff.

- Brigadier General O'Meara is a retired Brigadier General in the United States Army and a combat veteran of the War in Vietnam. After his service in Vietnam, he joined the Judge Advocate General's Corps. He retired from the United States Army in 2002, after 35 years of service. He teaches courses in Security Studies, Human Rights, and Global Studies at Rutgers University-Newark and Richard Stockton College. He serves as Adjunct Faculty with the Defense Institute of International Legal Studies where he has taught rule of law, governance, and peacekeeping subjects in such diverse locations as El Salvador, Peru, Cambodia, Rwanda, the Philippines, Chad, Sierra Leone, Guinea, Ukraine, Moldova, and Iraq. He is a qualified Emergency Medical Technician and served at the World Trade Center Site in the months after 9/11.

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 service members 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 dismissal below (1) to preserve the Presidential and Congressional powers to determine the geographic and temporal scope of war; (2) to avoid the fundamentally unfair consequences of altering substantive and procedural rights by revising the historical periods that the President and Congress affixed to hostilities; and (3) to protect the integrity of the

military justice system and the safety of U.S. soldiers and citizens around the world.

Here, plaintiff Abd Al-Rahim Hussein Al-Nishari ("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. (E.R. 76.) In September 2011, defendant and appellee Bruce MacDonald ("the appellee"), an administrative officer, issued orders to create a military commission empowered to try charges against the accused. (E.R. 86-116.) 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, as well as an attempted attack on a French tanker, the *M/V Limburg*, in October 2002. (E.R. 96-104.)

The military commission was established under the Military Commissions Act, 10 U.S.C. § 948 *et seq.* (2009) ("2009 Act"). The operative provision of the 2009 Act that sets forth subject matter jurisdiction 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). "Hostilities" is defined as "any conflict subject to the laws of war." 10 U.S.C. § 948a(9) (2009).

The Complaint in this action alleges that the military commission established by the appellee here lacked subject matter jurisdiction because the laws of war did not apply in Yemen in 2000 and 2002. (E.R. 80-81.) Indeed, the underlying charges against the accused should be brought in a federal district court. *See id.* As this action was dismissed on a Federal Rules of Civil Procedure Rule 12 motion, the allegations in the Complaint must be taken as true. FED. R. CIV. P. 12(b)(6); *Albright v. Oliver*, 510 U.S. 266, 292 (1994). Indeed, as described below and in the Complaint, the President and Congress stated that the United States was not at war in Yemen in 2000 and during the relevant period. (E.R. 77-79.) The President's and Congress's decision and pronouncements determining the scope of hostilities are definitive. By instituting military commissions here, however, the appellee has attempted to revise history by asserting that the United States was at war in Yemen during the relevant time—contrary to definitive pronouncements by the President and Congress.

The Complaint below raises a pure legal question: "Did the President or Congress choose to invoke their war powers and apply the law of war in Yemen at any time relevant to the allegations against the Plaintiff?" (E.R. 73.) By dismissing the Complaint on procedural grounds, the district court declined to address this important question. As a result, the appellee's historical revision of "peace" into "war" and the unilateral decision of an administrative officer (not the

President or Congress) to determine when the United States is at war continues unabated. The Court should not allow this result to stand.

The appellee's historical revision carves away the President's and Congress's Constitutional war powers. Such an alteration of history has profound implications on diplomatic relations, the application of numerous laws, and the constitutional authority of the branches of government. It significantly restricts rights of the accused 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 and threatens the safety of U.S. soldiers and citizens. 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 servicemen and women 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 appellee's revision of the historical dates of hostilities undermines the integrity of the commission, 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 dismissal, so the district court can address the merits of the important statutory and Constitutional issues raised in the Complaint.

ARGUMENT

I. ALLOWING THE COMMISSIONS TO PROCEED HERE WOULD PERMIT THE APPELLEE TO USURP AND UNDERMINE PRESIDENTIAL AND CONGRESSIONAL WAR POWERS

Allowing the district court's decision to stand would permit the appellee to usurp the President's and Congress's Constitutional powers and would insulate that usurpation from judicial review. Under the Constitution, the President and Congress decide when and where the United States is at war. *See* 50 U.S.C. § 1541(a) ("It is the purpose of [the War Powers Resolution] to fulfill the intent of the framers of the Constitution . . . and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities."). The Constitution vests in Congress the powers to "declare War" and "make Rules concerning Captures on Land and Water," Art. I, § 8, cl. 11, to "raise and support Armies," *id*., cl. 12, to "define and punish . . . Offences against the Law of Nations," *id*., cl. 10, and to "make Rules for the Government and Regulation of the land and naval Forces," *id*., cl. 14. The Constitution vests the President with the "executive Power," Article II, § 1, cl. 1,

and appoints him "Commander in Chief of the Army and Navy of the United States," *id*., § 2, cl. 1. The President is empowered, "by and with the Advice and Consent of the Senate, to make Treaties," and bound to "take Care that the Laws be faithfully executed." *Id*., cl. 2. He is also bound by oath to "faithfully execute the Office of President of the United States," and, to the best of his "Ability, preserve, protect and defend the Constitution of the United States." *Id*., § 1, cl. 8.

Under the War Powers Resolution, 50 U.S.C. § 1541 *et seq.*, the President must consult with Congress before engaging U.S. troops in hostilities and regularly thereafter. Absent a formal declaration of war or authorization of the use of force, the President must report to Congress within 48 hours whenever U.S. troops enter hostilities or are massed abroad for that purpose. 50 U.S.C. § 1543(a).

Here, the President and Congress have spoken on the state of relations in Yemen in 2000—definitively declaring that the United States was not at war. If the President does not know when the United States is at war—no one does.

President Clinton declined to treat the USS COLE bombing in *October 2000* as subject to the laws of war. Following the attack, he publicly stated that "America is not at war" and that it "was a time of peace" in and around Yemen. (E.R. 218-19); *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."). Following the attacks, President Clinton submitted a report to Congress, notifying it that he had deployed military personnel to Aden for the sole purpose of assisting in the recovery effort. (E.R. 217); *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). The report emphasized that military personnel in the area were armed "solely for the purpose of assisting in on-site security." *Id.* Indeed, if President Clinton wanted to engage in activities that amounted to hostilities, he was required under the War Powers Act to consult with Congress before doing so by submitting a report to Congress within 48 hours. Instead, President Clinton's report to Congress specifically 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.*

Congress accepted President Clinton's report, confirming that the United States was not at war in Yemen in 2000. It also affirmatively declined to treat the USS COLE bombing as subject to the laws of war. (E.R. 78.) It held hearings but declined to take any action that would have triggered the application of the laws of war. *Id.*; *see, e.g., The Attack on the U.S.S. Cole: Hearing Before the Subcomm.*

On Armed Services, 106th Cong. (2000). It did not pass a declaration of war or authorization for the use of military force in Yemen. Neither the President nor Congress escalated the bombing into a bilateral conflict, subject to the laws of war. Even in the aftermath of the bombing of the French tanker, *M/V Limburg*, on October 6, 2002, President Bush deployed no U.S military personnel, made no report to Congress under the War Powers Resolution, and issued no executive order indicating that the United States was engaged in hostilities in Yemen.

Neither the President nor Congress certified the existence of hostilities in Yemen until, at the earliest, September 2003. (E.R. 159-60); *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 concerning a rebel insurgency that began in 2004. (E.R. 79); Supporting peace, security, and innocent civilians affected by conflict in Yemen, S. Res. 341, 111th Cong. (2009) (enacted).

These decisions and pronouncements by the political branches are definitive and should be honored by the judiciary. *See The Protector*, 79 U.S. 700, 702 (1871) (holding that "[i]n the absence of more certain criteria, of equally general application," the judiciary must accept proclamations by the President as indicating the beginning and end of legal hostilities invoking the laws of war).[3] The appellee is not authorized to declare the beginning or the end of hostilities. The appellee's attempt here to revise the dates affixed to hostilities in Yemen by the President and Congress usurps the constitutional authority given to the President and Congress.

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

[3] *See also Salois v. United States*, 33 Ct. Cl. 326, 333 (Ct. Cl. 1898) (stating that if the government elects to treat an Indian tribe as at war with the United States, "the courts undoubtedly would be concluded by the executive action and be obliged to hold that the defendants were not in amity"); *Hamilton v. McClaughry*, 136 F. 445, 449 (C.C. D. Kan. 1905) (stating that whether the Boxer Rebellion was "a condition of war" as a matter of law "must be determined by the political department of the government; . . . the courts take judicial notice of such determination and are bound thereby").

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). Recognition of hostilities by Congress has a direct impact on the President's ability to engage in conflicts.

- Under the Trading with the Enemy Act, 50 U.S.C. App. §§ 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 in war. *See* The Foreign Intelligence Surveillance Act ("FISA"), 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 Constitution specifically leaves the determination of these serious legal and diplomatic implications tied to the existence of a state of war to the President and Congress. The gravity of the decision to declare hostilities militates against permitting the assertions of an administrative official, such as the appellee, to usurp or contradict Congressional and Presidential authority to determine whether the United States is at war.

Given the foreign policy and national security interests at stake, whether the United States is engaged in "hostilities" in a legal sense must be committed to the President and Congress. The seminal analysis of this principal, now codified in the War Powers Resolution, is found in the *Prize Cases*, 67 U.S. (2 Black) 635 (1862), in which the Court placed dispositive weight on the President's assessment of the situation:

> Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. [*Id.* at 670 (emphasis in original).[4]]

The dismissal of this case on procedural grounds ignores the *gravitas* of the legal issues and the profound implications of carving into the President's and Congress's power to define war. *See id.* at 698 (Nelson, J., dissenting) (the political recognition of the existence of an armed conflict "carries with it belligerent rights,

[4]*See also id.* at 690 (Nelson, J., dissenting on other grounds) (for there to be "war in a legal sense, in the sense of the law of nations, and of the Constitution . . . it must be recognized or declared by the sovereign power of the State"); HENRY W. HALLECK, INTERNATIONAL LAW 350-51 (1861) ("The right of making war . . . and other forcible means of settling international disputes, belongs . . . to the supreme power of the state . . . [The relations of war and peace] cannot be legally changed or interfered with by individuals. . . . [N]either individuals, nor bodies of individuals, less than the sovereign authority of the entire state, can authorize the making of a public war").

and thus change[s] the country and all its citizens from a state of peace to a state of war"). The power to declare war is so fundamental to our Constitutional structure that no procedural argument is of sufficient validity to justify the courts delegating the question to a commission.

II. THE APPELLEE VIOLATED PRINCIPLES OF RETROACTIVITY, EX POST FACTO PROHIBITIONS, AND DUE PROCESS

The real effect of the appellee's revision of the dates the President and Congress affixed to hostilities in Yemen is a retroactive application of the 2009 Act's statutory scheme. This type of revision alters core substantive and procedural rights of an accused regarding conduct in 2000 and 2002 by altering the historical predicate for that statutory scheme. The application of the 2009 Act here is improperly retroactive and violates prohibitions against Ex Post Facto laws and Due Process. These issues are so significant that they should be addressed and not avoided on procedural grounds.

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." *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 269-70 (*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. 5; *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 and 2002. To the contrary, the President's 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 appellee's retroactive application of the 2009 Act here violates this fundamental requirement for notice embodied in the law prohibiting retroactivity and the Due Process Clause.

B. The Appellee's 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 (9th Cir. 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 (9th Cir. 1995). Indeed, the Supreme Court has *specifically cautioned* about a governmental body using retroactive statutes "as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 U.S. at 269.

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.[5]

[5]*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 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*

Further, where 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).[6]

By changing the dates affixed to hostilities in Yemen, the appellee has retroactively changed the substantive law and Constitutional rights applicable to an accused. Simply defining a time period as one of "hostilities" suspends certain constitutional protections and creates criminal liability, *i.e.*, making certain conduct criminal that was not. In short, the appellee made what was not a crime in 2000 and 2002 a crime now in 2012. 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. Simply put, one cannot violate the laws of war—substantive crimes—if there was no war. This Ex Post Facto application is being done by administrative fiat through revising the

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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).

[6]In *Lindsey*, the defendants committed an offense where the penalty was imprisonment for not more than 15 years at the time of the offense. 301 U.S. at 397. This 15-year term was made mandatory by the law passed after the commission of the offense and under which defendant was sentenced. *Id.* The Supreme Court found that defendants were improperly sentenced under an Ex Post Facto statute because the statute made mandatory what was previously a maximum sentence, and the standard of punishment was more onerous than the previous one. *Id.* at 401.

historical predicate for the 2009 Act, making it apply to a period when it was not applicable.

C. The District Court's Decision, if Allowed to Stand, Would Place U.S. Soldiers and Citizens in Jeopardy

The district court's dismissal sets a dangerous precedent and places American lives at risk. In short, if the appellee is permitted to do what he did here, America's enemies would be emboldened to do the same to Americans. 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 revise the historical dates affixed to hostilities to pluck U.S. citizens out of a civilian justice system by simply deeming their conduct to have been in the context of war. Accordingly, the Court should reverse the district court's decision to avoid jeopardizing American lives.

III. PERCEPTION OF LEGITIMACY ENABLES U.S. MILITARY OBJECTIVES AND PROMOTES THE SAFETY OF OUR SERVICEMEN 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.[7] In

[7]As stated by our government, "when we uphold the rule of law, governments around the globe are more likely to provide us with intelligence we need to disrupt ongoing plots, they're more likely to join us in taking swift and decisive action against terrorists, and they're more likely to turn over suspected

order to encourage the continued cooperation of our allies and promote proper treatment of detained American military personnel, the United States must afford captured enemies a legitimate judicial process consistent with both United States' domestic laws and international law. The rule of law is sometimes the only salvation for American prisoners abroad.

A. Process Consistent with the Rule of Law Increases the Likelihood Our Enemies will Accord the Same to Our Captured Servicemen

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

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terrorists who are plotting to attack us, along with the evidence needed to prosecute them." Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Program on Law and Security, Harvard Law School (Sept. 16, 2011).

[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.

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).]

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 it being required by the Geneva Conventions, 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 proven 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. It follows that 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 servicemen in the instance that they may be captured.

B. For the Commissions to Effectively Serve 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 their criticisms, military commissions arguably serve an important function: to fill in the jurisdictional holes left by Article III and court-martial courts. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 624 (2006) (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 re-opens the system to yet further

criticism. When we fail to uphold the rule of law, even our legitimate goals are undermined.

IV. THE DISTRICT COURT ERRED IN DISMISSING THIS ACTION

In its opinion, the district court identified three procedural bases for its holding that it could not rule on whether the military commission has jurisdiction: (1) the court does not have jurisdiction because of 28 U.S.C. § 2241(e)(2); (2) the government is immune from suit because of sovereign immunity; and (3) abstention. All three of these justifications present serious legal and policy problems which, *Amici Curiae* briefly address here.

The district court erred in holding that 28 U.S.C. § 2241(e)(2)[9] divests it of jurisdiction to hear the accused's claims. Putting aside arguments as to whether *Boumediene* v. *Bush*, 553 U.S. 723 (2008), declared this subsection to be unconstitutional, the district court erred in holding that a question as to whether a commission possesses the authority to try a case at all "relates" to that trial for purposes of this statute.

Stripping away such judicial jurisdiction improperly limits judicial powers. *See ANA Int'l. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004) (reversing a dismissal for

[9]28 U.S.C. § 2241(e)(2) deprives courts of subject matter jurisdiction over any action against the United States or its agents "relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien . . . detained as an enemy combatant . . . "

lack of jurisdiction that the district court justified under a statute limiting judicial review of Immigration Matters, the Ninth Circuit stated that "even where the ultimate result is to limit judicial review, the Court cautions that as a matter of the interpretive enterprise itself, the narrower construction of a jurisdiction-stripping provision is favored over the broader one"); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (stating the "ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute"). Here, the accused's claims implicate myriad constitutional issues, including the violation of Article III § 2 of the Constitution, the Fifth, Sixth, and Eighth Amendments, and notably, the constitutional right of the commission to try him at all under the circumstances here. The district court's ruling effectively insulates the military commission established by the appellee from any review as to its jurisdiction. It creates a constitutional misapplication by allowing one individual actor to declare—contrary to the President's and Congress's declaration—that the United States was at war and then to empanel a commission to execute an individual predicated on that declaration without any sort of judicial check.

The district court's conclusion that sovereign immunity prevented its adjudication of this suit is counter to law and policy. By the district court's

reasoning, sovereign immunity would bar almost any action brought against a government employee, including well-established *Bivens* actions. The practical effect of such a ruling is that the government's agents would now be insulated from review even for egregious acts clearly outside of the scope of their authority if a plaintiff sued in order to reverse that act.

Lastly, the Court should not permit a ruling on abstention to avoid the significant legal questions raised by the Complaint. The district court based its very brief holding on abstention on an assertion that "Congress was attempting to balance many considerations in an unprecedented situation. While the use of military commissions in these circumstances is subject to debate and criticism, their existence is for the people to decide through Congress consistent with the Constitution." (E.R. 19.) But, the accused's challenge here is that the appellee's actions are *outside of the bounds of that statutory scheme*. Indeed, where the challenge is that the actions exceed the bounds of a statute, there is even more reason *not* to abstain because any balance struck by Congress in drafting a statute that would typically justify comity is wholly disregarded. Courts should address important constitutional and statutory issues, such as the ones at issue here. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (reviewing military commission's procedures in advance of a final decision as to whether the procedures violated the

Geneva Conventions, whether the commissions lacked power to proceed, and whether the procedures violated the Uniform Code of Military Justice).

CONCLUSION

Amici Curiae respectfully request that the Court reverse the order of the district court.

Respectfully submitted,

Dated: October 1, 2012

By: /s/ James J. Brosnahan
James J. Brosnahan

JAMES J. BROSNAHAN (CA Bar #34555)
SOMNATH RAJ CHATTERJEE (CA Bar #177019)
MEGAN C. KIEFER (CA Bar #268607)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

Attorneys for *Amici Curiae*
Retired Military Admirals and Generals

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(c) FOR CASE NO. 12-35475

I certify that pursuant to FED. R. APP. P. 32(a)(7)(c), this brief is proportionally spaced, has a typeface of 14 point or more, and contains 6,606 words, excluding the portions exempted by FED. R. APP. P. 32(a)(7)(iii).

Dated: October 1, 2012

By: /s/ James J. Brosnahan
James Brosnahan

JAMES J. BROSNAHAN (CA Bar #34555)
SOMNATH RAJ CHATTERJEE (CA Bar #177019)
MEGAN C. KIEFER (CA Bar #268607)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

Attorneys for *Amici Curiae*
Retired Military Admirals and Generals

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2012, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following:

Richard Kammen,
Gilroy Kammen Maryan & Moudy
135 North Pennsylvania Street, Suite 1175
Indianapolis, IN 46204

William J. Aceves
Associate Dean for Academic Affairs and Professor of Law
California Western School of Law
225 Cedar Street
San Diego, CA 92101

David Cole
c/o Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001

By: Megan C. Kiefer
Megan C. Kiefer

JAMES J. BROSNAHAN (CA Bar #34555)
SOMNATH RAJ CHATTERJEE (CA Bar #177019)
MEGAN C. KIEFER (CA Bar #268607)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

Attorneys for *Amici Curiae*
Retired Military Admirals and Generals