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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAID ULLAH (AS PERSONAL REPRESENTATIVE OF GUL RAHMAN), Plaintiffs, v. JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN Defendants.	No. 2:15-cv-286-JLQ PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS January 19, 2017 With Telephonic Oral Argument 10:00 a.m. PST

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INTRODUCTION

Defendants are independent contractors who designed and profited from an experimental torture program. They now invoke a narrowly-drawn jurisdiction-stripping provision in the Military Commissions Act of 2006 ("MCA"), and ask the Court to bar Plaintiffs' claims. Defendants' effort fails for two reasons: First, in enacting the MCA provision, Congress limited its application to military servicemembers and other government employees, and did not bar jurisdiction over non-agent independent contractors like Defendants. And second, the MCA provision only bars claims of individuals who were determined to have been properly detained as enemy combatants by an executive branch tribunal, and no Plaintiff falls within this narrow category.

Plaintiffs Suleiman Abdullah Salim, Mohamed Ben Soud, and Gul Rahman are not, and never have been, enemy combatants. Nor has the United States determined them to have been properly detained as such. To the contrary: the United States determined that Mr. Salim did not meet the criteria for detention as an enemy combatant, and released him with the certification that he "has been determined to pose no threat to the United States Armed Forces or its interests in Afghanistan." *See* Declaration of Dror Ladin submitted with this motion ("Ladin Decl."), Exh. A. There are no U.S. government documents that even refer to Mr. Ben Soud as an "enemy combatant," let alone determine that to

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be his status. And Mr. Rahman likewise never received any status determination: he was killed under torture within a month of his detention and before any government tribunal determined whether he was properly detained.

In sum, Defendants' arguments fail because the MCA jurisdictional bar by its plain terms does not apply to them. No court has ever held that contractors in Defendants' position are "agents of the United States"; that the MCA jurisdiction-stripping provision bars the claims of a person *cleared* by an executive tribunal of being an enemy combatant; or that the provision bars claims by individuals whose enemy combatant status was never even determined by an executive tribunal. This Court has jurisdiction over Plaintiffs' claims.

ARGUMENT

I. DEFENDANTS SOUGHT TO PROFIT AS INDEPENDENT CONTRACTORS AND ARE NOT AGENTS OF THE UNITED STATES.

Congress expressly reserved the reach of the jurisdiction stripping provision of 28 U.S.C. § 2241(e)(2) to suits "against the United States or its agents," and did not bar claims against those who have no agency relationship with the United States. Defendants cannot meet their burden of establishing the agency relationship required by this plain statutory text. Any doubt is dispelled by Defendants' contracts with the CIA, which explicitly establish an independent contractor—but not an agency—relationship. Defendants sought

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profit from the government as non-agent independent contractors rather than government employees; they cannot now claim an immunity that Congress purposely did not provide.[1]

When Congress uses the term "agents" without supplying a definition, the term is given its ordinary common law meaning. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."); *see also United States v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law"). Under the common law, "not all service providers and recipients stand in agency relationships." *United States v. Bonds*, 608 F.3d 495, 507 (9th Cir. 2010). "Unlike employees, independent contractors are not ordinarily agents." *Id.* at 505. To qualify as an agent, a contractor must have the "power to affect the legal rights and duties" of third

[1] Defendants previously attempted to claim immunity under the Federal Tort Claims Act, which applies to employees of "any federal agency," and excludes contractors from its coverage. (ECF No. 28, at p. 11 n.1). This effort to seek immunity under the MCA is no more availing.

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parties as a "representative" of the principal. Restatement (Third) of Agency § 1.01(c) (2006). "A person who contracts to accomplish something for another or to deliver something to another, but who is not acting as a fiduciary for the other, is a non-agent contractor." Restatement (Second) of Agency § 14N(b) (1958).

Defendants have the burden of showing that they were acting as agents. "[T]he party asserting that a relationship of agency exists generally has the burden in litigation of establishing its existence." *Atrium of Princeton, LLC v. NLRB*, 684 F.3d 1310, 1315 (D.C. Cir. 2012) (quoting Restatement (Third) of Agency § 1.02 cmt. d (2006)); *see also* 12 Williston on Contracts § 35:2 (4th ed. 2003) ("As a general rule, the party asserting the agency relationship has the burden of proving both the existence of the relationship and the authority of the agent."); *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1296 (5th Cir. 1994) ("Agency is never to be presumed; it must be shown affirmatively."). Defendants have not attempted to carry that burden, nor could they: no evidence supports the notion that they acted as fiduciaries for, and representatives of, the United States.[2]

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[2] Not only were Defendants not fiduciaries, but the CIA has acknowledged that the agency "[a]llowed a conflict of interest to exist wherein

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Defendants conspicuously fail to point to any clause in their contracts as evidence of the existence of an agency relationship, even though the contracts are on file with the Court. (ECF No. 84). The contracts are consistent and clear that Defendants' "legal status under this agreement is that of an Independent Contractor" and that "[n]othing contained herein shall be construed as appointing the [IC/Contractor] into the civil service of the United States" or "implying the creation of an employer-employee relationship." (ECF Nos. 84-1, at p. 2, 14, 34, 45, 57; 84-2 at p. 4, 16, 28, 38). Defendants' failure to point to their contracts is understandable, because the contracts nowhere suggest that Defendants and the government entered into an agency relationship, and "[a] finding of an agency relationship between the government and contractor is unusual absent extraordinary contract provisions." *Peterson Builders, Inc. v. United States*, 26 Cl. Ct. 1227, 1230 (U.S. Cl. Ct. 1992), *aff'd* 155 F.3d 566

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the contractors who helped design and employ the enhanced interrogation techniques also were involved in assessing the fitness of detainees to be subjected to such techniques and the effectiveness of those same techniques." John Brennan, *CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention, and Interrogation Program* (June 27, 3013), http://bit.ly/12JxFDk.

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(Fed. Cir. 1998); *see also Washington v. Avondale Indus., Inc.*, No. CIV.A. 98-346, 1999 WL 52142, at *2 (E.D. La. Jan. 29, 1999) (same). Defendants can identify no such "extraordinary contract provisions." Nor can they provide any indication that the United States intended to establish an agency relationship with them, by, for example, allowing them to represent and bind the United States with respect to third parties and requiring that they serve as fiduciaries.

The Fourth Circuit rejected a similar claim by independent contractors who had failed to make any showing that their contracts created an agency relationship but nonetheless contended that they were "'agents' of the United States within the meaning of § 745 [of the Suits in Admiralty Act] and thus enjoy the immunity from suit conferred by that section." *Servis v. Hiller Sys. Inc.*, 54 F.3d 203, 207 (4th Cir. 1995). The court found that, where none of the contracts "evidences any intent on the part of the United States to enter into a fiduciary relationship with [the contractors], nor do the documents indicate that appellees consented to act as fiduciaries of the government" and "[n]one of the documents refer to any appellee as an 'agent' of the United States," then "it is evident that appellees were merely non-agent independent contractors of the United States." *Id.* at 208. The same is true here.

Unable to rely on either the statutory text of the MCA or their contracts, Defendants misuse legislative history. Even though the plain language of the

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statute is clear, Defendants urge this Court to rely instead on a single statement of Senator Harkin, an *opponent* of the MCA, as Defendants concede. (ECF No. 105, at p. 8). But the Supreme Court has repeatedly instructed that "that the views of opponents to a statute 'are not persuasive' indications of the statute's meaning." *Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1213 n.17 (9th Cir. 2005) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 585 (1988)); *see also United States v. Int'l Union of Operating Eng'rs, Local 701*, 638 F.2d 1161, 1168 (9th Cir. 1979) ("Senator Brock was a leading Senate opponent of the legislation. His characterization of the legislation is thereby entitled to little weight."). In fact, the Supreme Court has "often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach." *DeBartolo*, 485 U.S. at 585. Senator Harkin's statement in opposition, which conflicts with the statutory text, is precisely this type of statement.

By contrast, Congress knows how to extend statutes to independent contractors when it wishes to do so. *See, e.g.*, 28 U.S.C. § 1494 (granting jurisdiction over accounts of "any officer or agent of, *or contractor with*, the United States"); 31 U.S.C. § 3729 (False Claims Act applies to claims

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"presented to an officer, employee, or agent of the United States" or "a *contractor*, grantee, or other recipient"); 30 U.S.C. § 1716 (defining covered "person" as "any agent or employee of the United States *and any independent contractor*") (emphases added). It did not do so here.

Defendants next argue that they qualify as "agents" because Plaintiffs "allege that Defendants' conduct is state action for ATS jurisdictional purposes." (ECF No. 105, at p. 8–9). This argument fails because it wrongly conflates the jurisdictional requirement that Defendants acted "under color of law" *with* state officials, which Plaintiffs have met, with agent status, a requirement that Defendants cannot meet. As Defendants acknowledge, ATS claims for "official torture" encompass claims against *private* individuals who "act 'together with state officials,' or with 'significant state aid.'" (ECF No. 105, at p. 8) (quoting *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004)); *see also Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970) ("To act under color of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." (quotation marks and citation omitted)). But it is hornbook law that acting "together" with, or with the "aid" of, government officials does not suffice to create an agency relationship with the government. *See* Restatement (Third) of Agency § 1.01(c) (2006) (agency is a "fiduciary relationship" where

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the agent has the "power to affect the legal rights and duties" of third parties as a "representative" of the principal).[3]

Defendants cannot carry the burden of showing that they are "agents of the United States" as required by the MCA. Their motion fails.

II. THE UNITED STATES DID NOT DETERMINE THAT PLAINTIFFS HAD BEEN PROPERLY DETAINED AS ENEMY COMBATANTS.

In enacting Section 2241(e)(2), Congress did not strip jurisdiction from the federal courts based on the mere *suspicion*, of anyone in government, that a prisoner was an enemy combatant. Instead of creating a harsh and unjusifiable test that would bar claims by victims of mistaken detention, Congress required an executive branch tribunal *determination* that a person who had initially been detained as an enemy combatant was, in fact, *properly detained* as such. Defendants argue that there is no need for a formal determination of a detained person's status. But Defendants' interpretation contradicts both the statute's text and the decision of every court to have construed this provision of the MCA.

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[3] Moreover, Plaintiffs' war crimes claims are actionable regardless of state action. *See Kadic v. Karadzic*, 70 F.3d 232, 243–44 (2d Cir. 1995) (violations of Common Article 3 of the Geneva Conventions give rise to ATS claims for war crimes, regardless of state action).

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As the D.C. Circuit has explained, when Congress enacted Section 2241(e)(2), it legislated against a backdrop of tribunals established by the Executive Branch to determine whether individuals who had been detained as enemy combatants were, in fact, properly detained. Congress was aware that individuals who had been detained, whether by the CIA or by the Department of Defense, would have their status determined by a Combatant Status Review Tribunal ("CSRT") at Guantánamo or an Unlawful Enemy Combatant Review Board ("UECRB") at Bagram. There was no separate tribunal established for detainees initially captured by the CIA, all of whom would be slated for status determination by the executive branch tribunals that decided whether the initial suspicion that led to detention was, in fact, proper. *See Boumediene v. Bush*, 553 U.S. 723, 783, 733 (2008) (CSRTs were established to review the "Executive's battlefield determination that the detainee is an enemy combatant," and "determine whether individuals detained at Guantanamo were 'enemy combatants'"); *Al Maqaleh v. Gates*, 605 F.3d 84, 96 (D.C. Cir. 2010) ("The status of the Bagram detainees is determined not by a Combatant Status Review Tribunal but by an 'Unlawful Enemy Combatant Review Board' (UECRB)."). The Supreme Court explained that the tribunal process is "the mechanism through which petitioners' designation as enemy combatants became final." *Boumediene*, 553 U.S. at 783. "[T]he Executive Branch's practice of using

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CSRTs to determine whether aliens detained at Guantanamo were 'properly detained as enemy combatants' was well known to the Congress when it enacted the MCA." *Janko v. Gates*, 741 F.3d 136, 145 (D.C. Cir. 2014). As the D.C. Circuit concluded, the outcome of these reviews was incorporated as a requirement of Section 2241(e)(2): "we are convinced that 'determined by the United States to have been properly detained as an enemy combatant' refers to a determination by the executive-branch tribunal the Congress knew was making that determination." *Id.* at 145.

The Fourth Circuit came to the identical conclusion: the MCA jurisdiction-stripping provision applies "only when an individual has been detained and a CSRT (or similar Executive Branch tribunal) has made a subsequent determination that the detention is proper." *al-Marri v. Wright*, 487 F.3d 160, 170 (4th Cir. 2007), *rev'd on other grounds sub nom. al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc) (per curiam), *vacated sub nom. al-Marri v. Spagone*, 555 U.S. 1220 (2009). As the court explained, "[t]he statute's use of the phrase 'has been determined . . . to have been properly detained' requires a two-step process . . . : (1) an initial decision to detain, followed by (2) a determination by the United States that the initial detention was proper." *Id.* at 169. To disregard the requirement of an executive branch tribunal determination "would eliminate the second step and render the statutory

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language 'has been determined . . . to have been properly detained' superfluous—something courts are loathe to do." *Id.*

> Other provisions of the DTA and MCA similarly demonstrate that Congress intended to remove jurisdiction only in cases in which the Government followed this two-step process. For those detainees to whom the DTA–MCA scheme applies, a CSRT (or similar tribunal) determines whether a person's initial detention as an enemy combatant is proper. In fact, Congress recognized that the very purpose of a CSRT is to "determine" whether an individual has been "properly detained." . . . The Department of Defense's CSRT procedures, in turn, explain that the CSRT process was established "to *determine*, in a fact-based proceeding, whether the individuals detained by the Department of Defense at the U.S. Naval Base Guantanamo Bay, Cuba, are *properly* classified as enemy combatants. . . .

Id. at 169–170; *see also* Ladin Decl. Exh. B at 000159 (describing UECRB procedures and explaining that "[t]he purpose of the UECRB is to make recommendations regarding a detainee's status as an unlawful enemy combatant," including to "recommend release when the Board finds that a detainee does not qualify, or no longer qualifies, as a UEC [unlawful enemy combatant]"). The statutory scheme and review procedures thus "reinforce the plain language of section 7 of the MCA," confirming that claims are barred only when an executive branch tribunal "has made a subsequent determination that the detention is proper." *al-Marri*, 487 F.3d at 170.

Every court that has examined the MCA jurisdictional bar has looked to the existence of a final decision by an executive branch tribunal to answer

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whether an individual was determined by the United States to have been properly detained as an enemy combatant. Where such a determination appears in the record, courts have held the individual's claims are barred. *See Hamad v. Gates*, 732 F.3d 990, 995 (9th Cir. 2013) ("Hamad's action satisfies the third requirement, because there is no dispute that a CSRT determined that Hamad was properly detained as an enemy combatant."); *Jawad v. Gates*, 832 F.3d 364, 368 (D.C. Cir. 2016) ("Jawad concedes that a CSRT found that he was an 'enemy combatant.'"); *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 317 (D.C. Cir. 2012) (CSRTs "confirmed the earlier determination that both detainees were enemy combatants"); *Janko*, 741 F.3d 136 (same). Conversely, where individuals who were initially detained as enemy combatants were not found to be enemy combatants by executive branch tribunals, the MCA does not impose a bar to jurisdiction. *See, e.g.*, *Allaithi v. Rumsfeld*, 753 F.3d 1327 (D.C. Cir. 2014) (denying, but not on MCA grounds, claims by individuals who were initially detained as enemy combatants but were later either (a) determined not to be enemy combatants by tribunals, or (b) released without a determination).

Faced with this wall of precedent, Defendants argue that determinations of executive branch tribunals are—contrary to the views of the Fourth, Ninth and D.C. Circuits—superfluous. Under Defendants' theory, there is no requirement for review by the tribunals that Congress understood to be tasked with

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determining whether individuals were properly detained. Instead, jurisdiction could be stripped merely by individual officials' initial suspicions and decisions to "detain and then transfer, and then render" an individual. (ECF No. 105, at p. 17). But if Defendants' interpretation were correct, the Ninth Circuit was wrong to look to the outcome of the tribunal in *Hamad*. That is, if an initial determination by an executive officer triggered the jurisdictional bar, the outcome of executive tribunals—which the Supreme Court described as a "direct review of the Executive's battlefield determination that the detainee is an enemy combatant," *Boumediene*, 553 U.S. at 783—would be irrelevant.

Beyond being at odds with every court to have construed Section 2241(e)(2), Defendants' reading would also render superfluous Congress's extension of the jurisdictional bar to detained individuals who were then awaiting a final status determination. Section 2241(e)(2) extends not only to detainees who have had their status determined by an executive branch tribunal, but also to a detainee who "is awaiting such determination." Defendants' construction would make this enactment surplasage: under the statutory framework, every detainee is captured and held based on an initial decision that the individual is detainable as an enemy combatant. Were Defendants correct that the initial decision to detain actually constitutes a *determination* that an

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individual was properly detained within the meaning of the MCA, then no detainee would ever be "awaiting such determination."

Instead, as the Fourth Circuit explained, the phrase "awaiting such determination" must refer to detainees who are scheduled for an executive tribunal review that has not yet occurred. *See al-Marri*, 487 F.3d at 172–73 ("The phrase 'awaiting such determination' gains meaning only if it refers to alien detainees captured and held outside the United States—whom Congress . . . expected would receive a CSRT based on the larger DTA–MCA scheme."). Defendants' reading, which disclaims any need for a tribunal determination, violates the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Hooks v. Kitsap Tenant Support Servs.*, 816 F.3d 550, 560 (9th Cir. 2016) (quotation omitted).[4]

In support of their mistaken interpretation, Defendants cite the statement of Senator Cornyn, who claimed that even a person who the "U.S. later decides . . . was not an enemy combatant" would actually be covered by the

[4] Defendants do not and could not claim that Plaintiffs, who are not detained, are "awaiting" the determination of any executive branch tribunal charged with evaluating their detention.

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statute. (ECF No. 105, at p. 14) (quoting Sen. Cornyn). But this statement conflicts with the plain text of Section 2241(e)(2), which requires a retrospective determination by the United States that an individual was "properly detained as an enemy combatant." And while the words of a supporter are entitled to more weight than an opponent, "[t]he remarks of a legislator, even those of the sponsoring legislator, will not override the plain meaning of a statute." *United States v. Tabacca*, 924 F.2d 906, 911 (9th Cir. 1991); *see also Am. Rivers v. FERC*, 201 F.3d 1186, 1204 (9th Cir. 2000) (the Ninth Circuit "steadfastly abides by the principle that legislative history—no matter how clear—can't override statutory text" (quotation marks omitted)). That is, of course, because "individual senators do not make laws; majorities of the House and Senate do." *Thompson v. Calderon*, 151 F.3d 918, 928–29 (9th Cir. 1998) (en banc) (Kleinfeld, J., concurring).[5]

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[5] Defendants also point to the statement of Senator Sessions. (ECF No. 105, at p. 14–15). But Senator Sessions explained what he meant: "[t]he fact of release should not be an invitation to litigation, so long as the military finds that it was appropriate to take the individual into custody in the first place." 152 Cong. Rec. S10,404 (2006). The finding to which Senator Sessions refers is, as

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Defendants have not shown that the United States made the required determination that Plaintiffs were properly detained as enemy combatants.

A. The United States determined that Mr. Salim had *not* been properly detained as an enemy combatant.

Defendants relegate to a footnote the final determination by the United States that Mr. Salim was *not* properly detained as an enemy combatant. (ECF No. 105, at p. 2 n.1). Although it initially made an erroneous determination, the tribunal established to review whether he was properly detained determined that Mr. Salim *was not an enemy combatant*, and that there was no evidence that Mr. Salim was, in fact, properly detained as such.

Thus, even if Mr. Salim was initially suspected of being a "facilitator," based in part on purported "admissions" he made under torture, (ECF No. 106-1, at p. 3), these baseless suspicions were refuted by the final review of the proper executive branch tribunal, which determined that Mr. Salim had never been involved in any "operations." (ECF No. 106-9, at p. 2–3). Accordingly, the United States reclassified him as "No Longer Enemy Combatant" ("NLEC") and ordered his release. *Id.*; *see also* Ladin Decl. Exh. B at 000163 (explaining that "when there is insufficient evidence to classify a detainee as a UEC [unlawful

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the courts have held, the decision of the tribunals that Congress understood to make status determinations, which is precisely the finding that is lacking here.

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enemy combatant], the detainee must be recommended for classification as an NLEC and released"). Notably, Mr. Salim was found not be an enemy combatant by the UECRB tribunal, even though, as the D.C. Circuit observed, "proceedings before the UECRB afford even less protection to the rights of detainees in the determination of status than was the case with the CSRT." *Al Maqaleh*, 605 F.3d at 96; *see also generally* Lt. Col. Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, 2010 ARMY LAW. 9 (June 2010) (detailing process and fairness concerns).

A finding that an individual was an NLEC was, at that time, the only classification for an individual whom the United States found not to have been properly detained as an enemy combatant. As the military's guidelines explain, an "NLEC is a detainee who is determined not to be, or no longer to be, an enemy combatant," *see* Ladin Decl., Exh. B at 000168,—precisely the finding made by the United States when it determined that Mr. Salim had never been involved in "operations," (ECF No. 106-9, at p. 2–3).[6]

[6] While "[t]he Board may also recommend NLEC classification when a detainee is exhausted of intelligence value" or "is considered to be a minimal threat," Ladin Decl., Exh. B at 000163, the grounds given by the tribunal make clear that Mr. Salim was reclassified because review showed that he had never

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As the Fourth and D.C. Circuits have explained, what is key is not whether a detainee was initially determined to be an enemy combatant but the results of the executive branch tribunal charged with reviewing the propriety of the detention. In Mr. Salim's case, that tribunal's final determination was that he was not properly detained as an enemy combatant. His claims are not barred.

B. The United States did not determine that Mr. Ben Soud was properly detained as an enemy combatant.

As Defendants concede, there is not a single executive branch document in the record that even uses the term "enemy combatant" with respect to Mr. Ben Soud. Nonetheless, Defendants ask this Court to bar his claims based on the suspicions of some CIA employees that he was a "probable member" of the Libyan Islamic Fighting Group, a group that was opposed to the Quaddafi dictatorship and that has never taken up arms against the United States. (ECF No. 105, at p. 16). But no court has ever suggested that the MCA jurisdiction bar could apply in the absence of *any* executive branch determination that an individual is an "enemy combatant." This Court should decline Defendants' invitation to disregard the plain language of the statute. Mr. Ben Soud's claims are not barred.

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been involved in "operations" before his detention and torture. (ECF No. 106-9, at p. 2–3).

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C. The United States did not determine that Mr. Rahman was properly detained as an enemy combatant.

Finally, Defendants cite no determination by the United States that Mr. Rahman was properly detained as an enemy combatant. Instead, they point to one cable that "characterized" Mr. Rahman as an enemy combatant. (ECF No. 105, at p. 17). Defendants thus implicitly acknowledge that the United States never actually determined Mr. Rahman's status. Even more explicitly, the documents Defendants themselves cite make clear that the executive branch never determined Mr. Rahman to be an enemy combatant. In a cable sent just before Mr. Rahman's death, "the senior interrogator" in the CIA's Counterterrorism Center wrote of his grave doubts that Mr. Rahman actually qualified for the interrogations for which Defendant Jessen had recommended him: "one of the guys they have in mind is Gul Rahman, who is an Afghan, and I do not think he is truly a [High Value Target] or [a Medium Value Target.] How do you think we should proceed on this?" (ECF No. 106-11, at p. 24 n.41).

Mr. Rahman was killed under torture before any executive branch tribunal determined his status. Section 2241(e)(2) does not bar his estate's claims.

CONCLUSION

For the reasons stated above, the MCA jurisdictional bar does not apply here. Defendants' Motion to Dismiss should therefore be denied.

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I hereby certify that on December 9, 2016, I caused to be electronically filed and served the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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