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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAID ULLAH (as personal representative of GUL RAHMAN),

Plaintiffs,

vs.

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN,

Defendants.

NO. 2:15-CV-286-JLQ

DEFENDANTS' MOTION TO DISMISS

January 19, 2017
With Telephonic Oral Argument
10:00 a.m. PST

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I. INTRODUCTION

The Military Commissions Act ("MCA") deprives a court of jurisdiction over non-habeas detention-related claims when an alien plaintiff was determined to have been properly detained by the United States as an enemy combatant. 28 U.S.C. § 2241(e)(2). The MCA deprives this Court of jurisdiction over this case.

Plaintiffs Suleiman Abdullah Salim ("Salim"), Mohamed Ahmed Ben Soud ("Soud") and Obaid Ullah, as personal representative of Gul Rahman ("Rahman") (collectively, "Plaintiffs")—all foreign citizens—assert non-habeas claims arising out of their detention by the United States Central Intelligence Agency ("CIA") following the events of September 11, 2001. Plaintiffs were properly detained by the United States as enemy combatants within the meaning of the MCA, and Plaintiffs' claims must be dismissed pursuant to Fed.R.Civ.P. 12(b)(1).

II. RELEVANT FACTUAL BACKGROUND

Plaintiffs allege that they are foreign citizens and were subjected to psychological and physical torture at the hands of the CIA and Defendants James Elmer Mitchell and John "Bruce" Jessen (collectively, "Defendants") when they were detained by the CIA in connection with the United States' War on Terror in the aftermath of the September 11th attacks. ECF No. 1. CIA documents produced in response to subpoenas issued pursuant to 5 U.S.C. § 301 and the procedures outlined in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) (collectively, "Subpoenas"), demonstrate that Plaintiffs were properly detained as "enemy combatants."

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A. Suleiman Abdullah Salim

The propriety of Salim's detention was determined and confirmed on multiple occasions. Initially, Salim's detention was determined to be proper in 2004. *See* Declaration of Christopher W. Tompkins submitted along with this motion ("Tompkins Decl.") ¶3, **Ex. A**, U.S. Bates 1542-1544. In particular, a March 19, 2004 memorandum requesting Salim's transfer to Department of Defense ("DoD") custody concluded that Salim (and others) "are combatants engaged in hostilities or supporting a force hostile to the United States. Their detention by the United States is proper." *Id.* at U.S. Bates 1543. The memorandum also describes Salim as a "facilitator of al-Qa'ida's 1998 attacks against U.S. embassies in Nairobi, Kenya and Dar Es Salaam, Tanzania." *Id.*

A subsequent 2004 transfer memorandum describes Salim as "Al-Qa'ida Personnel", and recommends his detention as a "Low Level Enemy Combatant," *id*. **Ex. B**, U.S. Bates 1530-1538; an additional 2004 transfer memorandum reaches the same conclusion. *Id*. **Ex. C**, U.S. Bates 1505-1513.

Salim's detention was next reviewed by an Enemy Combatant Review Board. This Board concluded that Salim was an "HLEC", an acronym that presumably stands for "High Level Enemy Combatant." *See* "Enemy Combatant Review Boards (ECRB): Detainees Reviewed [] March 2007," *Id*. **Ex. D**, U.S. Bates 1514-1527.[1]

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[1] Salim was later reclassified as: "No Longer Enemy Combatant". *See id*. **Ex. I**, U.S. Bates 1528-1529; *see also id*. **Ex. J**, U.S. Bates 1539-1541.

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B. Mohamed Ahmed Ben Soud (formerly Mohamed Shoroeiya Abd Al-Karim)

Soud is first referenced in a memorandum that reads: "Headquarters/ALEC is pleased to relay news of [] captures [] of probable members of Libyan Islamic Fighting Group (LIFG) with strong and immediate ties to al-Qa'ida operatives." *Id*. **Ex. E**, U.S. Bates 1501-1502. Another memorandum states: "HQS extends congratulations [] for the capture of [Abd al-Karim]," calling the capture a success "in the war against terrorism." *Id*. **Ex. F**, U.S. Bates 1503-1504.

Soud (a/k/a Abd al-Karim) is later referenced in a list of detainees who "may have important information about [] al-Qa-ida network." "HQS Approval of Proposal to Transfer." *Id*. **Ex. G**, U.S. Bates 1494-1495. Another memorandum regarding Soud explains that "HQS/ALEC assesses that Libyan Islamic Fighting Group Detainee 'Abd Al-Karim Al-Libi' … was one of the LIFG figures responsible for the Abu Yahya camp in Afghanistan," is believed to be a member of the LIFG's "Military Committee," and is a "senior figure in the group's military training camp." *Id*. **Ex. H**, U.S. Bates 1496-1500. An August 2004 memorandum titled "DDO Approval to Render" confirms Soud's LIFG and al-Qa'ida affiliations and states that Soud was not a candidate for "outright release because [he] still pose[d] a threat to U.S. persons and interests." *Id*. **Ex. N**, U.S. Bates 1545-1546.

C. Gul Rahman

The April 27, 2005 CIA Inspector General Report of Investigation on the Death of a Detainee identifies that Rahman was characterized as an enemy combatant: "Following Rahman's rendition to [Cobalt] [] generated six cables regarding Rahman, including two cables following his death. Only one of these cables, which reported the chronology of Rahman's death, provided a

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characterization of Rahman, describing him as an 'enemy combatant.'" *Id*. **Ex. K**, U.S. Bates 1267-1334, at 1278; **Ex. L**, U.S. Bates 1061-1063. A footnote on the same page explains: "The Department of Defense defines an 'enemy combatant' as an individual who, under the laws and customs of war, may be detained for the duration of the conflict"—*i.e.*, one who may be "properly detained." *Id*. The Report also describes Rahman as "a suspected Afghan extremist associated with the Hezbi Islami Gulbddin (HIG) organization," *id*. at 1271, and explains that Rahman "was targeted because of his role in Al-Qa'ida. Rahman was considered an Al-Qa'ida operative because he assisted the group." *Id*. at 1279.

The January 28, 2003 "Death Investigation- Gul Rahman" Memorandum for Deputy Director for Operations describes "Cobalt" as a prison "designed to house high value terrorist targets" and describes Rahman as a member of "Hezbi Islami." *Id*. **Ex. M**, U.S. Bates 1112-1147, 1112, 1113.

III. ARGUMENT

A. Applicable Legal Standard

Fed.R.Civ.P. 12(b)(1) provides for dismissal of an action for "lack of subject matter jurisdiction." *See* Fed.R.Civ.P.12(b)(1). A Rule 12(b)(1) motion can challenge the sufficiency of the pleadings to establish jurisdiction (facial attack), or a lack of any factual support for subject matter jurisdiction despite the pleading's sufficiency (factual attack). *See Grondal v. United States*, 2012 U.S. Dist. LEXIS 19398, at *11-13 (E.D. Wash. Feb. 16, 2012) (Quackenbush, J.). For a facial attack, all allegations are accepted as true. *Id.* For a factual attack, evidence outside the pleadings needed to resolve factual disputes as to jurisdiction may be considered. *See Assoc. of Am. Med. Coll. v. United States*, 217 F.3d 770, 778 (9th

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Cir. 2000). Plaintiffs have the burden of establishing jurisdiction. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994). Plaintiffs are unable to establish this Court's jurisdiction over this case, and Plaintiffs' claims should be dismissed.

B. The MCA Divests The Court Of Jurisdiction Over Plaintiffs' Claims

1. The MCA

The relevant provision of the MCA, codified at 28 U.S.C. § 2241(e)(2), deprives a court of jurisdiction over non-habeas detention-related claims where the alien plaintiff was determined to have been properly detained by the United States as an enemy combatant (or is awaiting such determination). The MCA provides, in relevant part:

> (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other 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 who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2241(e)(2). More generally, the MCA, PL 109–366, Oct. 17, 2006, 120 Stat. 2600, and subsequent amendments, also addressed the jurisdiction and procedures applicable to military commissions.

Combatant Status Review Tribunals ("CSRTs") were originally established following a July 7, 2004 military order. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 570, 126 S. Ct. 2749, 2761, 165 L. Ed. 2d 723 (2006). While CSRTs were commonly conducted for detainees held at Guantanamo Bay, the MCA's legislative history clarifies that CSRTs were only one means of possible "determination" of enemy combatant status by the United States. *See* 152 Cong.

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Rec. S10,403 (September 28, 2006) (statement of Sen. Cornyn) (explaining that the new language eliminates the requirement that a CSRT even be held before nonhabeas actions are barred and stating that "[t]his is important because many detainees were released before CSRTs were even instituted. … the determination that is the precondition to the litigation bar is purely an executive determination.")[2]

In *Boumediene v. Bush* the United States Supreme Court held that section 2241(e)(1) (stripping courts of jurisdiction to hear habeas corpus claims) was an unconstitutional suspension of the writ of habeas corpus under the Suspension Clause, Art. I, § 9, clause 2. 553 U.S. 723 (2008). The Ninth Circuit and several other courts have since held that the Supreme Court's decision in *Boumediene* did not affect the MCA's § 2241(e)(2). *See Al-Nashiri v. MacDonald*, 741 F.3d 1002, 1007 (9th Cir. 2013), *Hamad v. Gates*, 732 F.3d 990, 1001 (9th Cir. 2013), *Janko v. Gates*, 741 F.3d 136 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 1530, 191 L. Ed. 2d 559 (2015) (citing *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319 (D.C. Cir. 2012), *Kiyemba v. Obama (Kiyemba II),* 561 F.3d 509, 512 n. 1 (D.C. Cir. 2009).

The Ninth Circuit in *Hamad* described the requirements to deprive a court of jurisdiction under §2241(e)(2):

> Under § 2241(e)(2), courts lack jurisdiction over an action that meets the following five requirements: (1) the action is against the "United States or its agents"; (2) the action relates to "any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States"; (3) the action relates to an alien who was "determined by the United States to have been properly detained as an enemy combatant" or an alien awaiting such a determination; (4) the action is an action "other" than an application for a writ of habeas corpus, which is covered in §

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[2] *See* more detailed discussion of legislative history, *infra* section B.2.ii.

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> 2241(e)(1); and (5) the action does not qualify for an exception under § 1005(e)(2) or (3) of the Detainee Treatment Act of 2005 (DTA), which provide the D.C. Circuit jurisdiction over a narrow class of challenges by enemy combatants, *see* Detainee Treatment Act of 2005, Pub.L. No. 109–148, div. A, title X, § 1005(e), 119 Stat. 2680, 2740–44.

732 F.3d at 995.

This Court lacks jurisdiction to preside over Plaintiffs' claims because all five of the aforementioned elements are met. It is easily observed that the second, fourth, and fifth elements are satisfied. This action unquestionably relates to "any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States," is an action "other" than an application for a writ of habeas corpus, and does not qualify for an exception under section 1005(e)(2) or (3) of the Detainee Treatment Act of 2005.[3]

2. Element 1 Is Satisfied -- Defendants, CIA Contractors, Were "Agents" Of The United States

The first element of the MCA's § 2241(e)(2) is also met -- this is an action against "agents" of the United States. A review of the MCA's legislative history makes it clear that Congress understood that this provision would apply to government employees and contractors alike. *See* 152 Cong. Rec. S10,407

[3] DTA § 1005(e)(2)(A) permitted the D.C. Circuit to review the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant. The D.C. Circuit could review (1) whether a final decision of a CSRT was consistent with certain specified procedures, and (2) whether those procedures complied with the Constitution and applicable federal law. DTA § 1005(e)(2)(C). DTA § 1005(e)(3) allowed the D.C. Circuit to perform a limited review of convictions by military tribunals. *See id*. at 997.

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1 (September 28, 2006) (statement of Sen. Harkin) (noting in opposition that the bill
2 "immunizes the CIA, for example, and any contractors with the CIA, for
3 committing acts of torture.").
4 Plaintiffs bring this action under the Alien Tort Statute ("ATS"), 28 U.S.C.
5 § 1350. Under the ATS, Plaintiffs must establish that governmental actors carried
6 out the alleged torture in order for the claim to survive. *Aldana v. Del Monte*
7 *Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (recognizing state
8 action as necessary element of torture under the ATS); *Kadic v. Karadzic,* 70 F.3d
9 232, 243-44 (2nd Cir. 1995) (holding torture actionable under the ATS "only when
10 committed by state officials or under color of law"). When persons who are not
11 government officials "act[ ] together with state officials" or act with "significant
12 state aid[,]" they are deemed governmental actors for the purposes of the state
13 action requirement under the … AT[S]." *Doe v. Saravia,* 348 F. Supp. 2d 1112
14 (E.D. Cal. 2004).
15 Plaintiffs expressly allege in their Complaint that Defendants were CIA
16 contractors and that Defendants' purported conduct was undertaken at the request
17 of, and pursuant to, the supervision of the CIA and the United States Department
18 of Justice ("DOJ"). ECF. No. 1 ¶¶ 2-13, 21-24. Plaintiffs also allege that
19 Defendants acted as contractors "pursuant to contracts they executed with the CIA"
20 and allege that Defendants' purported creation, design, consultation, and advice as
21 to implementation of approved interrogation techniques were all done "under color
22 of law," and at the CIA's behest. *Id.* ¶¶ 16, 32, 42, 168, 174. Of course, Plaintiffs
23 cannot allege that Defendants' conduct is state action for ATS jurisdictional
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purposes but private action for MCA jurisdictional purposes. Defendants were "agents" of the United States at all relevant times.

3. Element 3 Is Satisfied -- Plaintiffs Were Determined By The United States To Have Been Properly Detained As Enemy Combatants

The third *Hamad* element—whether Plaintiffs were "determined by the United States to have been properly detained as [] enemy combatant[s]"—is also met, as demonstrated by the documents produced by the CIA pertaining to Plaintiffs' detention. In 2004, the Supreme Court addressed the preliminary question of whether and under what authority the United States could detain "enemy combatants," and concluded that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), authorized the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion).

a. SECTION 2241(E)(2) REQUIRES ONLY THAT THE INITIAL DETENTION BE PROPER, NOT THAT THE DETERMINATION WAS CORRECT

The D.C. Circuit recently held that section 2241(e)(2) "can constitutionally be applied to '*any* [non-habeas] detention-related claims, whether statutory or constitutional, brought by an alien detained by the United States and determined to have been properly detained as an enemy combatant.'" *Jawad v. Gates*, No. 15-5250, 2016 WL 4255001, at *4 (D.C. Cir. Aug. 12, 2016) (quoting *Al Janko*, 741 F.3d at 146) (emphasis and inserted text in original). The Court addressed 28 U.S.C. § 2241(e)(2), focusing on the meaning of "properly detained as an enemy combatant" and who can make that determination:

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> Pursuant to the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), the President may "detain enemy combatants 'for the duration of the particular conflict in which they were captured.'" *Al Janko v. Gates*, 741 F.3d 136, 138 (D.C. Cir. 2014) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 518, 124 S. Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion)). To determine whether an individual is properly detained as an enemy combatant, wholly apart from whether that person can be punished for his alleged crimes by a military commission, each detainee appears before a Combatant Status Review Tribunal (CSRT). *See id*.

Id. at *1.[4]

The *Jawad* court held that the CSRT's finding that Jawad was an "enemy combatant" precluded the district court's jurisdiction. In so doing, the Court rejected Jawad's arguments that (1) the government changed its determination that he had been "properly detained," (2) "the initial CSRT determination that he was properly detained was 'illegal and void' because 'his capture, torture, and detention [ ] violated domestic and international law concerning treatment of juveniles accused of a crime,'" (3) the MCA lacks jurisdiction over minors, and (4) this section of the MCA was inapplicable because his CSRT determination didn't find him to be an *unlawful* enemy combatant as opposed to an "enemy combatant." *Id*. at *3-4.

Under *Jawad* and *Al Janko*, the operative question is whether each of Plaintiffs' *initial detentions* was determined by the United States to be proper, not whether the determination that Plaintiffs were "enemy combatants" was correct. This contrasts with the vast majority of the litigation related to post-September

[4] *See infra* section B.2.ii, legislative history demonstrating that Congress did not intend to require the determination to be made by a CSRT.

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11th detentions, which have been habeas corpus proceedings where the pertinent question was whether the *status determination* was correct. That inquiry requires an analysis of whether there was sufficient evidence and process to determine that the individual was in fact an "enemy combatant."

In contrast, as the *Al Janko* court explains, a "properly detained" enemy combatant is not someone who was "correctly" *determined* to be an enemy combatant, but one who was properly *detained*. First, the court explained that it was clear that the detention of aliens as enemy combatants is an exclusively executive function. *Al Janko*, 741 F.3d at 141 (citing *Boumediene,* 553 U.S. at 782–83, 128 S. Ct. 2229 (distinguishing between those "detained by executive order" at Guantanamo and those held pursuant to criminal sentence); *Hamdi,* 542 U.S. at 516–17, 124 S. Ct. 2633 (holding the AUMF gives "the Executive . . . the authority to detain citizens who qualify as 'enemy combatants'"); *Rasul v. Bush,* 542 U.S. 466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004) (recognizing that detainees at Guantanamo are in exclusively executive detention); Detention, Treatment, and Trial of Certain Non–Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001) (executive order authorizing detention of enemy combatants)).

The *Al Janko* court then explained that the operative question is whether the alien was properly detained and not whether the determination of status is ultimately proven to be correct:

> The statute applies to an alien "determined by the United States to have been *properly* detained as an enemy combatant." 28 U.S.C. § 2241(e)(2) (emphasis added). [The Appellant] reads "properly" to modify "determined," thereby requiring that a CSRT *correctly* determine a detainee's status in order that section 2241(e)(2) apply.

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> But "properly" does not modify "determined"; it modifies "detained." The phrase "properly detained as an enemy combatant" identifies the type of determination the Executive Branch must make, *viz.*, a determination that the detainee meets the AUMF's criteria for enemy-combatant status. *See, e.g., Barhoumi v. Obama,* 609 F.3d 416 (D.C. Cir. 2010) (detainee is "properly detained pursuant to the AUMF" if he meets the requirements for enemy combatant status). But the statute does not say that the bar applies to an alien whom "the United States has *properly* determined to have been properly detained as an enemy combatant." It requires only that the Executive Branch determine that the AUMF authorizes the alien's detention without regard to the determination's correctness. Conditioning the statute's applicability on the accuracy of the Executive Branch's determination would do violence to the statute's clear textual directive.

10 741 F.3d at 143–44.

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b. A DETERMINATION BY THE CIA IS A DETERMINATION BY THE "UNITED STATES"

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Courts have not specifically addressed who in the Executive Branch can make the determination that an alien has been properly detained as an enemy combatant. The D.C. Circuit in *Al Janko* specifically declined to opine on this issue beyond determinations by CSRTs:

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> We need not decide today the full extent of the meaning of "the United States." In holding that section 2241(e)(2) barred claims brought on behalf of aliens determined by CSRTs to have been properly detained, *Al–Zahrani* necessarily held that a CSRT determination is a determination "by the United States," *see Al–Zahrani,* 669 F.3d at 317, 319, and we are bound by that holding, *see LaShawn A. v. Barry,* 87 F.3d 1389, 1395 (D.C. Cir.1996) (en banc). Moreover, whatever else "the United States" meant in 2006, "the contextual background against which Congress was legislating, including relevant practices of the Executive Branch which presumably informed Congress's decision, prior legislative acts, and historical events" makes clear that the words undoubtedly encompassed CSRTs. *United States v. Wilson,* 290 F.3d 347, 354 (D.C. Cir. 2002); *see also Nat'l Lead Co. v. United States,* 252 U.S.

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> 140, 147, 40 S. Ct. 237, 64 L. Ed. 496 (1920) (citing *United States v. Bailey,* 34 U.S. (9 Pet.) 238, 256, 9 L. Ed. 113 (1835)) (Story, J.).

Id.[5]

However, the MCA's legislative history makes it clear that Congress did not intend to require the determination by a CSRT and, in fact, expressly envisioned its application to determinations made by the CIA. This is apparent both from concerns expressed in opposition to the MCA, *see* 152 Cong. Rec. S10,407 (September 28, 2006) (statement of Sen. Harkin) (the bill "immunizes the CIA, for example, and any contractors with the CIA, for committing acts of torture"), as well as statements made by those in favor of the MCA. In fact, the statement of Senator Cornyn explains the intended effect of the revisions to section 2241(e)(2) in precisely the situation now before this Court:

> The MCA revises section 2241(e)(2) by, among other things, adopting a much narrower exception to the bar on post release lawsuits. Under

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[5] The D.C. Circuit's interpretation of the meaning of the statute's language is supported by the statutory history. The previous version of section 2241(e)(2) was enacted as part of the Detainee Treatment Act of 2005 ("DTA") and withdrew jurisdiction over non-habeas actions concerning aliens at Guantanamo who were in military custody or had been "determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the [DTA] to have been properly detained as an enemy combatant." Pub. L. No. 109-148, div. A, tit. X, § 1005(e)(1), 119 Stat. 2680, 2742. The MCA replaced the prior version of § 2241(e)(2) with the current requirement of a "determin[ation] by the United States." Pub. L. No. 109-366, § 7(a), 120 Stat. at 2636.

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> the MCA, 2242(e)(2) will bar nonhabeas lawsuits so long as the detainee ''has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.'' This new language does several things. First, it eliminates the requirement that the DC Circuit review a CSRT, *or that a CSRT even be held, before nonhabeas actions are barred. This is important because many detainees were released before CSRTs were even instituted. We do not want those who were properly detained as enemy combatants to be able to sue the U.S. military*. And we do not want to force the military to hold CSRT hearings forever, or in all future wars. Instead, under the new language, the determination that is the precondition to the litigation bar *is purely an executive determination*. It is only what the United States has decided that will matter. In addition, the language of (e)(2) focuses on the *propriety of the initial detention*. There inevitably will be detainees who are captured by U.S. troops, or who are handed over to us by third parties, who initially appear to be enemy combatants but who, upon further inquiry, are found to be unconnected to the armed conflict. *The U.S. military should not be punished with litigation for the fact that they initially detained such a person*. As long as the individual was at least initially properly detained as an enemy combatant, the nonhabeas litigation is now barred, even if the U.S. later decides that the person was not an enemy combatant or no longer poses any threat. The inquiry created here is not unlike that for reviewing, in the civilian criminal justice context, the propriety of an arrest. An arrest might be entirely legal, might be based on sufficient probable cause, even if the arrestee is later conclusively found to be innocent of committing any crime. The arresting officer cannot be sued and held liable for making that initial arrest, so long as the arrest itself was supported by probable cause, simply because the suspect was not later convicted of a crime. Similarly, under 2241 (e)(2), detainees will not be able to sue their captors and custodians if the United States determines that it was the right decision to take the individual into custody.

152 Cong. Rec. S10,403 (September 28, 2006) (statement of Sen. Cornyn); *see also id*. at S10,404 (statement of Sen. Sessions) ("The new bill states that as long as the military decides that it was appropriate to take the individual into custody as

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an enemy combatant, as a security risk in relation to a war, that person cannot turn around and sue our military after he is released.").

Legislative history also demonstrates, conclusively that section 2241(e)(2) was intended to address issues related to interrogation:

> [T]here is one issue that really has not come up in this debate, and that is the immunity that is given in this bill to the people who are interrogating the enemy combatants. We need to pass this bill so that interrogations can start up again because without the immunity, anybody who is hired by the United States Government to try to find out whom they are planning on blowing up next would be subject to a lawsuit that would be filed by some attorney that would claim that he was representing the public interest. This is a protection bill for the interrogators. It is something that is needed, and that is another reason why it ought to pass.

152 Cong. Rec. H7, 947-48 (September 29, 2006) (statement of Rep. Sensenbrenner).

In short, a determination by the CIA constitutes a determination by the United States for purposes of the MCA's § 2241(e)(2).

c. THE CIA DETERMINED THAT PLAINTIFFS WERE PROPERLY DETAINED AS ENEMY COMBATANTS

i. Salim

The CIA documents identified above demonstrate that Salim was determined to have been properly detained as an enemy combatant. Indeed, the propriety of Salim's detention was determined and confirmed on several occasions. Initially, Salim's detention was determined to be proper in 2004, when he was described as a "facilitator of al-Qa'ida's 1998 attacks against U.S. embassies in Nairobi, Kenya and Dar Es Salaam, Tanzania," and the CIA concluded that he was a "combatant engaged in hostilities or supporting a force hostile to the United States" and that

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his "detention . . . is proper." *See* Tompkins Decl. ¶ 3, **Ex. A**, U.S. Bates 1542-1544.

In later memoranda Salim is determined to be a "Low Level Enemy Combatant" or "High Level Enemy Combatant" by the "Enemy Combatant Review Boards." *Id*. **Ex. B**, U.S. Bates 1530-1538; **Ex. C**, U.S. Bates 1505-1513; **Ex. D**, U.S. Bates 1514-1527. Because Salim was determined to have been properly detained as an enemy combatant, this Court lacks jurisdiction over his claims.

ii. Soud (f/k/a Abd Al-Karim)

The United States determined that Soud was "properly detained as an enemy combatant." As the D.C. Circuit in *Al Janko* recognized, that phrase "identifies the type of determination the Executive Branch must make, *viz.,* a determination that the detainee meets the AUMF's criteria for enemy-combatant status." 741 F.3d at 143–44.

The evidence detailed above establishes that Soud was a "probable member[] of Libyan Islamic Fighting Group (LIFG) with strong and immediate ties to al-Qa'ida operatives," Tompkins Decl. ¶ 3, **Ex. E**, U.S. Bates 1501-1502, and that his capture was a success "in the war against terrorism." *Id*. **Ex. F**, U.S. Bates 1503-1504.

A memorandum titled "HQS Approval of Proposal to Transfer," lists Soud (Abd al-Karim) as a detainee who "may have important information about [] al-Qa-ida network." *Id*. **Ex. G**, U.S. Bates 1494-1495. Another memorandum states that "HQS/ALEC assesses that Libyan Islamic Fighting Group Detainee 'Abd Al-Karim Al-Libi' … was one of the LIFG figures responsible for the Abu Yahya

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1 camp in Afghanistan," was believed to be a member of the LIFG's "Military
2 Committee," and was a "senior figure in the group's military training camp." *Id.*
3 **Ex. H**, U.S. Bates 1496-1500. An August 2004 memorandum titled "DDO
4 Approval to Render" confirms Soud's LIFG and al-Qa'ida affiliations and states
5 that Soud was not a candidate for "outright release because [he] still pose[d] a
6 threat to U.S. persons and interests." *Id.* **Ex. N**, U.S. Bates 1545-1546.

7 While these memoranda do not use the specific words "enemy combatant,"
8 they make it clear that the CIA determined that it was proper to detain and then
9 transfer, and then render, Soud as a result of his membership in the LIFG's
10 Military Committee and ties to al-Qa'ida, and "threat to U.S. persons and
11 interests". The CIA's use of the characterization "Libyan Islamic Fighting Group
12 Detainee" instead of "enemy combatant" does not, and should not, alter the result.
13 Because the CIA determined that it was proper to detain Soud based on his
14 membership in a terrorist group, this Court lacks jurisdiction over his claims.

15 iii. Gul Rahman

16 Finally, the United States determined that Rahman was "properly detained as
17 an enemy combatant." Specifically, the April 27, 2005 CIA Inspector General
18 Report explains that Rahman was characterized as an enemy combatant:
19 "Following Rahman's rendition to [Cobalt] [] generated six cables regarding
20 Rahman" one of which "provided a characterization of Rahman, describing him as
21 an 'enemy combatant.'" *Id.* **Ex. K**, U.S. Bates 1267-1334, at 1278; **Ex. L**, U.S.
22 Bates 1061-1063. A footnote on the same page explains: "The Department of
23 Defense defines an 'enemy combatant' as an individual who, under the laws and
24 customs of war, may be detained for the duration of the conflict." *Id.* The
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definition used by the DoD and cited in the 2005 Report is coextensive with authority granted in the AUMF: The President may "detain enemy combatants 'for the duration of the particular conflict in which they were captured.'" *Al Janko*, 741 F.3d at 138 (quoting *Hamdi*, 542 U.S. at 518).

The CIA Inspector General Report also describes Rahman as "a suspected Afghan extremist associated with the Hezbi Islami Gulbddin (HIG) organization," Tompkins Decl. ¶ 3, **Ex. K**, at 1271, and explains that Rahman "was targeted because of his role in Al-Qa'ida. Rahman was considered an Al-Qa'ida operative because he assisted the group." *Id*. at 1279. A January 28, 2003 memorandum describes Rahman as a member of "Hezbi Islami," explains that "Cobalt" is a prison "designed to house high value terrorist targets." *Id*. **Ex. M**, U.S. Bates 1112-1147, 1112-13.

Although Rahman died before "Enemy Combatant Review Board" assessments were instituted, these documents reflect that the CIA detained Rahman, at least in part, on the basis that he was "a suspected Afghan extremist associated with the Hezbi Islami Gulbddin (HIG) organization," and that the CIA had characterized Rahman as an "enemy combatant" pursuant to the DoD and AUMF's criteria. As the CIA determined that Rahman was "properly detained as an enemy combatant," this Court lacks jurisdiction over his claims.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion should be granted and this action dismissed in its entirety.

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1 DATED this 18th day of November, 2016.

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CERTIFICATE OF SERVICE

I, Karen L. Pritchard, hereby certify that on November 18, 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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