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18 UNITED STATES DISTRICT COURT  
19 FOR THE EASTERN DISTRICT OF WASHINGTON

20 SULEIMAN ABDULLAH SALIM,  
21 MOHAMED AHMED BEN SOUD, OBAID  
22 ULLAH (AS PERSONAL  
23 REPRESENTATIVE OF GUL RAHMAN),

24 Plaintiffs,

25 v.

26 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

1 be his status. And Mr. Rahman likewise never received any status  
2 determination: he was killed under torture within a month of his detention and  
3 before any government tribunal determined whether he was properly detained.  
4

5 In sum, Defendants’ arguments fail because the MCA jurisdictional bar  
6 by its plain terms does not apply to them. No court has ever held that contractors  
7 in Defendants’ position are “agents of the United States”; that the MCA  
8 jurisdiction-stripping provision bars the claims of a person *cleared* by an  
9 executive tribunal of being an enemy combatant; or that the provision bars  
10 claims by individuals whose enemy combatant status was never even determined  
11 by an executive tribunal. This Court has jurisdiction over Plaintiffs’ claims.  
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13

14 **ARGUMENT**

15  
16 **I. DEFENDANTS SOUGHT TO PROFIT AS INDEPENDENT**  
17 **CONTRACTORS AND ARE NOT AGENTS OF THE UNITED STATES.**

18 Congress expressly reserved the reach of the jurisdiction stripping  
19 provision of 28 U.S.C. § 2241(e)(2) to suits “against the United States or its  
20 agents,” and did not bar claims against those who have no agency relationship  
21 with the United States. Defendants cannot meet their burden of establishing the  
22 agency relationship required by this plain statutory text. Any doubt is dispelled  
23 by Defendants’ contracts with the CIA, which explicitly establish an  
24 independent contractor—but not an agency—relationship. Defendants sought  
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26

1 profit from the government as non-agent independent contractors rather than  
2 government employees; they cannot now claim an immunity that Congress  
3 purposely did not provide.<sup>1</sup>  
4

5 When Congress uses the term “agents” without supplying a definition, the  
6 term is given its ordinary common law meaning. *See NLRB v. Amax Coal Co.*,  
7 453 U.S. 322, 329 (1981) (“Where Congress uses terms that have accumulated  
8 settled meaning under . . . the common law, a court must infer, unless the statute  
9 otherwise dictates, that Congress means to incorporate the established meaning  
10 of these terms.”); *see also United States v. Texas*, 507 U.S. 529, 534 (1993) (“In  
11 order to abrogate a common-law principle, the statute must ‘speak directly’ to  
12 the question addressed by the common law”). Under the common law, “not all  
13 service providers and recipients stand in agency relationships.” *United States v.*  
14 *Bonds*, 608 F.3d 495, 507 (9th Cir. 2010). “Unlike employees, independent  
15 contractors are not ordinarily agents.” *Id.* at 505. To qualify as an agent, a  
16 contractor must have the “power to affect the legal rights and duties” of third  
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22 <sup>1</sup> Defendants previously attempted to claim immunity under the Federal  
23 Tort Claims Act, which applies to employees of “any federal agency,” and  
24 excludes contractors from its coverage. (ECF No. 28, at p. 11 n.1). This effort to  
25 seek immunity under the MCA is no more availing.  
26



1 parties as a “representative” of the principal. Restatement (Third) of Agency §  
2 1.01(c) (2006). “A person who contracts to accomplish something for another or  
3 to deliver something to another, but who is not acting as a fiduciary for the  
4 other, is a non-agent contractor.” Restatement (Second) of Agency § 14N(b)  
5 (1958).  
6

7  
8 Defendants have the burden of showing that they were acting as agents.  
9 “[T]he party asserting that a relationship of agency exists generally has the  
10 burden in litigation of establishing its existence.” *Atrium of Princeton, LLC v.*  
11 *NLRB*, 684 F.3d 1310, 1315 (D.C. Cir. 2012) (quoting Restatement (Third) of  
12 Agency § 1.02 cmt. d (2006)); *see also* 12 Williston on Contracts § 35:2 (4th ed.  
13 2003) (“As a general rule, the party asserting the agency relationship has the  
14 burden of proving both the existence of the relationship and the authority of the  
15 agent.”); *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1296 (5th Cir. 1994)  
16 (“Agency is never to be presumed; it must be shown affirmatively.”).  
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20 Defendants have not attempted to carry that burden, nor could they: no evidence  
21 supports the notion that they acted as fiduciaries for, and representatives of, the  
22 United States.<sup>2</sup>  
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25 <sup>2</sup> Not only were Defendants not fiduciaries, but the CIA has  
26 acknowledged that the agency “[a]llowed a conflict of interest to exist wherein

1 Defendants conspicuously fail to point to any clause in their contracts as  
2 evidence of the existence of an agency relationship, even though the contracts  
3 are on file with the Court. (ECF No. 84). The contracts are consistent and clear  
4 that Defendants’ “legal status under this agreement is that of an Independent  
5 Contractor” and that “[n]othing contained herein shall be construed as  
6 appointing the [IC/Contractor] into the civil service of the United States” or  
7 “implying the creation of an employer-employee relationship.” (ECF Nos. 84-1,  
8 at p. 2, 14, 34, 45, 57; 84-2 at p. 4, 16, 28, 38). Defendants’ failure to point to  
9 their contracts is understandable, because the contracts nowhere suggest that  
10 Defendants and the government entered into an agency relationship, and “[a]  
11 finding of an agency relationship between the government and contractor is  
12 unusual absent extraordinary contract provisions.” *Peterson Builders, Inc. v.*  
13 *United States*, 26 Cl. Ct. 1227, 1230 (U.S. Cl. Ct. 1992), *aff’d* 155 F.3d 566  
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19 the contractors who helped design and employ the enhanced interrogation  
20 techniques also were involved in assessing the fitness of detainees to be  
21 subjected to such techniques and the effectiveness of those same techniques.”  
22 John Brennan, *CIA Comments on the Senate Select Committee on Intelligence*  
23 *Report on the Rendition, Detention, and Interrogation Program* (June 27, 3013),  
24 <http://bit.ly/12JxFDk>.  
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1 (Fed. Cir. 1998); *see also* *Washington v. Avondale Indus., Inc.*, No. CIV.A. 98-  
2 346, 1999 WL 52142, at \*2 (E.D. La. Jan. 29, 1999) (same). Defendants can  
3 identify no such “extraordinary contract provisions.” Nor can they provide any  
4 indication that the United States intended to establish an agency relationship  
5 with them, by, for example, allowing them to represent and bind the United  
6 States with respect to third parties and requiring that they serve as fiduciaries.  
7

8  
9 The Fourth Circuit rejected a similar claim by independent contractors  
10 who had failed to make any showing that their contracts created an agency  
11 relationship but nonetheless contended that they were “‘agents’ of the United  
12 States within the meaning of § 745 [of the Suits in Admiralty Act] and thus  
13 enjoy the immunity from suit conferred by that section.” *Servis v. Hiller Sys.*  
14 *Inc.*, 54 F.3d 203, 207 (4th Cir. 1995). The court found that, where none of the  
15 contracts “evidences any intent on the part of the United States to enter into a  
16 fiduciary relationship with [the contractors], nor do the documents indicate that  
17 appellees consented to act as fiduciaries of the government” and “[n]one of the  
18 documents refer to any appellee as an ‘agent’ of the United States,” then “it is  
19 evident that appellees were merely non-agent independent contractors of the  
20 United States.” *Id.* at 208. The same is true here.  
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25 Unable to rely on either the statutory text of the MCA or their contracts,  
26

Defendants misuse legislative history. Even though the plain language of the

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

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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

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

5  
6 Defendants next argue that they qualify as “agents” because Plaintiffs  
7 “allege that Defendants’ conduct is state action for ATS jurisdictional  
8 purposes.” (ECF No. 105, at p. 8–9). This argument fails because it wrongly  
9 conflates the jurisdictional requirement that Defendants acted “under color of  
10 law” *with* state officials, which Plaintiffs have met, with agent status, a  
11 requirement that Defendants cannot meet. As Defendants acknowledge, ATS  
12 claims for “official torture” encompass claims against *private* individuals who  
13 “act ‘together with state officials,’ or with ‘significant state aid.’” (ECF No. 105,  
14 at p. 8) (quoting *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004)); *see*  
15 *also Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970) (“To act under  
16 color of law does not require that the accused be an officer of the State. It is  
17 enough that he is a willful participant in joint activity with the State or its  
18 agents.” (quotation marks and citation omitted)). But it is hornbook law that  
19 acting “together” with, or with the “aid” of, government officials does not  
20 suffice to create an agency relationship with the government. *See* Restatement  
21 (Third) of Agency § 1.01(c) (2006) (agency is a “fiduciary relationship” where  
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1 the agent has the “power to affect the legal rights and duties” of third parties as a  
2 “representative” of the principal).<sup>3</sup>  
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4 Defendants cannot carry the burden of showing that they are “agents of  
5 the United States” as required by the MCA. Their motion fails.  
6

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

10 In enacting Section 2241(e)(2), Congress did not strip jurisdiction from  
11 the federal courts based on the mere *suspicion*, of anyone in government, that a  
12 prisoner was an enemy combatant. Instead of creating a harsh and unjustifiable  
13 test that would bar claims by victims of mistaken detention, Congress required  
14 an executive branch tribunal *determination* that a person who had initially been  
15 detained as an enemy combatant was, in fact, *properly detained* as such.  
16

17 Defendants argue that there is no need for a formal determination of a detained  
18 person’s status. But Defendants’ interpretation contradicts both the statute’s text  
19 and the decision of every court to have construed this provision of the MCA.  
20

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22 <sup>3</sup> Moreover, Plaintiffs’ war crimes claims are actionable regardless of state  
23 action. *See Kadıc v. Karadzic*, 70 F.3d 232, 243–44 (2d Cir. 1995) (violations of  
24 Common Article 3 of the Geneva Conventions give rise to ATS claims for war  
25 crimes, regardless of state action).  
26

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

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

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

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

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

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

1 whether an individual was determined by the United States to have been  
2 properly detained as an enemy combatant. Where such a determination appears  
3 in the record, courts have held the individual's claims are barred. *See Hamad v.*  
4 *Gates*, 732 F.3d 990, 995 (9th Cir. 2013) (“Hamad’s action satisfies the third  
5 requirement, because there is no dispute that a CSRT determined that Hamad  
6 was properly detained as an enemy combatant.”); *Jawad v. Gates*, 832 F.3d 364,  
7 368 (D.C. Cir. 2016) (“Jawad concedes that a CSRT found that he was an  
8 ‘enemy combatant.’”); *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 317 (D.C. Cir.  
9 2012) (CSRTs “confirmed the earlier determination that both detainees were  
10 enemy combatants”); *Janko*, 741 F.3d 136 (same). Conversely, where  
11 individuals who were initially detained as enemy combatants were not found to  
12 be enemy combatants by executive branch tribunals, the MCA does not impose  
13 a bar to jurisdiction. *See, e.g., Allaithi v. Rumsfeld*, 753 F.3d 1327 (D.C. Cir.  
14 2014) (denying, but not on MCA grounds, claims by individuals who were  
15 initially detained as enemy combatants but were later either (a) determined not  
16 to be enemy combatants by tribunals, or (b) released without a determination).

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

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

13 Beyond being at odds with every court to have construed Section  
14 2241(e)(2), Defendants' reading would also render superfluous Congress's  
15 extension of the jurisdictional bar to detained individuals who were then  
16 awaiting a final status determination. Section 2241(e)(2) extends not only to  
17 detainees who have had their status determined by an executive branch tribunal,  
18 but also to a detainee who "is awaiting such determination." Defendants'  
19 construction would make this enactment surplusage: under the statutory  
20 framework, every detainee is captured and held based on an initial decision that  
21 the individual is detainable as an enemy combatant. Were Defendants correct  
22 that the initial decision to detain actually constitutes a *determination* that an  
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1 individual was properly detained within the meaning of the MCA, then no  
2 detainee would ever be “awaiting such determination.”  
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4         Instead, as the Fourth Circuit explained, the phrase “awaiting such  
5 determination” must refer to detainees who are scheduled for an executive  
6 tribunal review that has not yet occurred. *See al-Marri*, 487 F.3d at 172–73  
7 (“The phrase ‘awaiting such determination’ gains meaning only if it refers to  
8 alien detainees captured and held outside the United States—whom Congress . .  
9 . expected would receive a CSRT based on the larger DTA–MCA scheme.”).  
10 Defendants’ reading, which disclaims any need for a tribunal determination,  
11 violates the “cardinal principle of statutory construction that a statute ought,  
12 upon the whole, to be so construed that, if it can be prevented, no clause,  
13 sentence, or word shall be superfluous, void, or insignificant.” *Hooks v. Kitsap*  
14 *Tenant Support Servs.*, 816 F.3d 550, 560 (9th Cir. 2016) (quotation omitted).<sup>4</sup>  
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19         In support of their mistaken interpretation, Defendants cite the statement  
20 of Senator Cornyn, who claimed that even a person who the “U.S. later  
21 decides . . . was not an enemy combatant” would actually be covered by the  
22

23 \_\_\_\_\_  
24         <sup>4</sup> Defendants do not and could not claim that Plaintiffs, who are not  
25 detained, are “awaiting” the determination of any executive branch tribunal  
26 charged with evaluating their detention.

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

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21 <sup>5</sup> Defendants also point to the statement of Senator Sessions. (ECF No.  
22 105, at p. 14–15). But Senator Sessions explained what he meant: “[t]he fact of  
23 release should not be an invitation to litigation, so long as the military finds that  
24 it was appropriate to take the individual into custody in the first place.” 152  
25 Cong. Rec. S10,404 (2006). The finding to which Senator Sessions refers is, as  
26

1 Defendants have not shown that the United States made the required  
2 determination that Plaintiffs were properly detained as enemy combatants.  
3

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

6 Defendants relegate to a footnote the final determination by the United  
7 States that Mr. Salim was *not* properly detained as an enemy combatant. (ECF  
8 No. 105, at p. 2 n.1). Although it initially made an erroneous determination, the  
9 tribunal established to review whether he was properly detained determined that  
10 Mr. Salim *was not an enemy combatant*, and that there was no evidence that Mr.  
11 Salim was, in fact, properly detained as such.  
12

13 Thus, even if Mr. Salim was initially suspected of being a “facilitator,”  
14 based in part on purported “admissions” he made under torture, (ECF No. 106-1,  
15 at p. 3), these baseless suspicions were refuted by the final review of the proper  
16 executive branch tribunal, which determined that Mr. Salim had never been  
17 involved in any “operations.” (ECF No. 106-9, at p. 2–3). Accordingly, the  
18 United States reclassified him as “No Longer Enemy Combatant” (“NLEC”) and  
19 ordered his release. *Id.*; *see also* Ladin Decl. Exh. B at 000163 (explaining that  
20 “when there is insufficient evidence to classify a detainee as a UEC [unlawful  
21  
22 the courts have held, the decision of the tribunals that Congress understood to  
23  
24 make status determinations, which is precisely the finding that is lacking here.  
25  
26

1 enemy combatant], the detainee must be recommended for classification as an  
2 NLEC and released”). Notably, Mr. Salim was found not be an enemy  
3 combatant by the UECRB tribunal, even though, as the D.C. Circuit observed,  
4 “proceedings before the UECRB afford even less protection to the rights of  
5 detainees in the determination of status than was the case with the CSRT.” *Al*  
6 *Maqaleh*, 605 F.3d at 96; *see also generally* Lt. Col. Jeff A. Bovarnick,  
7 *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*,  
8 2010 ARMY LAW. 9 (June 2010) (detailing process and fairness concerns).

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

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22 <sup>6</sup> While “[t]he Board may also recommend NLEC classification when a  
23 detainee is exhausted of intelligence value” or “is considered to be a minimal  
24 threat,” Ladin Decl., Exh. B at 000163, the grounds given by the tribunal make  
25 clear that Mr. Salim was reclassified because review showed that he had never  
26

1 As the Fourth and D.C. Circuits have explained, what is key is not  
2 whether a detainee was initially determined to be an enemy combatant but the  
3 results of the executive branch tribunal charged with reviewing the propriety of  
4 the detention. In Mr. Salim’s case, that tribunal’s final determination was that he  
5 was not properly detained as an enemy combatant. His claims are not barred.  
6  
7

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

10 As Defendants concede, there is not a single executive branch document  
11 in the record that even uses the term “enemy combatant” with respect to Mr.  
12 Ben Soud. Nonetheless, Defendants ask this Court to bar his claims based on the  
13 suspicions of some CIA employees that he was a “probable member” of the  
14 Libyan Islamic Fighting Group, a group that was opposed to the Quaddafi  
15 dictatorship and that has never taken up arms against the United States. (ECF  
16 No. 105, at p. 16). But no court has ever suggested that the MCA jurisdiction bar  
17 could apply in the absence of *any* executive branch determination that an  
18 individual is an “enemy combatant.” This Court should decline Defendants’  
19 invitation to disregard the plain language of the statute. Mr. Ben Soud’s claims  
20 are not barred.  
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25 \_\_\_\_\_  
26 been involved in “operations” before his detention and torture. (ECF No. 106-9,  
at p. 2–3).





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**CERTIFICATE OF SERVICE**

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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