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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

AMENDED REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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

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DEFENDANTS WERE AGENTS OF THE UNITED STATES

Plaintiffs cherry-pick quotations and ignore critical factual distinctions to support an incorrect "blanket rule" that "independent contractors are not ordinarily agents." *U.S. v. Bonds*, 608 F.3d 495, 505 (9th Cir. 2010) (citing *Dearborn v. Mar Ship Operations, Inc*. 113 F.3d 995, 997-98 (9th Cir. 1997)). Whether an agency relationship exists "is a legal conclusion made after an assessment of the facts of the relationship and the application of the law of agency to those facts." RESTATEMENT (THIRD) OF AGENCY § 1.02 (2006).[1]

Indeed, "[a]gency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *See* REST. 3D. AGENCY § 1.01; *Bonds*, 608 F.3d at 506. That Defendants' contracts with the CIA identify them as independent contractors has no impact on whether Defendants are "agents" for purposes of the MCA. Comment c to § 1.01 explains, in part, that:

> [T]he concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person. The person represented has a right to control the actions of the agent. . . .

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[1] In 2006, Restatement (Second) of Agency was superseded by Restatement (Third) of Agency. *Schmidt v. Burlington N. & Santa Fe Ry. Co*., 605 F.3d 686, 690, n.3 (9th Cir. 2010).

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> . . . [T]he common term "independent contractor" is equivocal in meaning and confusing in usage because some termed independent contractors are agents while others are nonagent service providers.

See REST. 3D. AGENCY § 1.01 at cmt. c. "The common-law definition of agency requires as an essential element that the agent consent to act on the principal's behalf, as well as subject to the principal's control." *Id*. at cmt. g. "To establish that a relationship is one of agency, it is not necessary to prove its fiduciary character as an element." *Id*. at cmt. e.

For example, *Peterson Builders, Inc. v. U.S.*, held that a shipbuilding contractor was not an agent of the government in the context of an extra-contractual constructive change notice to a subcontractor. 26 Cl. Ct. 1227, 1230 (1992). But in *Washington v. Avondale Indus., Inc.*, the court held that contract operators of vessels for the U.S. ***are*** agents pursuant to a contract involving ship building and testing activities. 1999 WL 52142, at *2-3 (E.D. La. Jan. 29, 1999).

Similarly, *Servis v. Hiller Sys. Inc*. held that one contractor "hired to perform limited repair tasks was not an agent of the U.S.," but that a second contractor with management and operational responsibilities was an agent of the U.S. 54 F.3d 203, 207 (4th Cir. 1995). *Servis* noted that the term "non-agent independent contractor" "is used colloquially to describe builders and others who have contracted to accomplish physical results not under the supervision of the one who has employed them to produce the results." *Id*. at 208 (quoting RESTATEMENT (SECOND) OF AGENCY § 14N, cmt. b). Plaintiffs' assertion of a blanket rule ignores the facts showing that Defendants acted on behalf of and subject to the control of the U.S.

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Under Plaintiffs' interpretation, it is not clear that the term "agent" in section 2241(e)(2) would apply to anyone. In ATS suits against government officers or employees acting within the scope of employment, the U.S. is substituted as a defendant pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671–2680. *Allaithi v. Rumsfeld*, 753 F.3d 1327, 1329 (D.C. Cir. 2014), *cert. den.*, 136 S. Ct. 37 (2015). If government officers and employees are immune under the FTCA, and independent contractors cannot be agents under the MCA, who does that term cover? As Plaintiffs note, statutes should not be construed as to make words superfluous. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

The Response Contradicts the Complaint and Defendants' Contracts.

Plaintiffs' Response contradicts their Complaint, which alleges that:

- Defendants "were compensated for and profited from their work with and on behalf of the CIA." ECF No. 1 ¶ 66.
- Defendants acted "pursuant to contracts they executed with the CIA." *Id*. ¶ 18.
- Defendants' purported conduct was undertaken at the request of, and pursuant to the supervision and control of, the CIA and the United States Department of Justice ("DOJ"). *See, e.g., id*. ¶¶ 1-2, 12-13, 21-24, 30, 32, 34, 39, 42-45, 59, 62-63. For example:
  - "[T]he White House" made the decision to transfer full responsibility for the interrogation of the first detainee to the CIA. *Id*. ¶ 35.
  - The DOJ's Office of Legal Counsel authorized the interrogation techniques allegedly used on Plaintiffs. *Id*. ¶ 45.

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- Defendants' purported creation, design, consultation, and advice as to implementation of approved interrogation techniques were all done "under color of law," and at the CIA's behest. *See, e.g.*, *id.* ¶¶ 16, 168-69, 174, 182.

Defendants' contracts with the CIA make it clear that Defendants were not "hired to perform limited repair tasks," or under contract to deliver an unsupervised work product. ECF No. 84. For example, a statement of work for Defendant Mitchell states that "Sponsor has need for psychologists who are trained and experienced in conducting psychological assessments and applied research in high-risk operational settings ***to provide consultation and training in the area of operational assessment***." ECF No. 84-1 at U.S. Bates 000073 (emphasis added).

Senator Harkin's statement that the MCA immunizes "contractors with the CIA" therefore does not conflict with the plain language of the statute. *See* 152 Cong. Rec. S10, 407 (September 28, 2006). Rather, his statement is consistent with Representative Sensenbrenner, a proponent, that the MCA would grant immunity to anyone "hired by the United States Government to try to find out whom they are planning on blowing up next." 152 Cong. Rec. H7, 947-48 (September 29, 2006).

Plaintiffs' remaining argument—*i.e.*, that Defendants acted "under color of law" as private individuals ***with*** state officials for purposes of ATS jurisdiction, but not as agents ***on behalf of*** the Government—both fails to address the facts of this case and ignores the allegations in Plaintiffs' Complaint as well as the Defendants' contracts with the CIA. *See, e.g.*, ECF No. 1 ¶ 66 ("Defendants were compensated for and profited from their work with and ***on behalf of*** the CIA.") (emphasis

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added); *see also* ECF No. 84. A closer reading of *Doe v. Saravia* shows that agency concepts are more closely related to the "color of law" analysis than Plaintiffs admit—as the court looked to evidence of financial, logistical, and official institution support to find "Saravia acted ***under apparent authority*** and color of law." 348 F. Supp. 2d 1112, 1150-51 (E.D. Cal. 2004) (emphasis added).

Plaintiffs themselves allege Defendants' conduct was undertaken "on behalf of" the CIA, pursuant to U.S. Government control and supervision, and "under color of law." Defendants were "agents" of the U.S. at all relevant times.[2]

PLAINTIFFS WERE DETERMINED BY THE UNITED STATES TO HAVE BEEN PROPERLY DETAINED AS ENEMY COMBATANTS

Plaintiffs misconstrue case law and ignore statutory and legislative history to argue that Plaintiffs cannot have been "determined by the United States to have been properly detained as [] enemy combatant[s]" without a Combatant Status Review Tribunal ("CSRT") or an Unlawful Enemy Combatant Review Board ("UECRB"). ECF No. 120 at 10. In so doing, Plaintiffs repeatedly cite a truncated passage from *Boumediene v. Bush*, 553 U.S. 723 (2008), for the proposition that a CSRT is required for an enemy combatant designation to become final: "CSRTs were established to review the 'Executive's battlefield determination that the detainee is an enemy combatant.'" *Id*. at 10, 14. The ***full*** quotation reads:

> To determine the necessary scope of habeas corpus review, therefore, we must assess the CSRT process, the mechanism through which

[2] Plaintiffs incorrectly assert Defendants' first motion to dismiss claimed immunity under the Federal Tort Claims Act, citing to their own briefing (*see* ECF No. 27).

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> petitioners' designation as enemy combatants became final. Whether one characterizes the CSRT process as direct review of the Executive's battlefield determination that the detainee is an enemy combatant—as the parties have and as we do—or as the first step in the collateral review of a battlefield determination makes no difference in a proper analysis of whether the procedures Congress put in place are an adequate substitute for habeas corpus. What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.

553 U.S. at 783. *Boumediene* addressed the procedural protections afforded detainees to determine the necessary scope of ***habeas corpus review***; it did not address the required determination under 28 U.S.C. § 2241(e)(2). The Court noted that a CSRT was the mechanism by which the designation of petitioners as enemy combatants became final. *Id*. It did not hold a CSRT was required to determine enemy combatant status; explain what it meant for such status to become "final"; or hold that such review and finality are required for § 2241(e)(2).

<u>*Habeas Corpus* Decisions Are Not Relevant to the Issue Here</u>

Plaintiffs do not address § 2241(e)(2), instead focusing on *habeas* cases such as *Al Maqaleh v. Gates*, 605 F.3d 84, 96 (D.C. Cir. 2010), and *al-Marri v. Wright*, 487 F.3d 160, 173 (4th Cir. 2007), and fail to address the distinct issues presented by those cases. The pertinent question there is not whether the detainee was "determined by the United States to have been properly detained as an enemy combatant," but whether the status determination was ***correct*** so the military could continue to hold the detainee. That inquiry addresses whether there was sufficient evidence/process to determine the individual was, in fact, an "enemy combatant."

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The operative question in this § 2241(e)(2) case, as discussed in *Jawad v. Gates*, 832 F.3d 364 (D.C. Cir. 2016) and *Al Janko v. Gates*, 741 F.3d 136 (D.C. Cir. 2014), is whether Plaintiffs' ***initial detentions*** were determined to be proper—not whether the determination that Plaintiffs were "enemy combatants" was correct. As *Al Janko* explains, a "properly detained" enemy combatant is not someone who was "correctly" ***determined*** to be an enemy combatant, but one who was properly ***detained***. 741 F.3d 136 at 143-44.

Plaintiffs ignore that distinction, and rely on a vacated opinion in a factually-distinguishable habeas case, *al-Marri v. Wright*, 487 F.3d 160, 173 (4th Cir. 2007). Plaintiffs misleadingly state the decision was reversed on "other grounds," ECF No. 120 at 11, and fail to acknowledge that the panel opinion on which Plaintiffs rely was vacated by an *en banc* 4th Circuit court, which decided the case without addressing the MCA, let alone § 2241(e)(2). *Pucciarelli*, 534 F.3d at 216.[3] As a result, *al-Marri* has no precedential value and cannot support Plaintiffs' argument.

To the extent the vacated *al-Marri* opinion states that the necessary determination under § 2241(e)(2) is one by a CSRT or military tribunal that the detainee has been "properly [as in "correctly"] classified" as an enemy combatant, it is incorrect and not supported by case law or legislative history. *See Al Janko*,

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[3] The case was vacated and remanded as moot when the Solicitor General sought to release the petitioner into Attorney General custody. *al-Marri v. Spagone*, 555 U.S. 1220 (2009).

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741 F.3d at 143-44 (section 2241(e)(2) "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."); 152 Cong. Rec. S10, 403 (September 28, 2006) (statement of Sen. Cornyn) ("the language of (e)(2) focuses on the ***propriety of the initial detention***. [. . .] 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.") (emphasis added).

Section 2241(e)(2) Does Not Require Review by a CSRT or Tribunal

Defendants do not dispute that a CSRT is one way to show that a detainee was properly detained. But Plaintiffs seek to add a "tribunal" ***requirement*** that is not found in § 2241(e)(2); is not supported by case law; and is contradicted by the legislative and statutory history. Despite claiming support by a "wall of precedent," Plaintiffs offer no such support. For example, *Al-Zahrani v. Rodriguez* offers no analysis of the required determination under § 2241(e)(2), but simply recites:

> [Appellants' sons] were detained at the United States military base at Guantanamo Bay, Cuba, as "enemy combatants." In 2004, under the then-current procedure of the United States military, Combatant Status Review Tribunals reviewed the detention of the two and confirmed the earlier determination that both detainees were enemy combatants.

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669 F.3d 315, 317 (D.C. Cir. 2012). *Al-Zahrani* does not stand for the proposition a CSRT was required for the MCA to bar jurisdiction. If anything, the mention of an earlier "enemy combatants" determination ***supports*** the position that, for purposes of § 2241(e)(2), review by a CSRT or other tribunal is ***not*** required.

Similarly, *Allaithi v. Rumsfeld* offers no support for Plaintiffs' statement that "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." ECF No. 120 at 13. *Allaithi* addressed whether government officers were acting within scope of their employment such that the plaintiffs' claims had to be brought pursuant to the FTCA and not the ATS. 753 F.3d at 1330. In fact, *Allaithi* explicitly addressed only detention and treatment issues related to the period after plaintiffs' CSRT clearance. *Id.*

Case law and legislative history make it clear that the statutory language does not require, and Congress did not intend it to require, a determination by a CSRT or similar tribunal for purposes of § 2241(e)(2). The statements of Senators Cornyn and Sessions are consistent with the MCA. *See* 152 Cong. Rec. S10,403 (September 28, 2006) (Sen. Cornyn) ((e)(2) "eliminates the requirement that the DC Circuit review a CSRT, or that a CSRT even be held, before nonhabeas actions are barred."); *id*. at S10,404 (Sen. Sessions); *Al Janko*, 741 F.3d at 141 ("detention of aliens as enemy combatants is an exclusively executive function."); *Hamad v. Gates*, 732 F.3d 990, 1003 (9th Cir. 2013) ("Congress's consistent intent was to channel and narrowly limit detainees' lawsuits of all sorts.").

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Plaintiffs argue—relying solely on the vacated *al-Marri* decision—that if the CIA can make the determination that an alien was properly detained as an enemy combatant and review by a tribunal is not required, the language "is awaiting such determination" becomes meaningless. ECF No. 120 at 14. There is little case law interpreting what "awaiting such determination" means, but Plaintiffs argue to an unsupportable extreme. The CIA's ability to make the determination an alien has been properly detained leaves a period between capture and an assessment of the propriety of detention in which a detainee would be "awaiting such determination."

Determinations as to the Plaintiffs

Multiple tribunals determined that Salim was properly detained; his later reclassification is not relevant to this issue. The CIA also determined it was proper to detain Soud based on his membership in a terrorist group—as stated in *Al Janko*, 741 F.3d at 143-44, he met "the AUMF's criteria for enemy-combatant status" even though the phrase "enemy combatant" was not used. Finally, Rahman was detained on the basis that he was "a suspected Afghan extremist associated with the [HIG] organization," and he is characterized as an "enemy combatant" pursuant to the DoD and AUMF's criteria. ECF No. 106-11 at U.S. Bates 1278. To the extent the CIA's determination that Rahman was properly detained as an enemy combatant was not formalized at a time before CSRTs were created, Rahman was awaiting a more formal determination at the time of his death.

This Court lacks jurisdiction over Plaintiffs' claims, and this case must be dismissed. *Al Janko*, 741 F.3d at 143-44.

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DATED this 27th day of December, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2016, I electronically filed the foregoing document 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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