

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARK MUNNS, et al.,
Plaintiffs,

No. 2:10-cv-00681-MCE-EFB

v.

MEMORANDUM AND ORDER

HILLARY DIANE RODHAM CLINTON,
et al.,
Defendants.

-----oo0oo-----

Presently before the Court is a Motion to Dismiss ("Motion") Plaintiffs' First Amended Complaint ("FAC") filed by Defendants Hillary Diane Rodham Clinton and Jennifer Foo (collectively "Defendants") in their official capacities as Secretary of State of the United States and as an employee of the Office of the Secretary of State, respectively. Defendants already successfully moved to dismiss (hereafter "First Motions") Plaintiffs' original Complaint ("Original Complaint"), see Munns v. Clinton, ___ F. Supp. 2d ___, 2011 WL 4566004 (E.D. Cal.) ("Original Order"), and now, Plaintiffs' FAC is DISMISSED without leave to amend for essentially the same reasons.

1 **BACKGROUND**

2 **A. Factual Background**

3
4 Given the substantial similarity between the Original
5 Complaint and the FAC, the Court's iteration of the facts here is
6 taken primarily from its Original Order granting Defendants'
7 First Motions, motions they filed in both their individual and
8 official capacities. Original Order, 2011 WL 4566004, *1-4.
9 Unless material differences between the pleadings are
10 specifically identified, all of the below facts were alleged in
11 both the Original Complaint and the FAC. The Court has chosen to
12 detail the facts in this manner because, as will become clear
13 below, Plaintiffs have not materially amended their Complaint and
14 the Court's resolution of Defendants' First Motions in its
15 Original Order is thus still directly on point here.

16 The original Plaintiffs were the families ("Family
17 Plaintiffs") of three men, Joshua Munns, John Young and John
18 Cote, who were killed in Iraq in 2008 ("Decedents"). Decedents
19 were employed by a private contractor, Crescent Security
20 ("Crescent"), that performed security functions under contract
21 with the United States Government.¹

22
23 ¹ According to the FAC, at some point prior to the events
24 giving rise to Plaintiffs' claims, the Government "created an
25 'authorized' list of private contractors." See, e.g., FAC, ¶ 3.
26 The Government purportedly "oversee[s]" those private
27 contractors, including Crescent, and the agreements entered into
28 by the contractors and their employees. Id. Though Plaintiffs'
attempt to implicate the Government in the FAC is more explicit
than their attempt in their Original Complaint, Plaintiffs
nonetheless made similar allegations that the employment
contracts were "authorized" by the Secretary of State even in
their initial pleading. Original Complaint, p. 12, ¶ 19.

1 In addition, Gary D. Bjorlin, a former Marine who is
2 presently classified as a contractor, has now also been joined as
3 a Plaintiff. FAC, ¶ 9. According to the FAC, Mr. Bjorlin
4 previously served in Iraq. Id.

5 The events underlying the Complaint were triggered in 2006
6 when Crescent assigned Decedents and four other men to guard a
7 one and one-half mile long military convoy traveling from Kuwait
8 to Southern Iraq.² According to Plaintiffs, Crescent issued the
9 men substandard equipment, ordered another security team that was
10 supposed to assist in the duty to stand down, and failed to
11 provide the men proper instructions or job guidelines. In
12 addition, Iraqi security team members, who were also Crescent
13 employees, failed to appear for the assignment, leaving only the
14 seven men to guard the convoy.

15 While under Decedents' guard, the convoy stopped at an Iraqi
16 checkpoint. After three to five minutes of waiting, a white
17 pickup truck approached and shot at the rear vehicle, which was
18 not occupied by any of the Decedents. Decedents themselves,
19 however, were also stopped by Iraqi men in police uniforms. They
20 were stripped of their communications gear and weapons, bound and
21 forced into the backs of different vehicles. Plaintiffs allege
22 one of the Iraqi officers was a former Crescent employee and that
23 Crescent's Iraqi interpreter was also working with the group
24 orchestrating the hijacking.

25 ///

27 ² Plaintiffs note in the FAC that "[t]he war in Iraq was
28 Id., ¶ 16.

1 When the Iraqi men eventually received a phone call
2 notifying them that the United States military was en route, the
3 men packed up and left with Decedents as captives. Other
4 individuals were left behind and were able to relay the
5 aforementioned facts. Plaintiffs have since been told, among
6 other things, that the kidnapping took place in full view of the
7 United States military, but that the Government did nothing to
8 intercede.

9 According to Plaintiffs, from this point forward, "federal
10 officials who were assigned to assist the families while they
11 sought the return of their adult children, such as Defendant
12 Jennifer Foo, actually worked to impede the families' work and
13 created 'government policies' to block their efforts to save
14 their sons." Original Complaint, p. 7, ¶ 7; see also FAC, ¶ 24.
15 Members of the State Department, including Defendant Foo, also
16 allegedly: 1) failed or refused to relay information to
17 Plaintiffs; 2) advised members of the families they should not
18 meet with an individual³ who had reportedly obtained information
19 on the location and condition of the missing men; 3) refused to
20 distribute or blocked the distribution of leaflets asking for
21 information about the hostages; 4) told families the FBI was
22 pursuing leads that would not be described; and 5) claimed to
23 have relevant information that could not be relayed to Plaintiffs
24 because it was "classified."

25 ///

26 ///

27
28 ³ In the FAC, Plaintiffs clarify that this individual was a
fellow United States citizen. FAC, ¶ 25.

1 More specifically, Plaintiffs allege, among other things,
2 that they had collected funds and prepared 90,000 flyers (printed
3 in English and Iraqi) for distribution in the Middle East. These
4 flyers offered a reward for information pertaining to the missing
5 men, but the State Department blocked their distribution.
6 Plaintiffs contend in their FAC that "[o]ther families, whose
7 children were not under contract with the State Department or the
8 DOD, were allowed to freely negotiate for the return of their
9 children" and that "there is no provision in the contracts signed
10 by the decedents that provided a waiver of any of the private
11 citizen's rights." Id., ¶ 27.

12 In addition, though Plaintiffs were provided with audio and
13 video "proofs of life," the United States refused to make contact
14 with the kidnapers under the policy that "America does not
15 negotiate with terrorists." Original Complaint, p. 9, ¶ 12; FAC,
16 ¶ 29. In the FAC, Plaintiffs contend "no similar policy was
17 applied to other citizens during the same period of time." FAC,
18 ¶ 29. In any event, Plaintiffs dispute whether the United States
19 actually considers the kidnapers in this case to be "terrorists"
20 or simply considers them "common criminals."

21 After the families saw little progress in either the
22 location or rescue efforts, the United States Drug Enforcement
23 Administration ("DEA") interceded in the matter on behalf of a
24 DEA employee who was a family member of one of the missing men.
25 The DEA determined that the kidnapers had given up trying to
26 negotiate with the United States because the kidnapers believed
27 they had no "negotiating partner."

28 ///

1 As an apparent last resort, the kidnappers eventually cut off one
2 of each Decedents' fingers, later obtained by the DEA, and still
3 the United States would not negotiate. Decedents were thereafter
4 brutally beaten, tortured and beheaded. Only then, after their
5 deaths, did the United States finally negotiate for the return of
6 Decedents' bodies.

7 Plaintiffs contend that, throughout this ordeal, they were
8 provided very little information by either the United States
9 Government or Crescent. Plaintiffs still have not been given
10 employment contracts, life insurance information or other related
11 employment documents.

12 In addition, Plaintiffs allege Crescent has improperly
13 withheld life insurance benefits that are due the families and
14 has required the families to sign releases of liability in order
15 to receive those funds. Plaintiffs believe they are entitled to
16 these life insurance proceeds and potentially to back pay due the
17 kidnapped men, and it is their position that "Defendant Secretary
18 of State is ultimately responsible for its contractor's
19 nonpayment and retention of private benefits." FAC, ¶ 43. In
20 the FAC, Plaintiffs clarify that they value these benefits and
21 back pay at over \$100,000 per Decedent. Id., ¶¶ 24, 36-37.

22 Also new to their FAC, though discussed by the parties in
23 the context of Defendants' First Motions, are Plaintiffs'
24 allegations that "it is Defendants' policy not to provide
25 benefits for contracts such as those detailed in the U.S. Army
26 Material Command..., Army Pamphlet 715-18." Id., ¶ 46.

27 ///

28 ///

1 More specifically, Plaintiffs contend Defendants "provide no
2 payment under the Defense Base Act ("DBA"), [42 U.S.C. § 1651, et
3 seq.]," which incorporates the Longshore and Harbor Workers'
4 Compensation Act ("LHWCA") and which "affords compensation
5 benefits for the injury or death of any employee engaged in any
6 DBA-covered employment under certain contracts." Id., ¶ 47.
7 Plaintiffs likewise aver that Defendants "provide no payment
8 under the War Hazards Compensation Act ("WHCA") [, 42 U.S.C.
9 § 1701, et seq.,]..., which provides compensation for employees
10 in the event of war hazards." Id., ¶ 48.

11 Aside from benefits or payments to which Plaintiffs claim
12 they are entitled, they also again allege that the Secretary of
13 State has "refused to provide, or was incapable of providing,
14 even the most basic information, such as copies of Crescent
15 Security contracts, Lloyd's of London life insurance information"
16 or other documents. Original Complaint, p. 11, ¶ 17; FAC, ¶ 35.⁴
17 In light of the lack of information received from the Government,
18 Plaintiffs have purportedly had to rely on third parties for
19 information.

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26

27 ⁴ In the FAC, Plaintiffs contend these documents are private
28 property under Defendants' control. FAC, ¶ 37. According to
Plaintiffs, the "value or costs of reproducing these
documents...[is] less than \$20.00." Id.

1 For example, Plaintiffs allege they heard rumors that the
2 kidnapping may have been motivated by revenge for incidents that
3 occurred as a result of the passage of the Coalition Provisional
4 Authority ("CPA") Order 17, which is allegedly a State Department
5 regulation creating absolute immunity for private contractors
6 killing anyone in Iraq.⁵ Plaintiffs also garnered information
7 from the book "Big Boy Rules, America's Mercenaries Fighting in
8 Iraq," by Steve Fainaru.

9 Ultimately, as a result of the above events, Plaintiffs
10 initiated this suit alleging causes of action for: 1) declaratory
11 relief; 2) Procedural Due Process Clause violations; and
12 3) violations of the Takings Clause of the United States
13 Constitution. The Court also interpreted Plaintiffs' Original
14 Complaint to allege a claim for injunctive relief under the First
15 Amendment. See Original Order, 2011 WL 4566004, *9 n.5.

16 More specifically, in their Original Complaint, Plaintiffs
17 asked the Court to make the following declarations:

18 Whether CPA (Coalition Provision Authority) Order 17,
19 was and is a proper application of government authority
20 under the United States Constitution when it provided
21 for a complete waiver of all laws, including those of
22 Iraq and those enacted by the United States Congress.
23 Complaint, p. 15, ¶ 26(a).

24 ⁵ For purposes of this instant Motion, and because it will
25 not change the Court's analysis, the Court will accept
26 Plaintiffs' interpretation of Order 17 as true. The Court notes
27 however, that a plain reading of the Order undermines Plaintiffs'
28 interpretation. According to the Government, and consistent with
this Court's own reading of the directive, Order 17 appears to
exempt contractors only from Iraqi legal process not from all
laws of this country as well. See Motion, Attachment 2, CPA
Order Number 17, § 4.

1 Whether as a consequence of CPA Order 17, Iraq became a
2 "free fire zone" where contractors were allowed to shot
3 [sic] at anything with complete impunity t [sic]
whenever they felt, in their sole discretion,
physically threatened. Id., p. 16, ¶ 26(b).

4 Whether CPA Order 17 gave rise to and helped foster the
5 contractor and subcontractor culture in Iraq, where
6 companies like Crescent literally sprang up overnight
7 and were nothing more than a folding table, some
8 stationary, and a couple beat-up trucks with AK-47
machine guns, but sanctioned to do business on behalf
of the United States and listed by the Secretary of
State and Department of Defense as legitimate business
entities. Id., p. 16, ¶ 26(c).

9 Whether the numbers and statistics have been so skewed
10 throughout the Iraq conflict that no one in the Office
11 of the Secretary State can really tell Plaintiffs how
12 much money we spent and how many contractors employed
by the United States have been lost; in essence, who is
doing the fighting for the United States. Id., p. 16,
¶ 26(d).

13 [W]hat the parameters are of the "War on Terror" and
14 who exactly the United States [sic] is fighting. Id.,
p. 17, ¶ 26(e).

15 [H]ow far federal immunity extends to a private
16 contractor like Crescent or an American Citizen who is
17 recruited and serves in this war under a private
18 contract that is let through the Secretary of State.
19 Further, what inalienable Constitutional rights are
20 lost or given up by a private citizen, such as the
Plaintiffs' sons, when he or she executes such a
contract and whether it is a public document that
should be made available to the families of those
citizens and the public? Id., p. 17, ¶ 26(f).

21 Within the "War on Terror" how far does a family's
22 Constitutional and Due Process Rights extend? Id.,
p. 17, ¶ 26(g).

23 Whether the families of contractors were legally
24 prohibited from negotiating with the kidnappers, who
25 were referred to by President as "common criminals" -
26 in other words, not "terrorists," and what are the
27 origins of this "official policy," and why did it not
28 apply to similarly situated Iraqis. Whether there is
an official policy in the United States government that
"we do not negotiate with terrorists." Id., p. 17,
¶ 26(h).

1 What recovery may be made by a family or surviving
2 spouse of a private contractor employed in the 'War on
3 Terror?' And how does one recover under the employment
4 contracts that no one has ever seen, or receive life
insurance benefits taken out by the companies in the
names of the contractors without anyone's knowledge?"
Id., p. 18, ¶ 26(I).

5 In their FAC, Plaintiffs have somewhat tempered their above
6 requests, and now Plaintiff Bjorlin only seeks declarations
7 regarding:

8 Whether CPA...Order 17, was and is a proper application
9 of government authority under the United States
10 Constitution when it provided for a complete waiver of
11 all laws, including those of Iraq and those enacted by
the United States Congress and the rights found in the
United States Constitution.

12 Whether the families of private contractors should be
13 prohibited from negotiating with the kidnappers who are
deemed "common criminals" - in other words, kidnappers
who are not defined as "terrorists" by the Defendants.

14 FAC, ¶ 50.

15 In asking the Court to consider the above issues, Plaintiff
16 Bjorlin clarifies that he "does not challenge the conduct of the
17 war in Iraq, or the various policies that apply to contractors
18 generally." Id. To the contrary, Mr. Bjorlin avers he "is a
19 citizen who supports the United States foreign policy decisions
20 in the region." Id., ¶ 51. Mr. Bjorlin therefore "does not
21 challenge the Executive branch and the Congressional right to
22 handle foreign policy as it relates to the 'war on terror.'" Id.,
23 ¶ 52. Instead, Plaintiff Bjorlin believes only "that CPA
24 Order 17 is an Unconstitutional exercise of Executive Branch
25 authority because it authorizes a narrowly defined group of
26 individuals, namely security contractors, to circumvent the
27 authority of Congress, the Courts, and the Constitution." Id.

28 ///

1 While he "does not challenge the political decisions of the
2 Executive Branch or Congress," Mr. Bjorlin nonetheless believes
3 he "has a right to know his future duties and responsibilities
4 under CPA Order 17, or any related order with similar language in
5 which he could be ordered to kill or injure another human being
6 in the course of carrying out his contract." Id., ¶ 51.

7 Plaintiffs have made additional modifications to their other
8 causes of action as well. For example, in their FAC, as opposed
9 to their Original Complaint, Plaintiffs make clear that they are
10 indeed pursuing First Amendment claims arising out of the State
11 Department's refusal to permit family members to meet with a
12 fellow American citizen who reportedly had information regarding
13 the missing men and out of the Government's decision to block the
14 distribution of Plaintiffs' flyers. See id., ¶¶ 1, 54-59. In
15 addition, while in the Original Complaint Plaintiffs sought
16 relief under the Procedural Due Process Clause on the basis that
17 "Defendants deprived Plaintiffs of their constitutionally
18 protected interest in the lives of their children," Original
19 Complaint, p. 19, ¶ 31, Plaintiffs now also argue that Defendants
20 are withholding Decedents' private property (i.e., insurance
21 benefits, back pay, and benefits owed under the DBA, LHWCA and
22 WHCA), FAC, ¶ 61.

23 Similarly, in their Original Complaint, Plaintiffs based
24 their Takings cause of action on the theory that the Government
25 is prohibited from taking "the lives of the Plaintiffs' children
26 and the work they performed for public use without just
27 compensation." Original Complaint, p. 20, ¶ 35.

28 ///

1 Plaintiffs also alleged there, “[t]o the extent that said
2 Plaintiffs’ sons’ labor was converted to public use, Plaintiffs
3 [were] entitled to just compensation for their property.” Id.
4 In their FAC, however, Plaintiffs have limited their Takings
5 claim to the latter theory and now argue solely that Decedents’
6 labor and private benefits (including insurance proceeds) were
7 taken in violation of the Constitution. FAC, ¶ 66.
8 Plaintiffs thus seek “just compensation for the value of the
9 private property seized for public use” or, alternatively,
10 damages. Id., ¶ 67.

11 Finally, Plaintiffs have added two defendants, Lloyds of
12 London (“Lloyds”) and CNA Financial Corporation (“CNA”)
13 (collectively “Insurance Defendants”), as well. Lloyds
14 purportedly issued life insurance policies to Crescent insuring
15 the lives of Decedents and listing Family Plaintiffs as
16 beneficiaries. Id., ¶ 12. CNA similarly issued life insurance
17 policies, which, contrary to the Lloyds policies, were issued
18 directly to Decedents, but were also payable to the Family
19 Plaintiffs. Id., ¶ 13. Plaintiffs allege contract-related
20 causes of action against these new defendants, who have not yet
21 appeared in this Court.

22

23 **B. Procedural Background**

24

25 Plaintiffs initiated this action on March 22, 2010.
26 Defendants subsequently moved to dismiss Plaintiffs’ Original
27 Complaint on March 7, 2011, arguing as to Plaintiffs’ claims
28 against Defendants in their official capacities that:

1) Plaintiffs' claims raised nonjusticiable political questions;
2) Plaintiffs lacked standing to seek a declaration or an
injunction because they failed to allege an imminent future
injury; 3) Plaintiffs likewise failed to satisfy the
preconditions for injunctive and declaratory relief because they
did not allege a likelihood of future injury; 4) the Court should
have declined to exercise its discretion to issue injunctive or
declaratory relief; 5) sovereign immunity barred Plaintiffs'
claims for compensation; 6) Plaintiffs failed to state a claim
under the Takings Clause; and 7) Plaintiffs failed to properly
serve Defendants. Defendants also challenged Plaintiffs' claims
against them in their individual capacities on a variety of
related and unrelated grounds.

The Court granted Defendants' First Motions with leave to
amend holding, among other things, that: 1) Plaintiffs' claims
for injunctive and declaratory relief (essentially their
declaratory relief, Procedural Due Process and First Amendment
causes of action) were nonjusticiable; 2) Plaintiffs lacked
standing to pursue those same claims; 3) Plaintiffs failed to
plead the necessary imminent harm to properly state their
injunctive and declaratory relief causes of action;
4) Plaintiffs' monetary claims (essentially their Takings cause
of action) were barred by the Government's sovereign immunity;
and 5) Plaintiffs failed to state a claim under the Takings
Clause as a matter of law. The Court also ordered Plaintiffs to
properly serve all Defendants within ten (10) days of filing the
FAC.

///

1 Plaintiffs thereafter amended their Complaint as just
2 discussed and filed the FAC with the Court.⁶ Now before the
3 Court is Defendants' Motion seeking dismissal of Plaintiffs'
4 claims alleged against them in their official capacities on
5 essentially the same grounds as they raised in their First
6 Motions. All parties appeared before this Court through their
7 respective counsel on Friday, February 24, 2012. For the
8 following reasons, Defendants' Motion is GRANTED without leave to
9 amend.

10
11 **STANDARD**

12 **A. Motion to Dismiss for Lack of Subject Matter**
13 **Jurisdiction Under Federal Rule of Civil Procedure**
14 **12 (b) (1) .⁷**

15 Federal Courts are presumptively without jurisdiction over
16 civil actions, and the burden of establishing the contrary rests
17 upon the party asserting jurisdiction. Kokkonen v. Guardian Life
18 Ins. Co. of America, 511 U.S. 375, 377 (1994). Lack of subject
19 matter jurisdiction is never waived and may be raised by either
20 party or the Court at any time. Attorneys Trust v. Videotape
21 Computer Prod., Inc., 93 F.3d 593, 594-95 (9th Cir. 1996).

22 ///

23 _____
24 ⁶ In granting Defendants' First Motions to Dismiss, the
25 Court permitted Plaintiffs forty-five (45) days in which to
26 amend. Plaintiffs' amendment on the forty-sixth (46) day was
27 thus untimely. The Court nonetheless declines any invitation to
28 dismiss Plaintiffs' FAC on this ground and will address the
parties' substantive arguments instead.

⁷ All further references to "Rule" or "Rules" are to the
Federal Rules of Civil Procedure unless otherwise noted.

1 In moving to dismiss for lack of subject matter jurisdiction
2 pursuant to Rule 12(b)(1), the challenging party may either make
3 a facial attack on the allegations of jurisdiction contained in
4 the complaint or can instead take issue with subject matter
5 jurisdiction on a factual basis. Thornhill Publ'g Co. v. Gen.
6 Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979);
7 Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3rd
8 Cir. 1977). If the motion constitutes a facial attack, the Court
9 must consider the factual allegations of the complaint to be
10 true. Williamson v. Tucker, 645 F.2d 404, 412 (5th Cir. 1981);
11 Mortensen, 549 F.2d at 891. If the motion constitutes a factual
12 attack, however, "no presumptive truthfulness attaches to
13 plaintiff's allegations, and the existence of disputed material
14 facts will not preclude the trial court from evaluating for
15 itself the merits of jurisdictional claims." Thornhill, 594 F.2d
16 at 733 (quoting Mortensen, 549 F.2d at 891). The Court may
17 properly consider extrinsic evidence in making that
18 determination. Velasco v. Gov't of Indon., 370 F.3d 392, 398
19 (4th Cir. 2004).

20
21 **B. Motion to Dismiss for Failure to State a Claim Under**
22 **Rule 12(b)(6).**

23 On a motion to dismiss for failure to state a claim under
24 Rule 12(b)(6), all allegations of material fact must be accepted
25 as true and construed in the light most favorable to the
26 nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336,
27 337-38 (9th Cir. 1996).

28 ///

1 Rule 8(a)(2) "requires only 'a short and plain statement of the
2 claim showing that the pleader is entitled to relief,' in order
3 to 'give the defendant fair notice of what the [...] claim is and
4 the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly,
5 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41,
6 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to
7 dismiss does not require detailed factual allegations. However,
8 "a plaintiff's obligation to provide the grounds of his
9 entitlement to relief requires more than labels and conclusions,
10 and a formulaic recitation of the elements of a cause of action
11 will not do." Id. (internal citations and quotations omitted).
12 A court is not required to accept as true a "legal conclusion
13 couched as a factual allegation." Ashcroft v. Iqbal, 556 U.S.
14 662, 129 S. Ct. 1937, 1950-51 (2009) (quoting Twombly, 550 U.S.
15 at 555). "Factual allegations must be enough to raise a right to
16 relief above the speculative level." Twombly, 550 U.S. at 555
17 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal
18 Practice and Procedure § 1216 (3d ed.2004) (stating that the
19 pleading must contain something more than "a statement of facts
20 that merely creates a suspicion [of] a legally cognizable right
21 of action.")).

22 Furthermore, "Rule 8(a)(2) ... requires a 'showing,' rather
23 than a blanket assertion, of entitlement to relief." Id.,
24 550 U.S. at 556 n. 3 (internal citations and quotations omitted).
25 Thus, "[w]ithout some factual allegation in the complaint, it is
26 hard to see how a claimant could satisfy the requirements of
27 providing not only 'fair notice' of the nature of the claim, but
28 also 'grounds' on which the claim rests."

1 Id. (citing 5 Charles Alan Wright & Arthur R. Miller, *supra*, at
2 § 1202). A pleading must contain “only enough facts to state a
3 claim to relief that is plausible on its face.” Id. at 570. If
4 the “plaintiffs ... have not nudged their claims across the line
5 from conceivable to plausible, their complaint must be dismissed.”
6 Id. However, “[a] well-pleaded complaint may proceed even if it
7 strikes a savvy judge that actual proof of those facts is
8 improbable, and ‘that a recovery is very remote and unlikely.’”
9 Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

10 11 **C. Leave to Amend**

12
13 A court granting a motion to dismiss a complaint must decide
14 whether to grant leave to amend. Leave to amend should be
15 “freely given” where there is no “undue delay, bad faith or
16 dilatory motive on the part of the movant, ... undue prejudice to
17 the opposing party by virtue of allowance of the amendment, [or]
18 futility of the amendment....” Foman v. Davis, 371 U.S. 178, 182
19 (1962); Eminence Capital, LLC v. Aspen, Inc., 316 F.3d 1048, 1052
20 (9th Cir. 2003) (listing the Foman factors as those to be
21 considered when deciding whether to grant leave to amend). Not
22 all of these factors merit equal weight. Rather, “the
23 consideration of prejudice to the opposing party ... carries the
24 greatest weight.” Eminence Capital, 316 F.3d at 1052.
25 Dismissal without leave to amend is proper only if it is clear
26 that “the complaint could not be saved by any amendment.”
27 Intri-Plex Techs. v. Crest Group, Inc., 499 F.3d 1048, 1056 (9th
28 Cir. 2007) (internal citations and quotations omitted).

1 **ANALYSIS⁸**

2 **A. Individual Capacity Defendants**

3
4 Before turning to the merits of the official-capacity
5 Defendants' current Motion, the Court notes that it is undisputed
6 Defendants have not been served in their individual capacities.
7 Opposition, 3:12-15; see also Stipulation to Extend Time (ECF
8 No. 45), 2:5-6. Pursuant to this Court's Original Order,
9 Plaintiffs were directed to serve the individual capacity
10 Defendants not later than ten (10) days following the date their
11 FAC was electronically filed. 2011 WL 4566004, *28. Accordingly,
12 in both their current Motion and at oral argument, Plaintiffs had
13 no choice but to concede that the individual capacity Defendants
14 should be dismissed. See, e.g., Opposition, 3:12-15. Plaintiffs'
15 claims against both Defendants Clinton and Foo in their individual
16 capacities are thus DISMISSED without leave to amend for failure
17 to serve those Defendants in conformity with this Court's Order.⁹

18
19 _____
20 ⁸ As previously stated, Plaintiffs' Original Complaint and
21 FAC are substantially the same. Accordingly, to the extent
22 applicable here, the Court incorporates by reference its entire
23 Original Order, 2011 WL 4566004, into its current Order. The
24 Court will nonetheless cite to specific sections of its Original
25 Order at various points below, thereby making clear which
26 portions of that decision are relevant to each of the parties'
27 current arguments.

28
29 ⁹ Moreover, while Plaintiffs stood by the merits of their
30 claims against Secretary of State Clinton at the hearing before
31 this Court, Plaintiffs were unable to rebut the fact that
32 Secretary Clinton had not taken office at the time the events
33 alleged in the Complaint purportedly occurred. Even in the FAC,
34 Plaintiffs allege only that Secretary Clinton is the "acting"
35 Secretary of State, not that she was in office during the
36 underlying tragedy. FAC, ¶ 10.

1 See Fed. R. Civ. Proc. 4, 41(b); E.D. Cal. Local Rule 110.

2
3 **B. Official Capacity Defendants¹⁰**

4 **1. Plaintiff Bjorlin's Declaratory Relief Cause of**
5 **Action.¹¹**

6 Plaintiff Bjorlin alone asks this Court to issue two
7 declarations regarding the validity of CPA Order 17 and the
8 manner in which the United States handles the kidnapping of its
9 citizens by terrorists in a foreign country and/or the manner in
10 which the United States handles any subsequent negotiations with
11 those terrorists.¹² This Court already rejected the Family
12 Plaintiffs' request that it issue essentially identical
13 declarations. See Original Complaint, p. 15-17, ¶¶ 26(a) and
14 26(h); Original Order, 2011 WL 4566004, *5-19.

15 ///

16
17
18 As difficult as it is for this Court to see how Secretary Clinton
19 can be implicated in her individual capacity by events that
20 occurred prior to her appointment, given the alternative grounds
21 justifying dismissal, this Court need not speculate as to whether
22 Plaintiffs can actually state a claim against the Secretary of
23 State on these facts.

24
25 ¹⁰ The claims against Defendants in their official
26 capacities are essentially claims against the United States.
27 Kentucky v. Graham, 473 U.S. 159, 165-66 (1985); Consejo de
28 Desarrollo Economico de Mexicali, A.C. v. United States, 482 F.3d
1157, 1173 (2007); Del Raine v. Carlson, 826 F.2d 698, 703 (7th
Cir. 1987).

¹¹ Contrary to the Original Complaint, in which all
Plaintiffs sought declaratory relief, the only Plaintiff pursuing
the Declaratory Relief cause of action via this FAC is the newly
added Plaintiff Bjorlin. The Family Plaintiffs chose not to
renew their original claim in this amended pleading.

¹² It is irrelevant to this Court's decision whether the
kidnappers are deemed "terrorists" or "common criminals."

1 Accordingly, the United States now seeks dismissal of this cause
2 of action again because, as before: 1) it presents nonjusticiable
3 political questions; 2) Plaintiff Bjorlin lacks standing to seek
4 this relief; and 3) Plaintiff Bjorlin has not alleged the
5 imminent harm that is a necessary prerequisite to finding a case
6 or controversy underlying the instant claim. Defendants'
7 arguments are well-taken.

8 First, Plaintiff Bjorlin has failed to allege he has
9 standing to pursue his current declaratory relief cause of action
10 for the same legal reasons the Family Plaintiffs lacked standing
11 to pursue their original claims. As the Court stated in its
12 Original Order:

13 A plaintiff bears the burden of establishing "that he
14 has standing for each type of relief sought."
Summers v. Earth Island Inst., 555 U.S. 488, 129 S.Ct.
15 1142, 1149, 173 L.Ed.2d 1 (2009).

16 To show Article III standing for injunctive relief, a
17 plaintiff must demonstrate the existence of an
18 "imminent and actual" threat of injury that is "not
19 conjectural and hypothetical." Id. "Past exposure to
20 harmful or illegal conduct does not necessarily confer
21 standing to seek injunctive relief if the plaintiff
22 does not continue to suffer adverse effects."
23 Mayfield v. U.S., 599 F.3d 964, 970 (9th Cir.2010)
24 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555,
25 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). "Once a
26 plaintiff has been wronged, he is entitled to
27 injunctive relief only if he can show that he faces a
28 'real or immediate threat ... that he will again be
wronged in a similar way.'" Id. at 970 (quoting City
of Los Angeles v. Lyons, 461 U.S. 95, 111, 103 S.Ct.
1660, 75 L.Ed.2d 675 (1983)).

...

Under the same logic, Plaintiffs' declaratory relief
claims fail as well. The lack of a controversy of any
sufficient immediacy essentially renders Plaintiffs'
claims impermissible requests for advisory opinions:

1 The federal courts established pursuant to
2 Article III of the Constitution do not render
3 advisory opinions. For adjudication of
4 constitutional issues, concrete legal issues,
5 presented in actual cases, not abstractions
6 are requisite. This is as true of
7 declaratory judgments as any other field.
8 The difference between an abstract question
9 and a controversy contemplated by the
10 Declaratory Judgment Act is necessarily one
11 of degree, and it would be difficult, if it
12 would be possible, to fashion a precise test
13 for determining in every case whether there
14 is such a controversy. Basically, the
15 question in each case is whether the facts
16 alleged, under all the circumstances, show
17 that there is a substantial controversy,
18 between parties having adverse legal
19 interests, of sufficient immediacy an[d]
20 reality to warrant the issuance of a
21 declaratory judgment.

22 Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956,
23 22 L.Ed.2d 113 (1969) (internal citations and
24 quotations omitted). As with Plaintiffs' claims for
25 injunctive relief, their declaratory relief claims are
26 entirely premised on past harms and there are no
27 allegations within the Complaint that Plaintiffs might
28 at some point be subject to Defendants' same policies
and actions such that any live controversy warranting
future declaratory relief exists.

Original Order, 2011 WL 4566004, *20.

A review of the Complaint makes clear that Plaintiff Bjorlin
seeks relief for a threat that is "conjectural and hypothetical,"
not "imminent and actual," and that there is no "substantial
controversy, between parties having adverse legal interests, of
sufficient immediacy." First, Plaintiff Bjorlin's standing is,
in some respects, even more attenuated than was the standing of
the Family Plaintiffs because, unlike those parties, Mr. Bjorlin
has not even alleged he suffered a past harm.

///

///

///

1 To the contrary, Plaintiff Bjorlin alleges only that he
2 previously served as a contractor in Iraq, is currently
3 classified as a contractor, and that "Defendant Secretary of
4 State will foreseeably apply CPA Order 17 and/or related language
5 to Plaintiff Gary Bjorlin in the future, which negatively impacts
6 his position as a contractor." FAC, ¶¶ 29, 51. On that basis
7 alone, Plaintiff Bjorlin would have this Court believe:

8 [I]t is foreseeable that [he] may be kidnapped or
9 injured as a security contractor. Plaintiff Gary
10 Bjorlin therefore wishes to know what, if any steps,
11 the United States will take to protect him as a
12 security contractor. Specifically, whether members of
13 his family are allowed to negotiate with criminals, as
14 opposed to individuals who the United States deems to
15 be "terrorists."

16 Id., ¶ 52.

17 What Mr. Bjorlin really seeks, then, is a declaration of his
18 rights, if he elects to serve again, if he is hired by a
19 contractor, if he is shipped overseas, if CPA Order 17 is still
20 in effect or if another similar order instead governs,¹³ and,
21 with respect to the kidnapping declaration, if he is kidnapped,
22 and if he is then held hostage. Based on this logic, almost any
23 American even contemplating serving overseas could make roughly
24 the same argument.

25 ///

26 ///

27 ///

28 ///

¹³ The Government has made clear that CPA Order 17 is no longer in effect in Iraq. See Motion, p. 12 n.6.

1 Mr. Bjorlin has thus failed to allege he has
2 standing to bring this claim. See Original Order, 2011 WL
3 4566004, *20-21.¹⁴

4 Plaintiff Bjorlin (and all of the Family Plaintiffs for that
5 matter) is likewise unable to assert any form of taxpayer
6 standing to justify pursuit of his instant cause of action as
7 well. Though Plaintiffs purport to bring the FAC "on behalf of
8 themselves as individuals and as taxpayers," FAC, p. 1, and later
9 refer to their pleading as a "Taxpayer Complaint," id., p. 2,
10 this Court has already rejected reliance on taxpayer standing in
11 this context. See Original Order, 2011 WL 4566004, *21 (citing
12 Valley Forge Christian College v. Americans United for Separation
13 of Church and State, Inc., 454 U.S. 464, 477 (1982);
14 DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 347 (2006)).

15 Regardless, even if Mr. Bjorlin had standing to seek the
16 above declarations, this Court has already nonetheless determined
17 his requested declarations raise nonjusticiable political
18 questions. Original Order, 2011 WL 4566004, *5-12. While
19 Plaintiff Bjorlin has attempted to rectify the massive over-
20 breadth of the requests in the Original Complaint by narrowing
21 the relief sought here, and while he disclaims any intent to
22 challenge United States foreign policy or to embarrass the
23 Government, Mr. Bjorlin still ultimately seeks relief that this
24 Court lacks the power to grant.

25
26 ¹⁴ For this same reason, Mr. Bjorlin's claim is also not yet
27 ripe. Original Order, 2011 WL 4566004, *21 (citing Hodgers-
28 Durgin v. De La Vina, 199 F.3d 1037, 1044 (9th Cir. 1999)
("["F]ailure to establish a likelihood of future
injury...renders...[claims] for declaratory relief unripe.").

1 Moreover, Plaintiffs' intent in bringing this suit is
2 unfortunately irrelevant to whether the questions raised in the
3 Complaint are justiciable. Indeed, intentions aside, Plaintiff
4 Bjorlin still seeks the judgment of this Court regarding how the
5 Government employs contractors overseas and how it handles
6 kidnappings, or permits families to intervene in kidnappings,
7 taking place amidst an international conflict in a war zone.
8 Accordingly, for the same reasons already stated in its Original
9 Order, Plaintiff's current Declaratory Relief cause of action is
10 nonjusticiable as well. Id.

11 Moreover, it has become clear to this Court, both upon its
12 review of all papers filed in this action and its consideration
13 of the parties' oral arguments, that Plaintiff Bjorlin will be
14 unable to amend the current pleading to properly state a claim
15 for the type of declaratory relief sought. Accordingly,
16 Plaintiff Bjorlin's claim for declaratory relief is DISMISSED
17 without leave to amend.

18
19 **2. Plaintiffs' First Amendment Cause of Action.**
20

21 By way of their First Amendment cause of action, Plaintiffs
22 "seek an injunction against Defendants' future violations of
23 rights to Freedom of Expression and Assembly guaranteed by the
24 United States Constitution." FAC, ¶ 59. Plaintiffs also appear
25 to seek damages as compensation for losses sustained as a result
26 of the Government's actions.

27 ///

28 ///

1 Id. ("Defendants' deliberate roadblock of Plaintiffs' protected
2 right under the First Amendment of the United States
3 Constitution...has resulted in substantial losses to
4 Plaintiffs.") (emphasis added).

5 Though Plaintiffs did not expressly identify a First
6 Amendment cause of action in their Original Complaint, this Court
7 interpreted that pleading to state such a claim for injunctive
8 relief. Original Order, 2011 WL 4566004, *9 n.5. The Court
9 therefore previously addressed this cause of action in its prior
10 Order regarding Defendants' First Motions. Plaintiffs have not
11 materially amended the allegations supporting this cause of
12 action in the FAC. Accordingly, for those reasons articulated in
13 its Original Order, Plaintiffs' equitable First Amendment claim
14 once again fails. See id., 2011 WL 4566004, *5-19, 20-21.

15 More specifically, none of the Plaintiffs have standing to
16 pursue any injunction under the First Amendment. As in their
17 prior Complaint, the Family Plaintiffs allege only past harms
18 incapable of conferring standing in support of this type of
19 equitable claim. Id., 2011 WL 4566004, *20-21. In addition, as
20 discussed above with respect to Plaintiffs' declaratory relief
21 cause of action, Plaintiff Bjorlin lacks standing to pursue the
22 instant claim for the same reasons he lacked standing in that
23 context. As stated, the likelihood of him serving overseas
24 again, let alone being kidnapped and then made to personally
25 suffer similar deprivations of his First Amendment rights at the
26 hands of the Government, is entirely speculative.

27 ///

28 ///

1 Similarly, the likelihood that any of Plaintiff Bjorlin's family
2 members, none of whom are plaintiffs here in any event, would
3 suffer any such injury is nothing more than hypothetical as well.

4 Even if Plaintiffs had standing to pursue this cause of
5 action, however, their claim would nonetheless be barred under
6 the political question doctrine for those reasons already stated
7 by the Court in its Original Order. 2011 WL 4566005, *5-19. As
8 in their Original Complaint, Plaintiffs in their FAC once again
9 claim their First Amendment rights were violated because the
10 Government blocked Plaintiffs' distribution of flyers Plaintiffs
11 hoped would lead to information regarding Decedents' whereabouts
12 and because the Government advised Decedents' families they could
13 not meet with a fellow citizen claiming to have such information.
14 FAC, ¶ 56. Plaintiffs thus challenge Executive Branch decisions
15 as to, among other things, "the Government's handling of
16 kidnappings overseas," decisions which are not reviewable in this
17 Court. Original Order, 2011 WL 4566005, *9-10. Indeed,
18 Plaintiffs here once again "seek to dictate the manner in which
19 the Government responds to the kidnapping of American citizens in
20 a foreign war zone, as well as the type and breadth of
21 information disseminated by the Government to both the families
22 of the victims and the kidnappers themselves." Id., 2011 WL
23 4566005, *10. Ultimately, Plaintiffs still seek to have this
24 Court "evaluate the scope of Government policies concerning
25 negotiations with 'terrorists, by official nomenclature or by any
26 other name." Id. This Court has already refused to do so, and
27 nothing in Plaintiffs' FAC has convinced the Court it should now
28 hold otherwise.

1 Accordingly, the Court now finds once again that Plaintiffs'
2 First Amendment cause of action presents a nonjusticiable
3 political question and thus should be dismissed.

4 Couching Plaintiffs' current claim as a request for damages
5 rather than a request for injunctive relief does nothing to
6 change this Court's conclusion. Regardless of the relief sought,
7 rendering a decision on this cause of action would require the
8 Court to invade the province of the Executive Branch in no less
9 of an intrusive manner than do Plaintiffs' requests for
10 injunctive relief. Moreover, as stated in greater detail below,
11 Plaintiff Bjorlin lacks standing to pursue any claim for monetary
12 relief. Finally, even if Plaintiffs' First Amendment cause of
13 action was not barred for all of the reasons just stated, this
14 claim would nonetheless fail because, again as discussed below,
15 Plaintiffs have not alleged the Government waived its sovereign
16 immunity. Because this Court believes any attempt to further
17 amend the FAC would be futile, Plaintiffs' First Amendment cause
18 of action is thus DISMISSED without leave to amend.

19
20 **3. Plaintiffs' Procedural Due Process and Takings**
21 **Causes of Action.**

22 In their Original Complaint, Plaintiffs alleged by way of
23 their Procedural Due Process cause of action that the Government
24 had "deprived [them] of their constitutionally protected interest
25 in the lives of their children without due process through the
26 use of 'underground regulations,' 'unwritten policies,' and while
27 illegally retaining vendors who were improperly compensated."
28 Original Complaint, p. 19, ¶ 31.

1 The Court determined that claim was nonjusticiable. Original
2 Order, 2011 WL 4566004, *5-12. In the FAC, to the contrary,
3 while Plaintiffs again appear to allege Defendants
4 unconstitutionally deprived them of Decedents' lives without due
5 process of law, Plaintiffs now make clear that they also believe
6 Defendants are withholding the following private property to
7 which the Family Plaintiffs are entitled: 1) insurance benefits
8 in excess of \$100,000 per Decedent; 2) back pay in excess of
9 \$100,000 per Decedent; and 3) benefits in excess of \$100,000 per
10 Decedent under the DBA, the LHWCA and the WHCA. FAC, ¶ 61.

11 Plaintiffs' Takings cause of action is similar to their
12 newly stated Procedural Due Process claim. For example,
13 Plaintiffs allege that "[t]o the extent that...Plaintiffs' sons'
14 labor and private benefits including insurance proceeds, were
15 converted to public use, Plaintiffs are entitled to just
16 compensation for this property." Id., ¶ 66. Again according to
17 Plaintiffs, the United States has improperly retained insurance
18 benefits, back payments and benefits owed under the DBA, LHWCA
19 and the WHCA. Id.

20 Plaintiffs' Procedural Due Process claim, which the Court
21 previously found entirely barred as nonjusticiable, now therefore
22 shares some characteristics with Plaintiffs' Takings cause of
23 action, a claim this Court determined in its Original Order
24 survived political question review. Accordingly, for those
25 reasons stated in the Court's Original Order, to the extent
26 Plaintiffs again seek to recover for the loss of Decedents'
27 lives, Plaintiffs' Procedural Due Process cause of action is
28 barred as nonjusticiable. Order 2011, WL 456604, *5-12.

1 However, to the extent Plaintiffs' current claim arises out of
2 the Government's purportedly wrongful retention of benefits and
3 back pay, this claim, like both Plaintiffs' original and newly-
4 stated Takings claim, is justiciable for the reasons stated there
5 as well. 2011 WL 4566004, *13-16 (finding Plaintiffs' Takings
6 cause of action justiciable to the extent based on Defendants'
7 failure to compensate Decedents for work performed or to
8 compensate Decedents pursuant to the DBA, LHWCA and WHCA). Both
9 Plaintiffs' Procedural Due Process and Takings causes of action
10 are nonetheless still barred in their entirety for the reasons
11 that follow.

12 First, as already discussed in great detail both in the
13 Court's Original Order and above here, the Family Plaintiffs lack
14 standing to seek injunctive relief given the lack of any
15 allegations in the FAC indicating they might suffer the harms
16 alleged at any point in the future. 2011 WL 4566004, *20-21.
17 Plaintiff Bjorlin likewise lacks standing to pursue an injunction
18 here for those reasons stated above. Conversely, to the extent
19 Plaintiff Bjorlin seeks monetary relief, his claim fails because
20 he has not alleged he has suffered any compensable harm. See
21 Friends of the Earth, Inc. v. Laidlaw Environmental Services
22 (TOC), Inc., 528 U.S. 167, 185 (recognizing "a plaintiff must
23 demonstrate standing separately for each form of relief sought");
24 see also City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983)
25 (comparing plaintiff's standing to pursue injunctive relief with
26 his standing to pursue damages).

27 ///

28 ///

1 Plaintiffs' claims for monetary relief likewise fail in
2 their entirety for the additional reason that Plaintiffs have not
3 alleged that the Government waived its sovereign immunity. "The
4 basic rule of federal sovereign immunity is that the United
5 States cannot be sued at all without the consent of Congress."
6 Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands, 461 U.S.
7 273, 287 (1983). This sovereign immunity "applies to all federal
8 agencies and to federal employees acting within their official
9 capacities." Hodge v. Dalton, 107 F.3d 705, 707 (9th Cir. 1997).
10 Absent a waiver of sovereign immunity, a claim against the United
11 States or a federal agency must be dismissed for lack of subject
12 matter jurisdiction. Kaiser v. Blue Cross of California,
13 347 F.3d 1107, 1117 (9th Cir. 2003). Any waiver of sovereign
14 immunity must be both "unequivocally expressed," Hodge, 107 F.3d
15 at 707, and "strictly construed in favor of the United States,"
16 Jerves v. United States, 966 F.2d 517, 521 (9th Cir. 1992).

17 The Court discussed Plaintiffs' failure to allege a proper
18 waiver of sovereign immunity in great detail in its Original
19 Order and that analysis remains just as applicable here. 2011 WL
20 4566004, *22-23. More specifically, though Plaintiffs purported
21 to bring the instant causes of action pursuant to 42 U.S.C.
22 § 1983, as this Court has already found, "Section 1983 does not
23 contain a statutory waiver of the federal government's immunity
24 and thus does not provide an avenue through which Plaintiffs can
25 pursue their monetary claims." Order, 2011 WL 4566004, *22.
26 Plaintiffs are likewise unable to pursue their claims against the
27 Government directly under the Constitution. See Rivera v. United
28 States, 924 F.2d 948, 951 (9th Cir. 1991).

1 In addition, Plaintiffs now admit they value their monetary
2 claims to be worth in excess of \$100,000 per Decedent. See,
3 e.g., FAC, ¶¶ 36, 48, 61 and 66. For the reasons articulated in
4 this Court's Original Order, Plaintiffs have thus pled themselves
5 out of an ability to proceed here under the Tucker Act.
6 Original Order, 2011 WL 4566004, *22 (claims seeking in excess of
7 \$10,000 must be brought in the Court of Federal Claims).
8 Finally, any attempt Plaintiffs may be making to bring claims
9 under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346,
10 2671 et seq., similarly fails for those reasons already stated by
11 this Court in its Original Order. 2011 WL 4566004, *23
12 (Plaintiffs' attempt to invoke waiver under the FTCA was flawed
13 because Plaintiffs failed to allege they exhausted administrative
14 remedies and, even if a waiver could potentially be found,
15 numerous statutory exceptions to the FTCA would apply.).
16 Plaintiffs' Procedural Due Process and Takings causes of action
17 are thus subject to dismissal on this basis alone.

18 Plaintiffs' attempt to save these claims by couching them as
19 requests for equitable relief is rejected as well. According to
20 Plaintiffs, their claims are not barred by the Government's
21 sovereign immunity because Plaintiffs do not seek damages and
22 instead merely seek the return of property and monies that belong
23 to them and that are being wrongfully held by the United States.
24 Opposition, 20:3-15 (citing Taylor v. Westly, 401 F.3d 924, 934
25 (9th Cir. 2005)); id., 21:20-21.

26 ///

27 ///

28 ///

1 However, Plaintiffs have not alleged that the Government, as
2 opposed to a third party, itself deprived Plaintiffs of any
3 benefits, back payments or insurance proceeds without due process
4 of law, nor have Plaintiffs alleged that the Government, as
5 opposed to a third party, itself took any property from
6 Plaintiffs without paying just compensation. To the contrary,
7 Plaintiffs allege that Crescent and the Insurance Defendants
8 deprived Decedents and their families of their property and that
9 the Government is somehow responsible for those deprivations.
10 Plaintiffs thus seek to recover not their own property but monies
11 from the federal coffers. This is precisely the type of claim to
12 which the United States is immune.¹⁵

13 Finally, Plaintiffs' instant claims are subject to dismissal
14 under Rule 12(b)(6) as well. More specifically, even if
15 Plaintiffs' claims for insurance benefits or back pay were not
16 barred for the reasons just stated, those claims again fail
17 because Plaintiffs have not alleged the Government, as opposed to
18 Crescent or the Insurance Defendants, deprived them of insurance
19 benefits or back pay. See Order, 2011 WL 4566004, *23-24.
20 Indeed, while Plaintiffs allege they contracted with Crescent and
21 that Crescent in turn contracted with the Insurance Defendants,
22 nowhere do Plaintiffs allege the Government was a party to any of
23 those agreements.

24
25 ¹⁵ For this same reason, Plaintiffs' attempt to cast their
26 request for payment of money owed as an equitable claim seeking
27 the return of Decedents' or Plaintiffs' property also fails
28 because they really seek monetary damages, which do not generally
constitute irreparable harm. See Original Order, 2011 WL
4566004, *21 and n.13 (citing Goldie's Bookstore, Inc. v.
Superior Court of State of Cal., 739 F.2d 466, 471 (9th Cir.
1984)).

1 Plaintiffs' conclusory assertions that the Government "oversaw"
2 those agreements or created an "authorized" list of Contractors
3 are insufficient to properly link the Government to the
4 underlying contracts, even through the generous lens prescribed
5 by Rule 12(b)(6).

6 Plaintiffs' attempt to assert an entitlement to benefits
7 under the LHWCA, the DBA and the WHCA likewise fails. First,
8 Plaintiffs have not exhausted their administrative remedies under
9 the LHWCA and the DBA in the Department of Labor. See Bish v.
10 Brady-Hamilton Stevedoring, 880 F.2d 1135, 1137 (9th Cir. 1989).
11 Moreover, even if Plaintiffs had alleged they exhausted their
12 claims, review of any final agency decision would be not in this
13 Court but in the Ninth Circuit. Pearce v. Dir., Office of
14 Workers' Comp. Programs, 603 F.2d 763, 771 & n.2 (9th Cir. 1979).
15 Likewise, any decision as to compensation under the WHCA is
16 rendered by the Secretary of the Department of Labor, whose
17 decision is "final and conclusive." See 42 U.S.C. §§ 1701(a),
18 1715; 20 C.F.R. §§ 61.1 et seq. Given the above authorities,
19 Plaintiffs apparently now concede that their workers'
20 compensation claims are insufficient. See, e.g., Opposition,
21 21:20-26 ("Plaintiffs seek contract payments and insurance
22 proceeds that clearly not subject to workers compensation
23 laws....[T]hese are not the Plaintiffs' claims in the amended
24 complaint."). Accordingly, Plaintiffs' Procedural Due Process
25 and Takings causes of action, like their Declaratory Relief and
26 First Amendment causes of action, are dismissed without leave to
27 amend.

28 ///

1 **CONCLUSION**

2

3 For all of the reasons stated herein, Defendants' Motion to
4 Dismiss (ECF No. 46) is GRANTED without leave to amend. This
5 action will, however, proceed on Plaintiffs' remaining claims
6 against the Insurance Defendants.

7 IT IS SO ORDERED.

8 Dated: March 27, 2012

9
10 

11 _____
12 MORRISON C. ENGLAND, JR.
13 UNITED STATES DISTRICT JUDGE
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28