**UNITED STATES DISTRICT COURT**
**DISTRICT OF COLUMBIA**

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| **Talal AL-ZAHRANI, et al.,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | |
| **v.** | ) | **Case No.: 1:09-CV-00028 (ESH)** |
| | ) | |
| **Donald RUMSFELD, et al.** | ) | |
| | ) | |
| **and** | ) | |
| | ) | |
| **UNITED STATES,** | ) | |
| | ) | |
| **Defendants.** | ) | |
| | ) | |

**INDIVIDUAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR RECONSIDERATION AND FOR LEAVE TO FILE AN AMENDED COMPLAINT**

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## INTRODUCTION

On February 16, 2010, this Court dismissed with prejudice Plaintiffs' constitutional claims against the individual defendants. The Court held that, under binding D.C. Circuit precedent, national security considerations were a special factor that barred Plaintiffs' claims and that Defendants were entitled to qualified immunity because Plaintiffs' decedents' constitutional rights were not clearly established between 2001 and 2006, the time during which decedents were detained.

Now, nearly a month after the Court's ruling, Plaintiffs ask this Court to reconsider its decision, and also to allow them to amend their complaint a second time. Plaintiffs assert their requests are based on "newly-discovered evidence"—a *Harper's Magazine* article released on January 18, 2010, that revolves around the statements of four guards at Guantánamo Bay who did not witness the deaths of decedents, and that alleges "possible homicides" and a government cover-up.

This Court should deny both motions. First, the evidence Plaintiffs rely on is not new because it was available almost a full month before the Court ruled. Second, although Plaintiffs say their motion is based on new evidence, it is clear their true aim is to rehash old arguments and relitigate issues already decided. Finally, Plaintiffs' proposed amended complaint would not survive a motion to dismiss and amendment would therefore be futile.

## BACKGROUND

Plaintiffs filed their first complaint on January 7, 2009, alleging, *inter alia*, that former Secretary of Defense Donald Rumsfeld and twenty-three other high-level military officials violated Plaintiffs' decedents' Fifth and Eighth Amendment rights by detaining them at Guantánamo Bay without due process and torturing them until decedents took their own lives.

Doc. 1. Plaintiffs amended their complaint on January 29, 2009. Doc. 2.

In June 2009, Defendants moved to dismiss Plaintiffs' claims because section 7 of the Military Commissions Act of 2006, 28 U.S.C. § 2241(e)(2) (MCA), barred their claims and because special factors counseled against creating the cause of action Plaintiffs sought. Doc. 13. Defendants also demonstrated they had qualified immunity because under binding D.C. Circuit precedent, decedents did not have the constitutional rights they allege Defendants violated, in any event those rights were not clearly established, and Plaintiffs failed to allege Defendants personally participated in any constitutional violations. *Id.*

Plaintiffs filed an opposition several months later, in October 2009, arguing that § 2241 was no longer valid, and was unconstitutional as applied to their claims. Doc. 19. They also argued that special factors did not bar their claims, and that decedents' rights were clearly established. *Id.* Defendants replied in December 2009. Doc. 22.

On January 18, 2010, the on-line version of *Harper's Magazine* released an article alleging "possible homicide" and a government cover-up regarding the deaths of decedents. *See* Doc. 27-1 at 1. The article based its allegations mainly on the accounts of four individuals who were guards at Guantánamo the night of decedents' deaths. *Id.* at 2-3. In the article, none of these individuals claims he saw how decedents died. Nor do the individuals affirmatively claim decedents were murdered.

Thirty days after release of the *Harper's* article, this Court granted Defendants' motion, holding that § 2241 was still valid and would bar Plaintiffs' claims. *See* Mem. Op. at 8-9. However, the Court also proceeded directly to the merits under principles of constitutional avoidance and judicial economy. *Id.* at 10 & n.3. The Court then held that under *Rasul v.*

*Myers*, 563 F.3d 532, 535 n.5 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009), national security considerations were a special factor barring suits by aliens detained at Guantánamo Bay, and that *Rasul* controlled here. *See* Mem. Op. at 12-13. The Court also held that Defendants had qualified immunity because decedents' constitutional rights were not clearly established during their detention. *Id.* at 13 n.5.

Plaintiffs have now filed a motion for reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure, based on the so-called "newly-discovered evidence" contained in the *Harper's* article. They have also filed a motion for leave to amend their complaint and a proposed amended complaint that adds allegations of homicide and cover-up and includes three new claims against the Defendants: (1) violation of the Alien Tort Statute by extrajudicial killing (Claim 5); (2) violation of District of Columbia law by tortious spoliation of evidence (Claim 16); and (3) violation of 42 U.S.C. §§ 1985(2) and 1985(3) by, *inter alia*, violating decedents Fifth, Eighth, and Thirteenth Amendment rights (Claim 17).[1]

## ARGUMENT

This Court should deny Plaintiffs' motion for reconsideration. Rather than presenting new evidence, pointing to a change in controlling authority, or identifying a clear error that compels this Court to change its opinion, Plaintiffs simply seek to relitigate issues the Court already decided in the hope they will receive a more favorable result the second time around. In any event, this Court should deny Plaintiffs' motion for leave to file an amended complaint

[1]The United States has filed an opposition concurrent with this opposition. *See* The United States' Opp'n to Pls.' Mots. for Recons. and Leave To Amend the Am. Compl. The United States' opposition addresses Plaintiffs' additional claims under the Alien Tort Statute and District of Columbia law.

because amendment would be futile: Plaintiffs' proposed amended complaint would not survive a motion to dismiss.

## I. THIS COURT SHOULD DENY PLAINTIFFS' MOTION FOR RECONSIDERATION BECAUSE IT SEEKS TO RELITIGATE ISSUES THE COURT ALREADY DECIDED.

Plaintiffs' motion for reconsideration simply rehashes old arguments and presents new legal theories that could have been raised earlier on issues this Court has already decided. Plaintiffs fail to present any evidence that was unavailable before the Court issued its Order, or to show how that evidence would compel the Court to change its prior position. Nor do Plaintiffs point to any change in controlling authority or clear error in the Court's decision. Therefore, the Court should deny their motion.

### A. Standard for Rule 59(e) Motions.

Rule 59(e) motions are discretionary and may be granted only if a court finds new evidence that was previously unavailable, an intervening change in controlling authority, or the need to correct a clear error or prevent manifest injustice. *See Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (citations omitted). The movant must establish that the new facts or clear errors of law "compel the court to change its prior position." *Nat'l Ctr. for Mfg. v. Dep't of Defense*, 199 F.3d 507, 511 (D.C. Cir. 2000) (citations omitted). Moreover, such motions are "disfavored," and should be granted only if the moving party establishes "extraordinary circumstances." *Koretoff v. Vilsack*, 626 F. Supp. 2d 4, 5 (D.D.C. 2009).

As courts have made clear, a Rule 59(e) motion is not an appropriate mechanism for presenting evidence the movant could have presented to the court before its ruling. *See Obriecht v. Raemisch*, 517 F.3d 489, 494 (7th Cir. 2008) ("[M]otions under Rule 59(e) cannot be used to present evidence that could have been presented before judgment was entered."); *Miller v. Baker*

*Implement Co.*, 439 F.3d 407, 414 (8th Cir. 2006) (denying motion for reconsideration even though plaintiff did not discover evidence before ruling because plaintiff failed to pursue discovery diligently and could have found evidence before ruling); *Niedermeier v. Office of Max S. Baucus*, 153 F. Supp. 2d 23, 30 (D.D.C. 2001) (denying motion for reconsideration where plaintiff admitted new evidence was known to plaintiff before entry of judgment).

Additionally, motions for reconsideration are not an opportunity to reargue decided issues, or present legal theories or arguments that could and should have been presented before. *See, e.g.*, *Carter v. Wash. Metro. Area Transit Auth.*, 503 F.3d 143, 145 n.2 (D.C. Cir. 2007) (citations omitted); *Katten v. District of Columbia*, 995 F.2d 274, 276 (D.C. Cir. 1993); *Consol. Rail Corp. v. Ritter*, 593 F. Supp. 2d 107, 109 (D.D.C. 2009).

Plaintiffs' motion for reconsideration is based on evidence they possessed well before this Court dismissed their claims. They fail to cite any intervening change in controlling authority and fail to identify any clear errors, never mind errors that compel the Court to change its prior position. Instead, Plaintiffs simply put forth arguments they failed to raise at the appropriate time. This Court should not countenance Plaintiffs' attempt to relitigate issues that have already been decided.

### B. Plaintiffs' Evidence Is Not New Because It Was Available Before the Court Ruled.

Plaintiffs' motion for reconsideration presents no new evidence because the evidence presented was available to Plaintiffs before the Court issued its ruling on February 16, 2010. Plaintiffs assert that their motion is based on "newly-discovered evidence that was not available to Plaintiffs until after the close of briefing," Pls.' Mot. for Recons. at 1, but the proper inquiry for Rule 59(e) motions is not whether evidence was available before the close of briefing, but

whether the evidence was available before the Court ruled. *See, e.g.*, *Obreicht*, 517 F.3d at 494.

Here, even taking Plaintiffs' representations at face value, the supposed evidence clearly was available more than four weeks before the Court ruled, as Plaintiffs readily admit. *See* Pls.' Mot. for Recons. at 4 (noting that allegations of possible homicide and cover-up were first reported on January 18, 2010). Moreover, the January 18, 2010, publication of the *Harper's Magazine* article was not a low-key event. Indeed, the article's author appeared that same day on MSNBC to discuss the article's contents. *See* Transcript of Keith Olbermann Interview with Scott Horton on Jan. 18, 2010, *available at* http://www.msnbc.msn.com/id/34937503/ (last visited Mar. 25, 2010).

Not only was the evidence available more than four weeks before the Court issued its ruling, but Plaintiffs themselves knew of the *Harper's* article and its allegations before February 16, 2010. *See* Pls.' Mot. for Recons. at 7 (noting that Plaintiffs were amending their complaint in light of the allegations in *Harper's* before February 16, 2010). Presumably, Plaintiffs—or at least their counsel in America—became aware of the article no later than within days of its release.[2] *See United Klans of Am. v. McGovern*, 621 F.2d 152, 154 (5th Cir. 1980) ("Where events receive . . . widespread publicity, plaintiffs may be charged with knowledge of their occurrence."). But instead of filing a notice with the Court flagging the article's allegations, or filing a motion for leave to amend their complaint, Plaintiffs were "preparing" to take the unusual step—given the posture of the case at the time—of seeking a status conference "to discuss next steps in this case." Pls.' Mot. for Recons. at 7. Plaintiffs offer no explanation why

[2] The *Harper's* article recounts a pre-publication interview with Plaintiff Talal Al-Zahrani, which supports a reasonable inference that Plaintiffs were aware of the allegations discussed in the article long before January 18, 2010. *See* Doc. 27-1 at 9-10, 14.

they did not file a motion for leave to amend their complaint once they learned of the allegations in *Harper's*. Nor do they explain why they waited so long before contacting Defendants' counsel to seek a status conference. Because the evidence Plaintiffs rely on for their motion was available well before the Court's ruling, that evidence is not new. Therefore, Plaintiffs' motion for reconsideration should be denied.

### C. Plaintiffs Cite No Facts or Law that Compels the Court To Change Its Prior Position, and Instead Attempt To Relitigate Already Decided Issues.

Even if this Court accepts the *Harper's* article as new evidence, the Court should still deny Plaintiffs' Rule 59(e) motion because it fails to establish that these alleged facts—or any law for that matter—compels the Court to change its prior position.[3] Instead, the bulk of Plaintiffs' motion is devoted to arguing that the Court's special factors and qualified immunity holdings were wrong based on arguments that could have been made well before the Court ruled on February 16, 2010.

Plaintiffs fail to establish that the new allegations compel the Court to change its position that special factors bar Plaintiffs' claims. Plaintiffs' arguments that new allegations of homicide and cover-up "caution" and "militate against" dismissing the case on special factors grounds, and that the Court must view all relevant factors in light of the specific facts of the case "before it can exercise the remedial judgment" required in a special factors analysis, Pls.' Mot. for Recons. at 10, highlight the deficiency in Plaintiffs' reasoning. As mentioned above, to succeed on a motion for reconsideration, a Plaintiff must establish that new facts *compel* a Court to change its prior position. *See supra* p. 4. But here, Plaintiffs argue only that the new facts should inform

[3]Indeed, under binding D.C. Circuit precedent, the new allegations are not material to the Court's context-specific special factors analysis. *See infra* Part II.C.

the "remedial judgment" a court exercises in a special factors analysis. In other words, nothing about the supposedly new facts compels the Court to change its special factors ruling. Rather, Plaintiffs seek for the Court to exercise its judgment and alter its prior ruling.

Indeed, here, the Court held that national security concerns were a special factor counseling hesitation. *See* Mem. Op. at 13. Plaintiffs' new allegations do not diminish those concerns. Instead, according to Plaintiffs, the added allegations may "outweigh" those concerns. Pls.' Mot. for Recons. at 9. But such an argument has no place in a motion for reconsideration because, again, it does not compel the Court to change its prior position. Instead, it simply suggests that the Court could have decided differently. As Plaintiffs note, a special factors analysis inherently involves weighing reasons for and against inferring a damages remedy. *Id.* at 8-9. Accordingly, new facts would at most cause the Court to reevaluate whether to infer a remedy—which itself is a matter of judgment. Therefore, the new facts simply could not compel the Court to change its prior position.

Perhaps recognizing that the new evidence does not compel the Court to change its position, Plaintiffs launch a direct assault on the Court's special factors holding itself. *Id.* at 10-13. In doing so, Plaintiffs simply rehash old arguments and present new arguments that could and should have been raised earlier. Moreover, they fail to cite any intervening change in controlling authority. Indeed, Plaintiffs cite only one case decided after the Court ruled, and that case involved a different context—a United States citizen detained in Iraq—and is not controlling authority. *Id.* at 11 (citing *Vance v. Rumsfeld*, 2010 WL 850173 (N.D. Ill. Mar. 5, 2010), *appeal docketed*, No. 10-1687 (7th Cir. Mar. 19, 2010)).

Similarly, Plaintiffs attack the Court's qualified immunity holding—which they

mischaracterize as "dicta," Pls.' Mot. for Recons. at 14—by offering arguments that could and should have been offered earlier.[4] In these arguments, Plaintiffs fail to cite a single authority that did not exist before February 16, 2010, or April 2006 for that matter. As with their special factors arguments, these arguments on qualified immunity are inappropriate in a motion for reconsideration. Therefore, the Court should deny Plaintiffs' motion.

## II. THIS COURT SHOULD DENY PLAINTIFFS' MOTION FOR LEAVE TO AMEND BECAUSE AMENDMENT WOULD BE FUTILE.

Even if this Court grants Plaintiffs' reconsideration motion, it should deny Plaintiffs' motion for leave to amend because the proposed amended complaint would not survive a motion to dismiss. Section 7 of the MCA, 28 U.S.C. § 2241(e)(2), bars Plaintiffs' constitutional and § 1985 claims. Special factors bar Plaintiffs' constitutional claims. And Defendants are entitled to qualified immunity on those claims and on the § 1985 claims because Plaintiffs' constitutional rights were not clearly established during the events in question. Moreover, § 1985 does not apply outside the territorial United States and is inapplicable to this case. Therefore, amending the complaint is futile.

### A. Standard for Motion for Leave To File an Amended Complaint.

Courts may deny a motion for leave to file an amended complaint if amendment would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). *See also Willoughby v. Potomac Elec. Power Co.*, 100 F.3d 999, 1003 (D.C. Cir. 1996). Amendment is futile where the amended

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[4]The D.C. Circuit has offered three definitions for "dicta": (1) language unnecessary to a decision; (2) ruling on an issue not raised; and (3) opinion of a judge which does not embody the resolution or determination of the court, and made without argument or full consideration of the point. *See Lawson v. United States*, 176 F.2d 49, 51 (D.C. Cir. 1949). The Court's detailed note 5 of its opinion does not fall clearly into any of these definitions, and instead represents an alternative holding by the Court.

complaint would not survive a motion to dismiss. *See James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996).

**B. 28 U.S.C. § 2241(e)(2) Bars Plaintiffs' Constitutional and § 1985 Claims.**

In its opinion, this Court held that 28 U.S.C. § 2241(e)(2) is still valid. *See* Mem. Op. at 8. This Court also stated that § 2241(e)(2)—which removes jurisdiction from claims regarding, *inter alia*, treatment or conditions of confinement by aliens determined to be properly detained as enemy combatants—"precludes this Court from hearing [Plaintiffs'] claims." Mem. Op. at 9. Plaintiffs correctly note that the Court did not dismiss Plaintiffs' claims under § 2241, but instead proceeded to the merits because a ruling on the constitutionality of § 2241 when Plaintiffs' claims failed on the merits would violate principles of constitutional avoidance and judicial economy. *See* Pls.' Mot. for Recons. at 8; Mem. Op. at 10-11.

Nonetheless, Defendants reiterate that § 2241 is valid here because *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), does not provide a constitutional right to a damages remedy. Rather, *Bivens* provides a federal common-law remedy inferred from the Constitution, as evidenced by the fact that special factors, including alternative remedial schemes, can counsel against inferring such a remedy. *See, e.g.*, *Bush v. Lucas*, 462 U.S. 365 (1983). As for Plaintiffs' § 1985 claims, § 2241 bars those claims as well because they relate to Plaintiffs' decedents' treatment while detained as enemy combatants.

**C. Special Factors Bar Plaintiffs' Amended Complaint.**

Special factors still counsel hesitation in inferring a damages remedy for Plaintiffs, notwithstanding their added allegations. The D.C. Circuit's conclusion in *Rasul* that national security considerations are a special factor barring claims by aliens detained at Guantánamo Bay

still applies and binds this Court here. *See Rasul*, 563 F.3d at 535 n.5; Mem. Op. at 13 ("The D.C. Circuit's conclusion that special factors counsel against the judiciary's involvement in the treatment of detainees held at Guantánamo binds this Court.").

As courts have explained, a special factors analysis focuses on the context in which a claim to relief is made. *See FDIC v. Meyer*, 510 U.S. 471, 484 n.9 (1995) ("[A] *Bivens* action alleging a violation of the Due Process Clause of the Fifth Amendment may be appropriate in some contexts, but not in others."). *See also Navab-Safavi v. Broad. Bd. of Governors*, 650 F. Supp. 2d 40, 66 (D.D.C. 2009) ("[T]he question of whether to recognize a *Bivens* remedy is context-specific.") (citing *Meyer*, 510 U.S. at 484 n.9). As *FDIC* and *Navab-Safavi* make clear, and as Plaintiffs acknowledge in their motion, courts look at context—and do not employ a "case-by-case approach" as Plaintiffs suggest—in determining whether to infer a damages remedy. *Compare* Pls.' Mot. for Recons. at 9 (stating that courts apply a "case-by-case approach"), *with id.* at 10 (citing *Navab-Safavi*, 650 F. Supp. 2d at 66 and its citation of *Meyer*, 510 U.S. at 484 n.9).

Here, Plaintiffs' added allegations do not change the context of this case. Plaintiffs' proposed amended complaint alleges that high-level military officials committed constitutional violations against detained aliens held abroad at Guantánamo Bay, just as their first amended complaint alleged. Accordingly, *Rasul* applies to the proposed amended complaint, just as the Court held *Rasul* applied to the first amended complaint. *See* Mem. Op. at 13. It follows that special factors bar Plaintiffs' claims, and amendment would be futile.

Plaintiffs' suggestions that the added allegations remove their case from *Rasul*'s reach, *see* Pls.' Mot. for Recons. at 8, 9, 13, misconstrue *Rasul*. There, the D.C. Circuit, faced with

allegations that high-level military officials tortured aliens detained at Guantánamo, stated flatly: "We see no basis for distinguishing [*Rasul*] from *Sanchez-Espinoza*." *Rasul*, 563 F.3d at 532 n.5. The case the court referred to, *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), involved allegations that high-level government officials violated the plaintiffs' constitutional rights by aiding the Contras in committing such acts as summary execution, rape, and murder. *Id.* at 205. Despite these horrific allegations, the D.C. Circuit held that given the context, national security considerations counseled against inferring a damages remedy. *Id.* at 208-09. As such, *Rasul* still binds the Court here because Plaintiffs' added allegations of homicide do not distinguish their case from *Sanchez-Espinoza*, which provided the basis for *Rasul*'s holding. Plaintiffs' claims still involve national security considerations. Given that context, *Rasul* is binding, and Plaintiffs' constitutional claims would not survive a motion to dismiss. Accordingly, this Court should deny their motion for leave to amend.

Plaintiffs' argument that barring their claims on special factors grounds will leave them without a remedy, Pls.' Mot. for Recons. at 13-14, does not alter the special factors analysis here. As the D.C. Circuit recently stated, the proper inquiry is "not whether there is a remedy," but "who should decide" whether to create a remedy. *Wilson v. Libby*, 535 F.3d 697, 709 (D.C. Cir. 2008). And although Plaintiffs' added allegations are extreme, as demonstrated above, that does not affect the special factors analysis, particularly here where Plaintiffs ask this Court to infer a damages remedy in an area fraught with national security considerations. Furthermore, contrary to Plaintiffs' suggestion, *see* Pls.' Mot. for Recons. at 13-14, this Court is not the last and only entity that can hold Defendants accountable, assuming accountability is warranted. Indeed, the civilian and military criminal justice systems are best suited to investigate and punish crimes

such as homicide.[5]

Moreover, in their motion, Plaintiffs fail to address three additional special factors that counsel hesitation in inferring a damages remedy here: (1) the constitutional commitment of national security and foreign policy matters to the political branches of government; (2) Congress's refusal to provide a damages remedy for aliens detained abroad despite careful attention to the treatment of those detainees; and (3) the impact such a remedy could have on the military's effectiveness. *See* Ind. Defs.' Mot. to Dismiss at 8-17.

### D. Defendants Are Entitled to Qualified Immunity on Plaintiffs' Constitutional and § 1985 Claims Because Plaintiffs' Constitutional Rights Were Not Clearly Established.

The proposed amended complaint would not survive a motion to dismiss because Defendants are entitled to qualified immunity on both the constitutional and the § 1985 claims. Plaintiffs' decedents' constitutional rights are not clearly established to this very day, and certainly were not clearly established in 2006. Nor were decedents' statutory rights under § 1985(2) clearly established, if they even exist.

The Supreme Court has long held that government officials can only be liable for violating "clearly established" constitutional or statutory rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Under *Pearson v. Callahan*, 129 S. Ct. 808 (2009), courts have discretion to grant qualified immunity on clearly-established grounds only, without first determining whether a constitutional violation occurred. *Id.* at 818. The Supreme Court added that such an approach is appropriate where a court could

[5]In fact, the Criminal Division of the United States Department of Justice conducted an inquiry into various allegations relating to the deaths and alleged cover-up regarding those deaths at Guantánamo Bay and concluded that no credible evidence supported those allegations.

"rather quickly and easily decide" there was no violation of clearly established law. *Id.* at 820.

Here, the Court already held that Plaintiffs' constitutional rights were not clearly established in 2006, and Plaintiffs have cited no authority to alter that holding. To reiterate briefly, the D.C. Circuit in *Rasul* held that Guantánamo detainees' constitutional rights were not clearly established in 2004. 563 F.3d at 530 & n.2. In doing so, the court noted that at the time of the plaintiffs' detention, neither the Supreme Court nor the D.C. Circuit had ever held that aliens detained outside the sovereign United States had any constitutional rights. *Id.* at 530. Here, that applies to Plaintiffs' claims as well. At the time of decedents' detention, neither the Supreme Court nor the D.C. Circuit had held that aliens detained outside the United States have any constitutional rights. Moreover, the D.C. Circuit held in 2009 that such detainees in fact do not have constitutional rights under the Fifth Amendment. *See Kiyemba v. Obama*, 555 F.3d 1022, 1026 & n.9 (D.C. Cir. 2009), *vacated on other grounds*, 130 S. Ct. 1235 (2010).[6] Accordingly, Defendants did not violate any clearly established constitutional rights.

These cases dispose of both Plaintiffs' constitutional and § 1985(3) claims. Section 1985(3) itself provides no substantive rights, and only provides a right of action for violation of certain constitutional rights. *See Great Am. Fed. Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979) ("Section 1985(3) provides no substantive rights itself."). Because the underlying constitutional rights that Plaintiffs claim were violated in their § 1985(3) action were not clearly established, Defendants are entitled to qualified immunity. *See Bois v. Marsh*, 801

[6]*Kiyemba*, although vacated on other grounds, still informs the qualified immunity analysis. Because the *Kiyemba* court held in 2009 that aliens detained at Guantánamo do not have rights under the Due Process Clause, those rights simply could not have been clearly established in 2006.

F.2d 462, 477 (D.C. Cir. 1986) (recognizing the applicability of qualified immunity to claims brought under § 1985(3)).

Plaintiffs' § 1985(2) claim fares no better. Defendants could find no case law applying § 1985(2) in circumstances remotely similar to those alleged here—the alleged torture and death of aliens detained outside of the sovereign United States—and assert that § 1985 does not apply outside the sovereign United States. *See infra* Part II.E. Even assuming *arguendo* that § 1985(2) provides a statutory right in such circumstances, § 1985(2)'s application was not clearly established, given the apparent absence of case law on § 1985(2)'s extraterritorial application. *See Pitt v. District of Columbia*, 491 F.3d 494, 512 (D.C. Cir. 2007) (holding that right not clearly established where Supreme Court had not explored contours of right and D.C. Circuit had declared right not clearly established).

Plaintiffs' arguments that the Reagan Act and a State Department report to a United Nations body clearly established decedents' constitutional rights are mistaken. *See* Pls.' Mot. for Recons. at 15-16. Courts look at *case law* when determining whether rights are clearly established. *See Lederman v. United States*, 291 F.3d 36, 48 (D.C. Cir. 2002) (noting that courts look at federal and, where appropriate, state case law in determining whether rights clearly established) (citing *Doe v. Delie*, 257 F.3d 309, 321 n.10 (3d Cir. 2001)). And to the extent Plaintiffs allege that Defendants violated clearly established statutory rights included in the Reagan Act, that Act does not provide a private cause of action against the Act's violators. *See* 10 U.S.C. § 801, stat. note § 1092. *See also Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984) ("Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation—of federal or of state law—unless that statute or regulation provides the

basis for the cause of action sued upon.").[7] As for the State Department's 2006 communication to a United Nations committee, that communication only stated the administration's official position, and has no bearing on a clearly-established analysis.

Plaintiffs may protest that torture and homicide are clearly illegal under various international treaties, and therefore their proposed amended complaint should not be dismissed. But as Defendants made clear in their reply, *see* Ind. Defs.' Reply at 17-18, the proper inquiry here is whether Defendants violated any clearly established *constitutional* rights—or statutory rights with regards to Plaintiffs' § 1985(2) claim. As demonstrated above, such rights were not clearly established during the events in question. Therefore, Defendants are entitled to qualified immunity, Plaintiffs' proposed amended complaint would not survive a motion to dismiss, and this Court should deny Plaintiffs' motion for leave to amend.

**E. Plaintiffs Have Failed To State a Claim Under § 1985.**

Plaintiffs' § 1985 claims fail as a matter of law because § 1985 does not apply outside of the sovereign United States. Accordingly, that claim would not survive a motion to dismiss, and amendment would be futile.

It is a "longstanding principle of American law" that congressional legislation applies only within the territorial jurisdiction of the United States, unless a contrary intent appears.

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[7]Although the Reagan Act, Pub. L. No. 108-375, 118 Stat. 1811, 2069-70 (codified at 10 U.S.C. § 801, stat. note §§ 1091-92), indeed constrained military officials to the Constitution, laws, and treaties of the United States in their treatment of alien detainees, it did not declare that such detainees, when held abroad, actually had constitutional rights. *See id.* § 1091(a) ("Sense of Congress"). Additionally, the judiciary—not Congress—determines the meaning and scope of the Constitution, *see City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997), and as the Supreme Court stated in 2008, "before today, the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution." *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008).

*EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). Under this principle, courts presume a statute does not extend beyond places over which the United States "has sovereignty or some measure of legislative control," but rather is "primarily concerned with domestic conditions." *Id.* (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). In order to overcome this presumption, Congress must "clearly express[]" its intention that a statute applies extraterritorially. *Id.* (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

Here, nothing in the language of § 1985 suggests that Congress intended it to apply beyond the sovereign United States.[8] Accordingly, under the presumption discussed in *EEOC*, § 1985 does not apply outside the territorial United States. Given the above, Plaintiffs' assertion, Proposed Am. Compl. ¶ 384, that Guantánamo Bay is within the meaning of "Territory" as used in § 1985 is baseless. Moreover, it is a legal conclusion entitled to no weight. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

Recognizing the territorial limitations of § 1985, Plaintiffs add an allegation that the

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[8]Although the statute refers to actors "in any State or Territory," the word "Territory" refers to territories under Article IV of the United States Constitution, not an area leased from another government, such as Guantánamo Bay. In interpreting the language of a statute, one must recognize the context in which the statute was passed. *See District of Columbia v. Carter*, 409 U.S. 418, 420 (1973). Section 1985, when originally passed, was Section 2 of the Ku Klux Klan Act of 1871, which Congress enacted to support and protect racial equality in the South after the Civil War. *See* 17 Stat. 13 (1871); *see also Kimble v. McDuffy, Inc.*, 648 F.2d 340, 348 (5th Cir. 1981). Given this background, the statute's reference to actors "in any State or Territory" presumably refers to actors in states or those territories under Article IV of the Constitution. *See* U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."). *Cf. Carter*, 409 U.S. at 424 n.11 (stating that the phrase "Territory" in 42 U.S.C. § 1983, which originated in Section 1 of the Ku Klux Klan Act, refers to territories under Article IV).

alleged conspiracy "was undertaken and furthered, in part, in Washington, D.C." Proposed Am. Compl. ¶ 385. This allegation has two flaws. First, it is conclusory. *See Ashcroft*, 129 S. Ct. at 1949 (2009). Second, it suggests that by alleging some domestic activity as part of a claim, one can effectively plead around the presumption that statutes apply only within the territorial United States. Such a suggestion "threatens to swallow" that very presumption because plaintiffs could invariably allege that acts or omissions in the United States contributed to a statutory violation abroad. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 703 (2001) (rejecting "headquarters doctrine"—which considers whether steps towards commission of tort occurred in the United States—in context of Federal Tort Claims Act in part because doctrine would eliminate Act's exception to torts committed abroad). In short, § 1985 is a domestic statute, enacted in a domestic context, with domestic application only. Accordingly, Plaintiffs' § 1985 claims fail as a matter of law, and the Court should deny Plaintiffs' motion for leave to amend because amendment would be futile.

## CONCLUSION

Plaintiffs have failed to present any new evidence to this Court, or any evidence that warrants reconsidering the Court's holding. At bottom, Plaintiffs want a second bite at the apple: they want to reargue issues the Court clearly ruled on. This Court should deny them this opportunity. And Plaintiffs' proposed amended complaint would be futile because the MCA bars their claims, those claims still implicate national security and other special factors counseling hesitation, and because decedents' constitutional and statutory rights were not—and are not—clearly established. Accordingly, the Court should deny Plaintiffs' motion for reconsideration and motion for leave to file an amended complaint.

Dated: April 15, 2010

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 15, 2010, I electronically filed 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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