UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Talal AL-ZAHRANI, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 09-0028 (ESH)**
	)	
Donald RUMSFELD, et al.	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs Talal Al-Zahrani and Ali Abdullah Ahmed Al-Salami have filed a motion for reconsideration of the Court's February 16, 2010 Order [Dkt. 25], granting defendants' motions to: 1) dismiss plaintiffs' constitutional claims against the individual defendants; 2) substitute the United States as the defendant for the individually named defendants in plaintiffs' claims under the Alien Tort Claims Act ("ATCA" or "ATS"), 28 U.S.C. § 1350; and 3) dismiss the claims against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680. Plaintiffs' motion, pursuant to Federal Rule of Civil Procedure 59(e), alleges the discovery of new evidence that was not available to plaintiffs during the briefing of defendants' earlier motions. (Mot. for Recons. In Light of Newly-Discovered Evidence ["Pls.' Mot."] at 1.) Plaintiffs have also filed a motion for leave to amend their complaint in light of newly-discovered evidence. Based on its review of the filings by the parties and applicable case law, the Court will deny plaintiffs' motions.

FACTUAL BACKGROUND

Plaintiffs' allegations against the United States and some two dozen individual defendants are described in the Court's February 16, 2010 Memorandum Opinion. *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 106-07 (D.D.C. 2010). To summarize, Yasser Al-Zahrani, Jr., a citizen of Saudi Arabia, and Salah Ali Abdullah Ahmed Al-Salami, Jr., a citizen of Yemen, were among nearly 800 individuals deemed to be "enemy combatants" by the United States government and transferred to Guantanamo Bay, Cuba, beginning in January 2002. (Am. Compl. ¶¶ 11, 13, 43-44.) Both men were taken to Guantanamo in spring 2002 (*id.* ¶¶ 83, 125), and plaintiffs allege that during the years in which Al-Zahrani and Al-Salami were imprisoned there, they endured inhumane and degrading conditions of confinement and violent acts of torture and abuse. (*Id.* ¶¶ 51-70.) Plaintiffs further allege that the brutal acts and conditions that Al-Zahrani and Al-Salami endured for over four years had damaging effects on their physical and psychological heath, effects that defendants intended, knew of, and/or should have anticipated but failed to prevent. (*Id.* ¶¶ 97-100; 146-164.) After months of hunger strikes and, for Al-Salami, multiple medical evaluations evidencing depression and suicidal thoughts, Al-Zahrani and Al-Salami were found dead in their cells sometime after 12:35 a.m. on June 10, 2006. (*Id.* ¶¶ 101, 146-164, 165.) A final report from the Naval Criminal Investigative Service ("NCIS") issued in 2008 concluded that the deaths were suicides by hanging. (*Id.* ¶ 4.)

Since they made the above allegations in their amended complaint, plaintiffs contend that new facts have come to light concerning the deaths of Al-Zahrani and Al-Salami. (Pl.'s Mot. at 2.) Specifically, plaintiffs point to interview accounts from four soldiers who were stationed at Guantanamo at the time of the deaths—Army Staff Sergeant Joe Hickman, Specialist Tony Davila, Army Specialist Christopher Penvose, and Army Specialist David Carroll. (*Id.* at 3-4.)

These men were interviewed as part of a story written by Scott Horton and published in *Harper's Magazine* on January 18, 2010. (*Id.*, Ex. A.) The soldiers, who were part of a Military Intelligence unit assigned to guard Camp Delta, allegedly had "first-hand observations of camp activity" on the night Al-Zahrani and Al-Salami died, but "they were never approached or interviewed for the NCIS investigation." (*Id.* at 4.) Plaintiffs argue that the accounts of the soldiers suggest that Al-Zahrani and Al-Salami did not die in their cells of suicide, but "were transported from their cells to an undisclosed, unofficial 'black site' nicknamed 'Camp No' that was outside the perimeter of the main prison camp, and died there or from events that transpired there."[1] (*Id.*)

In light of the *Harper's Magazine* article, plaintiffs seek to amend their complaint to include allegations that Al-Zahrani and Al-Salami were "the victims of homicide at the hands of Defendants and their agents." (Proposed Second Am. Compl. ["Proposed Compl."] ¶ 45.) Plaintiffs seek to include, *inter alia*, allegations that Al-Zahrani, Al-Salami, and a third prisoner were removed from their cells and taken to Camp No, where they "were killed or caused severe injury highly likely to cause death and that did indeed soon result in their deaths, including by having rags stuffed down their throats by U.S. officials." (*Id.* ¶¶ 48, 50.) Further, plaintiffs seek

[1] Plaintiffs' brief describes in detail the observations of Hickman, Davila, Penvose, Carroll, and other soldiers from the night of June 9 and June 10, 2006, included in the Horton article. (Pl.'s Mot. at 4-6; *see also id.*, Ex. A (copy of Horton article).) None of the soldiers state that they had any direct contact with or observation of Al-Zahrani or Al-Salami the night they died, but their versions of the events of that evening and the next day are arguably inconsistent with aspects of the NCIS and other media reports. (*Id.* at 5.) For example, Penvose claims that although the NCIS report states that the first dead body was found sometime after 12:35 a.m., the camp went into a "frenzy of activity" well before then, and Hickman was told that three dead prisoners were delivered to the medical clinic around 12:15 a.m. (*Id.*) Moreover, guards interviewed for the article stated that they were told by commanding officers that although the media reported that Al-Zahrani and Al-Salami committed suicide by hanging, they actually committed suicide by swallowing rags. (*Id.* at 6.) The guards then were instructed not to contradict or undermine the official report of hanging and were told that their communications were being monitored to ensure that they did not. (*Id.*)

to allege that defendants destroyed evidence, including removing body parts from the deceased prisoners, and that the homicides and subsequent cover-ups of those homicides "were the result of persistent racial, ethnic, and religious animus against the deceased." (*Id.* ¶¶ 57-58.)

Based on the allegations plaintiffs seek to add to their complaint, their proposed amendments include several new claims in addition to the counts in their First Amended Complaint. *See Al-Zarahni*, 684 F. Supp. 2d at 107 (describing fourteen claims for relief). These claims include: extrajudicial killing against "U.S. officials" in their individual capacity under the ATCA (Proposed Compl. ¶¶ 268-275); tortious spoliation of evidence against "U.S. officials" in their individual capacity under the common law of the District of Columbia[2] (*id.* ¶¶ 369-378); and conspiracy to injure and kill based on invidious racial, religious and/or ethnic origin animus under 42 U.S.C. §§ 1985(2)-(3). (*Id.* ¶¶ 379-385.) Plaintiffs also assert that in light of their new allegations of homicide, discovery is necessary for the Court to determine the validity of defendants' anticipated response to plaintiffs' Fifth Amendment and other constitutional claims. (*Id.* ¶ 293(a).)

PROCEDURAL BACKGROUND

Plaintiffs filed their original complaint against the government, twenty-four named individuals, and one hundred unnamed military, medical, and civilian personnel on January 7, 2009. (Compl. ¶ 6.) That complaint was amended on January 29, 2009, and included fourteen claims for relief.[3] (Am. Compl. ¶¶ 199-325.) On June 26, 2009, the individual defendants moved to dismiss plaintiffs' constitutional claims under Federal Rules of Civil Procedure

[2] Plaintiffs state that they also intend to pursue a claim for spoliation of evidence under the FTCA, but that pursuant to an exhaustion requirement, they first will submit this claim to the Department of Defense and Central Intelligence Agency. (Proposed Compl. at 96 n.1.)

[3] The Court's February 16, 2010 Memorandum Opinion includes a detailed description of plaintiffs' original claims, the individual defendants named in the complaint, and the motions filed by the government in response to the complaint. *Al-Zahrani*, 684 F. Supp. 2d at 106-08.

12(b)(1) and 12(b)(6) on the grounds that this Court lacked subject matter jurisdiction over these claims and that plaintiffs failed to state a claim upon which relief can be granted. The government also filed a motion to substitute itself for the individual defendants with respect to plaintiffs' claims under the ATCA. Finally, the United States filed a motion to dismiss all of plaintiffs' claims under the FTCA, including the ATCA claims for which it had sought substitution, on the grounds that this Court lacks subject matter jurisdiction over these claims.

On February 16, 2010, this Court issued a Memorandum Opinion, granting each of defendants' motions and dismissing the case. As to plaintiffs' constitutional claims, the Court held that the Supreme Court in *Boumediene v. Bush*, 553 U.S. 723 (2008), did not invalidate the entirety of § 7 of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 20 Stat. 2600 (2006). *Al-Zahrani*, 684 F. Supp. 2d at 109-11. Specifically, the Court found that the section of the MCA removing from the courts "jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of an alien detained and determined to be an enemy combatant by the United States is still valid law. *Id.* at 108, 110; *see also* 28 U.S.C. § 2241(e)(2). However, the Court did not reach plaintiffs' argument that the jurisdictional restriction in the MCA is unconstitutional, holding instead that even assuming *arguendo* that the Court has jurisdiction, plaintiffs' constitutional claims did not survive defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Id.* at 112. The Court found that it was bound by the D.C. Circuit's decisions in *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) ("*Rasul II*") and *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) , which "foreclose[d it] from creating a *Bivens* remedy for plaintiffs." *Id.* It also concluded that under *Rasul II*, the

individual defendants were entitled to qualified immunity against plaintiffs' constitutional claims. *Id.* at 112 n.5.

The Court next held that the government was properly substituted for its individual agents as defendant in plaintiffs' ATS claims, which in turn are governed by the FTCA. *Id.* at 116. It then concluded that all of plaintiffs' non-constitutional claims under the FTCA are barred by that statute's exception to its waiver of sovereign immunity for "any claim arising in a foreign country." *Id.* at 116, 119.

Plaintiffs' motion for reconsideration challenges only the Court's conclusions as to the availability of a remedy for plaintiffs' *Bivens* claims, the applicability of qualified immunity to individual defendants, and the appropriateness of the government's substitution as defendant in plaintiffs' claims under the ATCA. (Pls.' Mot. at 8, 14, 17.) Plaintiffs argue that the new evidence presented in the *Harper's Magazine* article compels the Court to change its analysis of these issues. The motion does not address the Court's findings as to the continued vitality of 28 U.S.C. § 2241(e)(2) or the Court's dismissal of plaintiffs' FTCA claims on the basis of the statute's "foreign country exception." (*Id.* at 8.)

ANALYSIS

I. MOTION FOR RECONSIDERATION UNDER RULE 59(e)

"After a district court dismisses certain defendants or claims with prejudice, those defendant[s] or claims can be reinstated through the vehicle of an amended complaint only if the plaintiff is also entitled to relief from the judgment or order." *Fantasia v. Office of Receiver of Comm'n on Mental Health Servs.*, No. 01-1079, 2001 WL 34800013, at *12 (D.D.C. Dec. 21, 2001); *see also Confederate Mem. Ass'n, Inc. v. Hines*, 995 F.2d 295, 299 (D.C. Cir. 1993) ("Once the District Court granted [defendants'] motions to dismiss, appellants could amend the

complaint only by leave of court or by written consent of the adverse party . . . coupled with a motion under Rule 59(e) to alter or amend the judgment.") (internal quotation marks and citations omitted). Accordingly, before this Court can consider plaintiffs' motion to amend their complaint, it must first rule upon their motion for reconsideration under Federal Rule of Civil Procedure 59(e). *Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23, 27 (D.D.C. 2001); *see also Firestone v. Firestone,* 76 F.3d 1205, 1208 (D.C. Cir. 1996) ("Rule 15(a)'s liberal standard for granting leave to amend governs once the court has vacated the judgment. . . . But to vacate the judgment, [plaintiffs] must first satisfy Rule 59(e)'s more stringent standard."); *Helm v. Resolution Trust Corp.*, 84 F.3d 874, 879 (7th Cir. 1996) (plaintiff "must have first succeeded on a Rule 59(e) . . . motion before the court could grant her leave to file an amended complaint").

A. Standard of Review

"There is no Federal Rule of Civil Procedure that expressly addresses motions for reconsideration[, but c]ourts typically treat motions to reconsider as motions to alter or amend a judgment under Federal Rule of Civil Procedure 59(e)." *Howard v. Gutierrez*, 503 F. Supp. 2d 392, 394 (D.D.C. 2007). "'A Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Ciralsky v. CIA*, 355 F.3d 661, 671 (D.C. Cir. 2004) (quoting *Firestone*, 76 F.3d at 1208). "Motions under Fed. R. Civ. P. 59(e) are disfavored and relief from judgment is granted only when the moving party establishes extraordinary circumstances." *Niedermeier*, 153 F. Supp. 2d at 28; *see also Mobley v. Cont'l Cas. Co.*, 405 F. Supp. 2d 42, 45 (D.D.C. 2005) ("A motion for reconsideration . . . will not lightly be granted."); *Turkmani v. Republic of Bolivia*, 273 F. Supp. 2d 45, 49 (D.D.C. 2002) ("[R]econsideration and amendment of a previous order is an extraordinary

measure."). "A Rule 59(e) motion to reconsider is not simply an opportunity to reargue facts and theories upon which a court has already ruled." *State of New York v. United States*, 880 F. Supp. 37, 38 (D.D.C. 1995). Nor is it "a vehicle for presenting theories or arguments that could have been advanced earlier." *Burlington Ins. Co. v. Okie Dokie, Inc.*, 439 F. Supp. 2d 124, 128 (D.D.C. 2006). "Only if the moving party presents new facts or a clear error of law which 'compel' a change in the court's ruling will the motion to reconsider be granted. *State of New York*, 880 F. Supp. at 38 (quoting *Natural Res. Defense Council, Inc. v. U.S. Envtl. Protection Agency*, 705 F. Supp. 698, 702 (D.D.C. 1989)).

B. Availability of a Remedy for Plaintiffs' *Bivens* Claims

Plaintiffs argue that the factual record in this case is "in significant respects false and incomplete" because of defendants' obstruction and misrepresentation. (Pls.' Mot. at 9.) As a result, plaintiffs contend that this Court is "without a sufficient understanding of the contours of this case to be able to determine if the D.C. Circuit's special factors analysis in *Rasul II* indeed applies, or if the reasons for recognizing a remedy in the specific context of this case outweigh the reasons against." (*Id.*) Specifically, plaintiffs maintain that "unspecified national security concerns" should not be allowed to trump other factors in this case without question, given the government's alleged efforts to keep the circumstances of Al-Zahrani and Al-Salami's deaths secret and the possibility of a homicide at a "black site." (*Id.* at 10.) Plaintiffs allege that the new evidence compels the creation of a *Bivens* remedy, or at least additional discovery geared toward uncovering sufficient evidence to allow the Court to conduct a special factors analysis.

1. *Bivens, Sanchez-Espinoza*, and *Rasul II*

In *Bivens*, the Supreme Court held that although federal courts may fashion damages remedies for violations of constitutional rights, such "remed[ies] will not be available when

'special factors counseling hesitation' are present." *Chappell v. Wallace*, 462 U.S. 296, 298 (1983) (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971)). Those special factors relate "to the question of who should decide whether such a remedy should be provided." *Bush v. Lucas*, 462 U.S. 367, 380 (1983). "Where, for example, the issue 'involves a host of considerations that must be weighed and appraised,' its resolution 'is more appropriately for those who write the laws, rather than for those who interpret them.'" *Sanchez-Espinoza*, 770 F.2d at 208 (quoting *Bush*, 462 U.S. at 380) (internal quotations and citations omitted).

Relying on the Supreme Court's post-*Bivens* special factor analysis in *Sanchez-Espinoza*, the D.C. Circuit "ha[d] no doubt that . . . considerations of institutional competence preclude judicial creation of damage remedies" where federal defendants are sued by nonresident aliens asserting their constitutional rights. *Id.* There, plaintiffs accused defendants of "acting in concert and conspiracy with the other defendants and others unknown, [and] authoriz[ing], financ[ing], train[ing], direct[ing] and knowingly provid[ing] substantial assistance for the performance of activities which terrorize and otherwise injure the civilian population of the Republic of Nicaragua." *Id.* at 205. The assistance allegedly provided by the United States "resulted in summary execution, murder, abduction, torture, rape, wounding, and the destruction of private property and public facilities." *Id.* The extreme nature of these allegations notwithstanding, the Court held that "the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad." *Id.* at 209. The Court concluded that the "foreign affairs implications" of suits like that in *Sanchez-Espinoza* "cannot be ignored," because of "their ability to produce . . . 'embarrassment of our government abroad'

through 'multifarious pronouncements by various departments on one question.'" *Id*. (quoting *Baker v. Carr*, 369 U.S. 186, 226 (1962)).

Nearly twenty-five years later, in *Rasul II*, the D.C. Circuit, invoking *Sanchez-Espinoza*, affirmed the dismissal of claims under the Fifth and Eighth Amendments brought by former detainees at the military facility in Guantanamo Bay. Although it found that plaintiffs had failed to state a *Bivens* claim because defendants were entitled to qualified immunity, *Rasul II*, 563 F.3d at 532, it also identified an alternative ground for dismissing plaintiffs' *Bivens* claims—that "special factors" counseled against doing so. *Id.* at 532 n.5. The Court found that "[t]he danger of obstructing U.S. national security policy is one such factor" and that there was "no basis" for distinguishing the *Rasul* plaintiffs' claims from the claims in *Sanchez-Espinoza*. *Id.* (citing *Rasul v. Myers*, 512 F.3d 644, 673 (D.C. Cir. 2008) ["*Rasul I*"] (Brown, J., concurring)). As such, it held that the "special factors" analysis foreclosed the former detainees' *Bivens* claims. *Id.*; *see also Rasul I*, 512 F.3d at 673 ("The present case involves the method of detaining and interrogating alleged enemy combatants during a war-a matter with grave national security implications.").

2. Application to Plaintiffs' Claims

The Court finds that the new evidence and allegations[4] presented by plaintiffs do not change the application of *Rasul II* to this case nor do they compel reconsideration of the Court's dismissal of plaintiffs' constitutional claims. Simply put, plaintiffs' claims—even as amended to

[4] As discussed more fully *infra*, the Court need not consider plaintiffs' proposed amendments to their amended complaint in deciding plaintiffs' motion under Federal Rule of Civil Procedure 59(e). Rather, the Court takes into account only "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Ciralsky*, 355 F.3d at 671. Plaintiffs' proposed amendments are not evidence—rather, they are allegations based on the *Harper's Magazine* article. However, for purposes of plaintiffs' *Bivens* claims, the Court will assume that the proposed amendments are true.

include the information highlighted in the *Harper's Magazine* article and allegations that Al-Zahrani and Al-Salami were victims of homicides caused either directly or indirectly by defendants—involve the treatment of detainees held at Guantanamo Bay, and, therefore, national security concerns. And, as the Court stated in its February 16, 2010 Memorandum Opinion, "[t]he D.C. Circuit's conclusion [in *Rasul II*] that special factors counsel against the judiciary's involvement in the treatment of detainees held at Guantanamo binds this Court and forecloses it from creating a *Bivens* remedy for plaintiffs here." *Al-Zahrani*, 684 F. Supp. 2d at 112. Nothing in the newly-presented evidence contradicts or distinguishes the Circuit's reasoning—reasoning that gives this Court no choice but to conclude that "the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad." *Sanchez-Espinoza*, 770 F.2d at 209. Nor have plaintiffs demonstrated how additional discovery will distinguish this case from *Rasul II* such the Court can evade the Circuit's clear holding.

Plaintiffs argue that the decision to recognize a *Bivens* remedy is "context-specific" and that the similarities between *Rasul II* and aspects of plaintiffs' complaint should not end the Court's inquiry. (Pls.' Mot. at 9-10 (quoting *Navab-Safavi v. Broad. Bd. of Governors*, 650 F. Supp. 2d 40, 66 (D.D.C. 2009).) But none of the evidence presented by plaintiffs differentiates their claims from those in *Rasul II* or *Sanchez-Espinoza* in a meaningful way—all three cases involve alleged violations of fundamental constitutional rights of foreign subjects by military and foreign policy officials while abroad. While it is, as plaintiffs argue, "disturb[ing]" that defendants allegedly "fought to keep secret virtually all information concerning the cause and circumstances of Al-Zahrani and Al-Salami's deaths" and that "details of an elaborate, high-level cover-up of likely homicide at a 'black site' at Guantanamo" are now emerging (*id.* at 10), these

claims are comparable to those in *Sanchez-Espinoza*, where it was alleged that the United States had violated fundamental human rights when it allegedly sponsored terrorist raids in Nicaragua that resulted in the "execution, murder, abduction, torture, rape [and] wounding" of "innocent Nicaraguan civilians." 770 F.2d at 205. And, they are comparable to allegations that U.S. officials threatened, tortured, and beat detainees at Guantanamo Bay. *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 27, 29 (D.D.C. 2006). Moreover, even if every allegation of "shocking conduct" in plaintiffs' proposed amended complaint and the *Harper's Magazine* article is true (Pls.' Mot. at 14), the highly disturbing nature of allegations in a complaint cannot be a sufficient basis in law for the creation of a *Bivens* remedy where special factors counsel hesitation. The question before the Court is not whether homicide "exceeds the bounds of permissible official conduct in the treatment of detainees in U.S. custody and demands accountability" or whether the families of Al-Zahrani and Al-Salami deserve a remedy. (*Id.* at 13-14.) Rather, the question is "who should decide whether such a remedy should be provided." *Bush*, 462 U.S. at 380; *see also Wilson v. Libby*, 535 F.3d 697, 705, 709 (D.C. Cir. 2008). The D.C. Circuit unequivocally answered that question when it found that courts "must leave to Congress the judgment whether a damage remedy should exist" in cases involving national security and foreign policy concerns. *Sanchez-Espinoza*, 770 F.2d at 209; *see also Rasul II*, 563 F.3d at 532 n.5. Bound by the Circuit's decision in *Rasul II* that claims regarding the treatment of detainees at Guantanamo Bay are no different than the claims at issue in *Sanchez-Espinoza*, the Court is precluded from creating a *Bivens* remedy in this case.[5]

[5] Although it need not reach plaintiffs' arguments concerning qualified immunity, the Court notes that nothing presented by plaintiffs alters its earlier conclusion that the Circuit's decision in *Rasul II* compels it to find that the individual defendants are protected by the doctrine of qualified immunity. *Al-Zahrani*, 684 F. Supp. 2d at 112 n.5. In *Rasul II*, the Circuit held that defendants were entitled to qualified immunity because

C. Government's Substitution As Defendant

Plaintiffs further argue that defendants' alleged conduct was outside the scope of their employment and therefore that the substitution of the United States as the defendant is inappropriate. (Pls.' Mot. at 17.) The government moved to substitute itself for individually named defendants because the *Westfall* Act "provides that a claim against the United States under the [FTCA] is the exclusive remedy for persons seeking recovery for damages for any 'negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.'" (Mem. of P. & A. in Supp. of United States' Mot. for Substitution of Claims I to IV of the Am. Compl. ["Substitution Mem."] at 6 (quoting 28 U.S.C. § 2679(b)(1)).) As part of its motion, the government included a "Certification of Scope of Employment" from Phyllis J. Pyles, Director of the Torts Branch of the Civil Division of the U.S. Department of Justice. (*Id.*, Ex. A.) Ms. Pyles certified that at the time of the conduct alleged in the Amended Complaint, the individual defendants in the case were acting within the

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> [n]o reasonable government official would have been on notice that [detainees at Guantanamo] had any Fifth Amendment or Eighth Amendment rights [because a]t the time of their detention, neither the Supreme Court nor this court had ever held that aliens captured on foreign soil and detained beyond sovereign U.S. territory had any constitutional rights-under the Fifth Amendment, the Eighth Amendment, or otherwise.

563 F.3d at 530. This reasoning applies squarely to defendants, whose alleged conduct occurred between 2002 and 2006, two years before the Supreme Court's recognition in *Boumediene* that noncitizens detained by the United States at Guantanamo have the habeas corpus privilege under the U.S. Constitution. *Boumediene*, 553 U.S. at 732. Plaintiffs' argument that the Supreme Court's observations in footnote 15 to its decision in *Rasul v. Bush*, 542 U.S. 466 (2004) (discussing the district court's jurisdiction over plaintiffs' claims) somehow bestowed constitutional rights on Guantanamo detainees (Pls.' Mot. at 15) is unavailing—most notably because four years later, in *Boumediene*, the Supreme Court itself stated that "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*, 553 U.S. at 770 (emphasis added).

scope of their employment. (*Id.*, Ex. A. at 2.) The Court concurred, concluding that it was bound by the D.C. Circuit's holding in *Rasul I*, which stated that even "seriously criminal" acts fall within the scope of employment where the acts "[a]re intended as interrogation techniques to be used on detainees." *Al-Zahrani*, 684 F. Supp. 2d at 113-14 (quoting *Rasul I*, 512 F.3d at 658); *see also id.* at 114 (finding defendants' alleged conduct "foreseeable and incidental to defendants' positions as military, medical, or civilian personnel in connection with Guantanamo").)

Plaintiffs now contend that newly discovered evidence[6] compels the Court to reconsider its earlier holding because it demonstrates that defendants' conduct in this case, unlike the conduct in *Rasul I*, was not "pursuant to standard operating procedures" and was not "used in connection with interrogations at Guantanamo." (Pls.' Mot. at 17.) Rather, plaintiffs allege that the military's own rules prohibited the alleged conduct at issue—in particular, "direct involvement in homicides at a 'black site' at Guantanamo and subsequent efforts to conceal [defendants'] conduct." (*Id.* at 18.) Plaintiffs further argue that defendants' attempt to conceal evidence and cover-up facts surrounding their actions undercuts any argument that the conduct

[6] Defendants point out that plaintiffs, by their own admission, became aware of the "new" evidence they now proffer on January 18, 2010, nearly a month prior to the Court's release of its February 16, 2010 Memorandum Opinion. (United States' Opp'n to Pls.' Mots. for Reconsideration and Leave to Am. the Am. Compl. ["Government's Opp'n"] at 8-14; Pls.' Mot. at 4.) Accordingly, defendants argue that the Court should deny plaintiffs' motion for reconsideration because they have not presented "newly discovered or previously unavailable" evidence. (Government's Opp'n at 8); *see also Int'l Painters & Allied Trades Indus. Pension Fund v. Design Tech.*, 254 F.R.D. 13, 18-19 (D.D.C. 2008) ("New evidence, as that term is used in Rule 59(e), means evidence which 'is newly discovered or previously unavailable despite the exercise of due diligence.'") (quoting *Niedermeier*, 153 F. Supp. 2d at 29). The Court agrees that "a Rule 59(e) motion is not intended to be a vehicle for the introduction of evidence that was 'available but not offered at the original motion or trial.'" *Id.* (quoting *Natural Res. Def. Council, Inc.*, 705 F. Supp. at 702). However, because the Court finds that the evidence proffered by plaintiffs is insufficient to warrant reconsideration of its earlier decision, it need not resolve this debate.

was permissible. (*Id.*) Based on these new allegations, plaintiffs argue that an evidentiary hearing as to scope of employment is warranted. (*Id.* at 19-21.)

As an initial matter, the Court rejects plaintiffs' assertion that it "must at this procedural stage" accept plaintiffs' "new factual allegations" as true. (*Id.* at 22.) The issue before the Court is not whether plaintiffs' proposed amendments to the amended complaint (*i.e.*, their new factual allegations) state a cause of action or create a dispute as to defendants' scope of employment. Rather, the question is whether plaintiffs have presented new evidence that "'compel[s]' a change in the court's" previous ruling that defendants' conduct was within the scope of their employment. *State of New York*, 880 F. Supp. at 38 (quoting *Natural Res. Defense Council, Inc.*, 705 F. Supp. at 702); *see also Carter v. WMATA*, 503 F.3d 143, 145 n.2 (D.C. Cir. 2007) ("[R]econsideration is only appropriate when 'the moving party shows new facts or clear errors of law which compel the court to change its prior position.'") (quoting *Nat'l Ctr. for Mfg. Sci. v. Dep't of Def.*, 199 F.3d 507, 511 (D.C. Cir. 2000)). Only after the Court has decided that the new evidence warrants the extraordinary measure of reconsideration do plaintiffs' proposed amendments become relevant. *See Firestone*, 76 F.3d at 1208 ("Rule 15(a)'s liberal standard for granting leave to amend governs once the court has vacated the judgment. . . . But to vacate the judgment, [plaintiffs] must first satisfy Rule 59(e)'s more stringent standard.").

Plaintiffs' new evidence consists of recollections by individuals who were present at Guantanamo Bay on June 9-10, 2006, but who did not at any time see or interact with Al-Zahrani or Al-Salami or have any knowledge, first-hand or otherwise, of Al-Zahrani or Al-Salami's treatment. Having reviewed these accounts, as well as the rest of the *Harper's Magazine* article, the Court concludes that nothing therein compels it to reconsider its earlier holding that the individually named defendants were acting within the scope of their employment in their

dealings with Al-Zahrani and Al-Salami. Specifically, nothing presented in the article rebuts the certification submitted by AUSA Pyles[7] or materially disputes her certification, as none of the observations by Hickman, Penvose, Davila, and Carroll[8] are inconsistent with the conclusion that defendants were acting within the scope of their duties in connection with their "positions as military, medical, and civilian personnel in connection with Guantanamo." *Al-Zahrani*, 684 F. Supp. 2d at 114. Plaintiffs' speculations aside, nothing witnessed by these soldiers or recounted in the article demonstrates that the individually named defendants were not "on the job" when committing the alleged conduct. *Harbury v. Hayden*, 522 F.3d 413, 422 n.4 (D.C. Cir. 2008) ("Many states and D.C. apply the scope-of-employment test very expansively," which means that "[t]he scope-of-employment test often is akin to asking whether the defendant merely was on duty or on the job when committing the alleged tort."). Accordingly, the Court declines to reconsider its original finding, based on binding D.C. Circuit precedent, [9] that defendants'

[7] An Attorney General's certification that a federal employee was acting within the scope of his employment constitutes "*prima facie* evidence that the employee was acting within the scope of his employment." *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 662 (D.C. Cir. 2006). "'[A] plaintiff challenging the government's scope-of-employment certification bears the burden of coming forward with specific facts rebutting the certification.'" *Id.* (quoting *Stokes v. Cross*, 327 F.3d 1210, 1214 (D.C. Cir. 2003)).

[8] The evidence presented in the *Harper's Magazine* article includes, *inter alia*: Hickman's observation of a van driving unidentified detainees to and from the direction of "Camp No," an alleged area about which he was never briefed and has no first-hand knowledge; the backing in of that van to the entrance of the medical clinic; Penvose's account of receiving an instruction from an "agitated" senior navy officer to deliver a code word to another officer; the frenzied reaction of soldiers at Guantanamo around the time of the deaths; Hickman and Davila's reports that they were told by a medical corpsman and other guards that three prisoners, one with severe bruising, had died because they had rags stuffed down their throats; Penvose and Carroll's failure to observe the delivery of any detainees to the clinic from the camp on the night in question; instructions from defendant Bumgarner to guards that no one was to "undermine" the official report on the deaths, which stated the cause of death as suicide by hanging; and defendant Bumgarner's suspension following an interview in which he told the press that the deceased detainees had cloths in their mouths. (Pls.' Mot. at 4-6; *see also id.*, Ex. A.)

[9] Plaintiffs' argument that defendants' alleged conduct was "not pursuant to sanctioned policies and procedures" and is therefore distinguishable from *Rasul I* is unpersuasive. (Pls.'

alleged treatment of Al-Zahrani and Al-Samali was within the scope of their employment. *Al-Zahrani*, 684 F. Supp. 2d at 113-14 (citing *Rasul I*, 512 F.3d at 660).

II. MOTION FOR LEAVE TO AMEND

The Court does not evaluate plaintiffs' motion for leave to file an amended complaint separately from plaintiffs' motion for reconsideration. *Fantasia*, 2001 WL 34800013, at *12 (after district court dismisses claims with prejudice, motion for leave to amend "is not evaluated as a stand-alone motion, but is inextricably linked with his motion to reconsider the order granting . . . defendants' motions to dismiss"). Plaintiffs' claims, which were dismissed by the Court on February 16, 2010, "can be reinstated through the vehicle of an amended complaint *only* if the plaintiff is also entitled to relief from the judgment or order." *Id.* (citing *Firestone*, 76 F.3d at 1208) (emphasis added); *see also Johnson v. Dist. of Columbia*, 244 F.R.D. 1, 4 (D.D.C. 2007) ("If the plaintiff persuades the court to vacate its judgment of dismissal, only then can the court entertain the plaintiff's proposed amendment."). As already decided, plaintiffs have failed to proffer sufficient grounds for reconsideration of the Court's February 16, 2010 Order. For that reason, plaintiffs' motion for leave to amend is denied.

Mot. at 17-21.) The test for scope of employment is not whether an employee followed his employer's rules or instructions—indeed, even activities that are "forbidden" by an employer are "within the scope of employment when 'actuated, at least in part, by a purpose to serve the [employer].'" *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998) (quoting Restatement (Second) of Agency §§ 228(1)(c), 230). For that reason, even "seriously criminal and violent conduct can still fall within the scope of a defendant's employment under D.C. law." *Harbury*, 522 F.3d at 422; *see also Rasul I*, 512 F.3d at 660 ("[A]llegations of serious criminality do not alter our conclusion that the defendants' conduct was incidental to authorized conduct.").

CONCLUSION

For the foregoing reasons, the Court denies plaintiffs' motions for reconsideration [Dkt. 27] and for leave to amend [Dkt. 28].

SO ORDERED.

/s/
ELLEN SEGAL HUVELLE
United States District Judge

Date: September 29, 2010