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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAID ULLAH (as personal representative of GUL RAHMAN),

Plaintiffs,

vs.

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN,

Defendants.

NO. 2:15-CV-286-JLQ

DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULES 12(b)(1) AND 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Note On Motion Calendar:

April 22, 2016, 9:00 a.m., at Spokane, Washington

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INTRODUCTION

Defendants James Elmer Mitchell and John "Bruce" Jessen (collectively, "Defendants"), by and through undersigned counsel, respectfully submit that this dispute does not belong in this Court. Plaintiffs Suleiman Abdulla Salim, Mohamed Ahmed Ben Soud and Obaid Ullah, as personal representative of Gul Rahman (collectively, "Plaintiffs")—all foreign citizens—improperly bring this action under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, claiming Defendants violated the "law of nations." As discussed, this Court lacks jurisdiction to hear Plaintiffs' claims and, in any event, Plaintiffs have failed to state a viable claim as a matter of law.

Plaintiffs allege that Defendants designed, implemented and applied certain U.S. government-approved "enhanced interrogation techniques" on individuals—including Plaintiffs—detained abroad in facilities controlled by the U.S. government. Plaintiffs further allege that these acts violated the "law of nations," and seek relief pursuant to the ATS because Defendants' purported conduct allegedly consisted of: (1) torture and other cruel, inhuman, and degrading treatment; (2) non-consensual human experimentation; and (3) war crimes.

Plaintiffs' claims must be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for multiple reasons: First, Plaintiffs' claims are inherently entangled with (and predicated upon) decisions reserved for the political branches of the U.S. government; the Political Question Doctrine

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therefore removes consideration of such claims from this Court. Second, Defendants are immune to Plaintiffs' claims under the principle of Derivative Sovereign Immunity. Third, this Court lacks jurisdiction over Plaintiffs' claims because Plaintiffs fail to overcome the presumption against application of the ATS to conduct alleged to have occurred abroad. Fourth, Plaintiffs have not—and cannot—assert viable claims under the ATS, and fail to advance specific allegations sufficient to pursue an ATS claim. Fifth, and finally, Plaintiff Obaid Ullah lacks the capacity to sue on behalf of Gul Rahman's estate. Therefore, this matter should be dismissed in its entirety.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of an action for "lack of subject matter jurisdiction." *See* FED. R. CIV. P. 12(b)(1). A Rule 12(b)(1) motion can challenge the sufficiency of the pleadings to establish jurisdiction (facial attack), or a lack of any factual support for subject matter jurisdiction despite the pleading's sufficiency (factual attack). *See Grondal v. United States*, 2012 U.S. Dist. LEXIS 19398, at *11-13 (E.D. Wash. Feb. 16, 2012) (Quackenbush, J.). For a facial attack, all allegations are accepted as true. *Id.* For a factual attack, evidence outside the pleadings needed to resolve factual disputes as to jurisdiction may be considered. *See Assoc. of Am. Med. Coll. v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). Plaintiffs have the burden of

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establishing jurisdiction. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

Rule 12(b)(6), in turn, provides for dismissal of an action for "failure to state a claim upon which relief can be granted." *See* FED. R. CIV. P. 12(b)(6). For a 12(b)(6) motion, "all well-pleaded allegations of material fact [are accepted as true] and construe[d] in the light most favorable to the non-moving party." *Padilla v. Yoo*, 678 F.3d 748, 757 (9th Cir. 2012). "[C]onclusory allegations of law and unwarranted inferences" are insufficient. *Associated Gen'l Contractors v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998). A complaint must state "evidentiary facts which, if true, will prove [the claim]," *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008), otherwise it will be dismissed. *See Watson v. Weeks*, 436 F.3d 1152, 1157 (9th Cir. 2006).

Plaintiffs are unable to establish this Court's jurisdiction over this case and have failed to advance a claim upon which relief can be granted. Therefore, Defendants' Motion to Dismiss should be granted and Plaintiffs' claims dismissed.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO HEAR THIS CASE PURSUANT TO THE POLITICAL QUESTION DOCTRINE.

The Political Question Doctrine prevents courts from deciding issues assigned to the Executive or Legislative branches of the U.S. government. *See Baker v. Carr*, 369 U.S. 186 (1962). Against this backdrop, the Supreme Court, *id.*

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at 217, has opined that "[p]rominent on the surface of any case held to involve a political question is":

> (1) 'a textually demonstrable constitutional commitment of the issue to a coordinate political department';
>
> (2) 'a lack of judicially discoverable and manageable standards for resolving it';
>
> (3) 'the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion';
>
> (4) 'the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government';
>
> (5) 'an unusual need for unquestioning adherence to a political decision already made'; or
>
> (6) 'the potentiality of embarrassment from multifarious pronouncements by various departments on one question.'

Using the *Baker* factors as a guide, courts must conduct a "***discriminating*** case-by-case analysis . . . to determine whether a political question is so inextricably tied to the case as to divest the court of jurisdiction." *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 551 (9th Cir. 2014) (emphasis added). Governing precedent recognizes that although not every case that "touches foreign relations lies beyond judicial cognizance," *Baker*, 369 U.S. at 21, "the foreign relations of our government is committed by the Constitution to the executive and legislative [branches] . . . and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *See Corrie v.*

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Caterpillar, Inc., 503 F.3d 974, 982 (9th Cir. 2007) (citation omitted). Here, a "discriminating" analysis of the *Baker* factors establishes that ***all six*** factors are implicated by Plaintiffs' claims, and demonstrates, conclusively, that this Court lacks jurisdiction to hear Plaintiffs' claims pursuant to the Political Question Doctrine.

A. Plaintiffs' Claims Implicate a Textually Demonstrable Constitutional Commitment to the Executive Branch.

The U.S. Constitution expressly assigns decisions involving war and foreign policy to the Executive and Legislative Branches. *See* U.S. Const. art II, § 2, cl. 1; art. I, § 1, cls. 12-14; art. II, § 2. Indeed, "the strategy and tactics employed on the battlefield are clearly not subject to judicial review." *Lane v. Halliburton*, 529 F.3d 548, 559 (5th Cir. 2008); *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (recognizing that President's decision to deploy troops in a foreign land was nonjusticiable); *DaCosta v. Laird*, 471 F.2d 1146, 1153-57 (2d Cir. 1973) (recognizing that the decision to mine another country's harbors during war is nonjusticiable). Claims are textually committed to another branch of government when they "will require reexamination of" a decision made by a coordinate branch of government that is "insulated from judicial review." *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1359-60 (11th Cir. 2007).

Here, Plaintiffs expressly plead that Defendants' alleged conduct arose directly from decisions the ***U.S. government*** made in response to the threat posed by al-Qa'ida. Compl. ¶¶ 22-24. As Plaintiffs admit, the CIA requested that Dr.

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Mitchell review the "Manchester Manual" in December 2001, after the CIA determined the document included "strategies" for al-Qa'ida members to "resist interrogation." *Id.* ¶ 22. Plaintiffs also concede that Defendants' subsequent purported conduct was undertaken at the request of, and pursuant to, the supervision of the CIA and the U.S. Department of Justice ("DOJ"), *id.* ¶¶ 21-24, 30, 59, and that "the White House" made the decision to transfer full responsibility for the interrogation of Abu Zubaydah (the first detainee) to the CIA. *Id.* ¶¶ 31, 35, 39. Ultimately, the Complaint acknowledges both that the CIA captured and detained Plaintiffs, and that the DOJ's Office of Legal Counsel ("OLC") authorized the interrogation techniques allegedly used on Plaintiffs. *Id.* ¶¶ 45, 72, 118-21, 157-59.

Actions of this variety are not subject to judicial review. *See, e.g., Saldana*, 774 F.3d at 553 (holding that the Political Question Doctrine applies to underlying foreign-policy choices, "such as the very decision to engage in military activity"); *Corrie*, 503 F.3d at 982 ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative [branches]," and the "propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision"). Plaintiffs' claims implicate the first *Baker* factor.

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B. No Judicially Manageable Standards Apply to Plaintiffs' Claims.

Plaintiffs' claims are also not susceptible to judicially manageable standards, the second *Baker* factor. 369 U.S. at 217. For instance, although Plaintiffs' claims are expressly predicated upon alleged torture, Compl. ¶¶ 168-73, the Ninth Circuit has determined that no clear definition of "torture" existed during the period Defendants' alleged conduct took place. *Yoo*, 678 F.3d at 764. Specifically, the Ninth Circuit has recognized that "torture" involved the intentional infliction of "severe pain or suffering," a phrase that lacked any definition, *id.*, and that there existed "considerable debate, both in and out of government, over the definition of torture as applied to specific interrogation techniques." *Id.* at 748. This "considerable debate" continued throughout the time period concerning the conduct alleged in the Complaint. Compl. ¶¶ 30, 59.

Indeed, the Ninth Circuit noted that judicial decisions had expressly considered (and declined to characterize as torture) certain interrogation techniques Plaintiffs now claim constituted torture. *Id.*; *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978) (holding that stress positions, hooding, subjection to noise, sleep deprivation and deprivation of food and drink was not "occasion[ing] suffering of the particular intensity and cruelty implied by the word torture as so understood"); *HCJ 5100/94 Public Committee Against Torture in Israel v. Israel*, 53(4) PD 817 [1999] (Isr.) (declining to find hooding, violent shaking, painful stress positions, exposure to loud music and sleep deprivation constituted "torture"); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C.

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Cir. 2002) (holding that plaintiffs failed to allege torture where "severe pain or suffering" was not alleged).

The same is true for the remaining alleged bases for Plaintiffs' claims. Compl. ¶¶ 168-85. For example, the concept of non-consensual human medical experimentation was substantively addressed only once, in *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 174 (2d Cir. 2009), and that decision does not advance any parameters for determining what constitutes human medical experimentation—*i.e.*, it does not articulate a "judicially manageable" standard. Similarly non-existent is a "widespread consensus regarding the elements of cruel, inhuman and degrading treatment"—such that a judicially manageable standard can be crafted and applied. *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1093 (N.D. Cal. 2008); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 711-12 (N.D. Cal. 1988) (holding cruel, inhuman, and degrading treatment cannot be sufficiently defined to support an ATS claim). The absence of judicially manageable standards implicates the second *Baker* factor.

C. Plaintiffs' Claims are Inherently Entangled with Political Decisions.

Finally, the Political Question Doctrine precludes judicial resolution of issues requiring an initial policy determination of a kind reserved for nonjudicial discretion, thus implicating the third through sixth *Baker* factor(s). 369 U.S. at 217; *Lane*, 529 F.3d at 563 (holding that the Political Question Doctrine prohibits "judicial pronouncement as to the wisdom of the military's use of civilian

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contractors in a war zone"); *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997) (holding that the Political Question Doctrine prevents courts from rendering "a policy determination regarding the necessity of simulating actual battle conditions"). Likewise, the Ninth Circuit recognizes that a case is nonjusticiable when the circumstances compel a court to "look beyond the lone defendant in [a] case and toward the foreign policy interests and judgments of the United States government itself." *Saldana*, 774 F.3d at 545.

Here, Plaintiffs' claims cannot be adjudicated "without inquiring into or passing judgment" on political decisions. *Id.* at 555. Indeed, Plaintiffs admit that Defendants' alleged interrogation of them was conducted in accordance with government policy decisions—as evidenced by Plaintiffs' recitation of the reports issued in support, and in review of, detainee interrogations. Compl. ¶¶ 20, 59. The Complaint also establishes that Defendants' alleged involvement in any purported interrogation techniques or programs was solely at the behest of, and connected with, U.S. government actions in response to the threat posed by al-Qa'ida. *Id.* ¶¶ 22, 24.

Indeed, Plaintiffs seek to involve this Court in issues which are "inherently entangled" with political decisions, whereby a favorable judgment will "necessarily conflict with and denounce our government's official actions," *Saldana*, 774 F.3d at 554-55, and/or require this Court to render a policy determination akin to making a judicial pronouncement as to the "necessity of

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simulating actual battle conditions." *Aktepe*, 105 F.3d at 1404. This Court simply cannot find for Plaintiffs "without implicitly questioning, and even condemning," U.S. policy on the war against al-Qa'ida. *Corrie*, 503 F.3d at 984.

Thus, Plaintiffs' claims directly implicate, and satisfy, the third through sixth *Baker* factors: the impossibility of deciding the case without an initial policy determination; appropriate respect for coordinate branches; an unusual need to adhere to political decisions made in the context of foreign affairs; and the potential for embarrassment from multifarious pronouncements by various departments on the same question. This entanglement affords more than a sufficient basis to dismiss.

As Plaintiffs' claims implicate ***all six*** of the *Baker* factors, this action must be dismissed for lack of jurisdiction under the Political Question Doctrine.

II. DEFENDANTS ARE ENTITLED TO DERIVATIVE SOVEREIGN IMMUNITY.

A. The Doctrine of Derivative Sovereign Immunity.

A sovereign government is immune from claims unless it has waived immunity and consented to suit. *See, e.g., United States v. Mitchell*, 445 U.S. 535, 538 (1980). Government employees, private citizens, and contractors performing work on the government's behalf have all similarly been held to be immune from suit based on the principle of ***derivative*** sovereign immunity. *See, e.g., Filarsky v. Delia*, 132 S. Ct. 1657, 1658 (2012); *Westfall v. Erwin*, 484 U.S. 292, 295 (1988);

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Boyle v. United Techn. Corp., 487 U.S. 500 (1988); *Barr v. Matteo*, 360 U.S. 564, 568-69 (1959); *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21-22 (1940).

The concept of Derivative Sovereign Immunity stems from the Supreme Court's decision in *Yearsley*. *See In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 342 (4th Cir. 2014), *cert. denied sub nom., KBR, Inc. v. Metzgar*, 135 S. Ct. 1153 (2015). In *Yearsley*, the plaintiff sought to impose liability upon a contractor working on behalf of the government, and within the scope of its "validly conferred" authority, for damaging the plaintiff's property while providing dredging services under a government contract with the U.S. Army Corps of Engineers. *Id.* at 21-22. The Supreme Court held that the contractor's acts were "act[s] of the government," and were immune from suit unless the government had waived its immunity. *Id.* at 22.

In *Filarsky*, the Supreme Court applied Derivative Sovereign Immunity to constitutional claims brought under 42 U.S.C. § 1983 against a private attorney retained by the government as a contractor to carry out a government investigatory function. 132 S. Ct. at 1666. The Court held that private individuals performing government functions should not be left "holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *Id.* In reaching this conclusion, the Court recounted the history of private citizens being afforded derivative sovereign immunity and noted that, even in the mid-nineteenth century, "the common law did not draw a distinction

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between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities." *Id.* at 1663.

From a policy perspective, the Supreme Court has acknowledged that Derivative Sovereign Immunity applies in part to ensure that "talented individuals" with "specialized knowledge or expertise" are willing to accept public engagements. *Filarsky*, 132 S. Ct. at 1665-66. Thus, Derivative Sovereign Immunity serves at least two important purposes. First, it protects the government's own sovereign immunity, because otherwise private individuals incurring liabilities during contract performance would pass those costs along to the government, directly or indirectly. *Saleh v. Titan Corp.*, 580 F.3d 1, 8 (D.C. Cir. 2009); *Boyle*, 487 U.S. at 511-12. Second, it ensures that private contractors remain willing to perform essential tasks, rather than declining for fear of being held liable to third-parties for doing the government's work. *Filarsky*, 132 S. Ct. at 1665-66 (recognizing deleterious effect if private individuals held personally liable for work done at government's behest).

Derivative Sovereign Immunity is routinely afforded to government contractors who act pursuant to authority validly conferred by the government and within the scope of their contracts. *Agredano v. U.S. Customs Serv.*, 223 F. App'x 558, 559 (9th Cir. 2007) ("[C]ompany contracting with the federal government cannot be held liable for injuries third parties incur as a result of the contract's

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execution, where the contract is legal and the company does not breach the terms of the contract.") (citing *Myers v. United States*, 323 F.2d 580, 583 (9th Cir. 1963)); *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) ("[C]ourts have extended derivative immunity to private contractors" because "[i]mposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work."); *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1447-48 (4th Cir. 1996) (observing that "[e]xtending immunity to private contractors to protect an important government interest is not novel," and that "no matter how many times or to what level [a government] function is delegated, it is a small step to protect that function when delegated to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions."); *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 196 (2d Cir. 2008); *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 204 (5th Cir. 2009); *see also Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 646 (6th Cir. June 2, 2015), *pet. for reh'g denied*, 2015 U.S. App. LEXIS 12416 (July 7, 2015).

B. This Case Must Be Dismissed Because Defendants Are Entitled to Derivative Sovereign Immunity based on the Complaint's Allegations.

As a preliminary matter, because the CIA has not waived its sovereign immunity, Derivative Sovereign Immunity should apply to this dispute. *See Mitchell*, 445 U.S. at 538; *Chesney v. TVA*, 782 F. Supp. 2d 570, 586 (E.D. Tenn.

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2011). Motions to dismiss under Rule 12(b)(1) are also properly granted pursuant to the doctrine of Derivative Sovereign Immunity where, as here, its "applicability . . . is established on the face of [p]laintiff's complaint[.]" *Ackerson*, 589 F.3d at 206.

Plaintiffs specifically allege that Defendants acted as contractors "pursuant to contracts they executed with the CIA." Compl. ¶¶ 32, 42. Plaintiffs have not—and cannot—allege that the authority conferred upon Defendants pursuant to their contracts with the CIA was improperly conferred, or that Defendants exceeded this authority. Rather, Plaintiffs concede that Defendants' purported creation, design, consultation, and advice as to implementation of approved interrogation techniques were all done "under color of law," and at the CIA's behest. *Id.* ¶¶ 16, 32, 168, 174.

The Ninth Circuit's recent decision in *Yoo* requires the application of Derivative Sovereign Immunity to Defendants. 678 F.3d at 750. In *Yoo*, an American citizen detained as an "enemy combatant" after the September 11, 2001, attacks sought to hold a government attorney who authored a series of OLC memoranda[1] regarding "enhanced interrogation techniques" liable ***in his personal***

[1] From April 1, 2002 to July 20, 2007, the OLC issued eight separate memoranda discussing the legal standards governing military interrogation of alien unlawful combatants held abroad. Compl. ¶¶ 20, 30, 45, 59; *see also Yoo* 678 F.3d at 752-53.

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capacity. *Id.* at 750. After the district court denied a motion to dismiss under Rule 12(b)(6), *id.* at 754, the Ninth Circuit reversed on the basis that the defendant was, in fact, "entitled to qualified immunity." *Id.* at 769. As the Ninth Circuit explained:

> Under recent Supreme Court law . . . we are compelled to conclude that, regardless of the legality of Padilla's detention and the wisdom of Yoo's judgments, at the time he acted the law was not 'sufficiently clear that every reasonable official would have understood that what he [wa]s doing violate[d]' the plaintiffs' rights. We therefore hold that Yoo must be granted qualified immunity, and accordingly reverse the decision of the district court.

678 F.3d at 750 (citing *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011)). The Ninth Circuit's decision in *Yoo* to hold the defendant—one of the authors of the memoranda that authorized the very interrogation techniques allegedly applied to Plaintiffs—immune from suit ***regardless*** of either the "legality" of the plaintiff's detention or the "wisdom" of the defendant's "judgments" thereby entitles Defendants to Derivative Sovereign Immunity here. Any other result would, quite literally, leave Defendants "holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity," a result the Supreme Court condemned in *Filarsky*. 132 S. Ct. at 1666.

Derivative Sovereign Immunity has also been afforded to private consultants in comparable circumstances. *See Chesney*, 782 F. Supp. 2d at 586. In *Chesney*, contractors were hired to provide engineering consulting services to the Tennessee Valley Authority ("TVA") regarding the design of its ash handling and disposal

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policies, procedures, and operations. *Id.* Notably, the "TVA had the ultimate authority to determine which, if any, of defendants' advice and recommendations to follow or implement." *Id.* at 583. After plaintiffs were injured, defendants were held to be immune because, "under *Yearsley*, if [the] TVA would not be liable for the challenged conduct/and or decisions, [defendants] cannot be held liable for their conduct in regard to the same challenged conduct or decisions." *Id.* at 586.

Likewise, in a matter also involving allegations of torture of foreign nationals abroad, the D.C. Circuit held that defendants were entitled to immunity because they acted within the scope of their employment in detaining and interrogating enemy aliens. In *Ali v. Rumsfeld*, 649 F. 3d 762, 765 (D.C. Cir. 2011), Afghan and Iraqi citizens captured and held abroad by the U.S. military sued the former Secretary of the Department of Defense and high-ranking Army officers alleging that they were subjected to torture and cruel, inhuman or degrading treatment. The district court dismissed the claims, in part, "on the ground that the defendants [were] entitled to qualified immunity" on plaintiff's constitutional claims. *Id.* at 767. The district court also held that defendants were "entitled to absolute immunity" because they were acting within the scope of their employment, and could therefore be sued only under the Federal Tort Claims Act ("FTCA")—not under the ATS. *Id.* at 768-69.

On appeal, the D.C. Circuit, relying on its prior decisions in *Rasul v. Myers* (*Rasul I*), 512 F.3d 644 (D.C. Cir.), *vacated*, 555 U.S. 1083 (2008), and *Rasul v.*

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Myers (*Rasul II*), 563 F.3d 527 (D.C. Cir.) (*per curiam*), *cert. denied*, 130 S. Ct. 1013, (2009), noted that in *Rasul II* the government-defendants were shielded from ATS liability because they acted within the scope of their employment:

> We determined the defendants' alleged tortious conduct—'the detention and interrogation of suspected enemy combatants'—was 'incidental to [their] legitimate employment duties' because it was 'the type of conduct the defendants were employed to engage in.' Because the defendants had acted within the scope of their employment, we held the ATS claims 'were properly restyled as claims against the United States that are governed by the FTCA' and upheld their dismissal for failure to exhaust administrative remedies. The plaintiffs here bring similar claims against similar (and, in the case of defendant Rumsfeld, identical) defendants. And like the *Rasul* defendants who, we held, were acting within the scope of their employment, the defendants here—who engaged in the same conduct—were acting within the scope of their employment as well.

Id. at 774-75 (citations omitted). After concluding that the district court correctly held that defendants were acting within the scope of their employment, and, as a result, that such claims had to be brought against the U.S. under the FTCA, the D.C. Circuit affirmed the dismissal of the ATS claims under Rule 12(b)(1). *Id.*

As *Filarsky* instructs, treatment of governmental contractors should mirror that of government employees who would otherwise be immune in comparable situations. 132 S. Ct. at 1666. Thus, if government ***employees*** would be immune for conduct within the scope of their employment—even if it involved "the detention and interrogation of suspected enemy combatants," as in *Ali* and *Rasul II*—then so too should Defendants' conduct here be immune under *Filarsky*. And

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just like the TVA had "ultimate authority" in *Chesney*, here, the CIA maintained the "ultimate authority" to determine which, if any, of Defendants' advice and recommendations to follow or implement. *See* Compl. ¶¶ 24, 26-27, 32, 34, 39 ("CIA Headquarters chose the most coercive option [for Abu Zubaydah], which had been proposed by Mitchell."), 40-45, 56, 162. Accordingly, this case must be dismissed for lack of jurisdiction because Defendants are entitled to Derivative Sovereign Immunity.

C. The Ninth Circuit's Decision in *Gomez v. Campbell-Ewald* is Inapposite.

Plaintiffs may contend that the Ninth Circuit's decision in *Gomez v. Campbell-Ewald*, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 2015 U.S. LEXIS 3362 (May 18, 2015), establishes that Defendants are not entitled to Derivative Sovereign Immunity. Setting aside the fact that the Supreme Court could reverse *Gomez*, the decision is inapposite in that, among other things, the defendant there: (1) provided marketing services of a type never before recognized as being subject to immunity; (2) exceeded the authority granted to it by the government; and (3) Congress had created a federal cause of action affording relief. As none of those circumstances exist here, Defendants are entitled to Derivative Sovereign Immunity.

In *Gomez*, the Ninth Circuit held that a mobile marketing consultant retained by the U.S. Navy to send recruitment text messages on its behalf was not entitled to Derivative Sovereign Immunity. *Id.* at 879-82. In so holding, the Ninth Circuit

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in *Gomez* reasoned that "*Yearsley* established a narrow rule regarding claims arising out of property damage caused by public works projects," and that "Congress has expressly created a federal cause of action affording individuals like Gomez standing to seek compensation for violations of the [Telephone Consumer Protection Act]" ("TCPA"). *Id.* at 879. The court found that *Filarsky* did not "establish any new theory" of immunity for service contractors, and had instead narrowly applied "in the context of § 1983 qualified immunity from personal tort liability." *Id.* at 882-83. The court also suggested a lack of "decades or centuries of common law recognition of the proffered defense," and stated that it was "aware of no authority exempting a marketing consultant from analogous federal tort liability." *Id.* Finally, the court found that the "record contains sufficient evidence that the text messages were contrary to the Navy's policy permitting texts only to persons who had opted in to receive them. Consequently, we decline the invitation to craft a new immunity doctrine or extend an existing one." *Id.* at 883.

Gomez is inapposite. Unlike the defendant in *Gomez*, who served as a mobile marketing consultant, Defendants provided services related to national defense. It is axiomatic that the government relies extensively on private sector contractors for such services, and that this category of contractors have traditionally been recognized as entitled to immunity. *See Dobyns v. E-Sys., Inc.*, 667 F.2d 1219, 1222 (5th Cir. 1982) (discussing a "symbiotic relationship" between government and private contractors). Defense contractors (like

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Defendants) are certainly a part of this "symbiotic relationship," as "the military finds the use of civilian contractors in support roles to be an essential component of a successful war-time mission." *See Lane*, 529 F.3d at 554; *see also Moshe Schwartz & Jennifer Church Cong. Research Serv.*, R43074, *Dept. of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress* (May 2013) (concluding that contractor personnel accounted for at least half of the United States' total force in Iraq and Afghanistan). Moreover, the OLC memoranda referenced in the Complaint establish that Defendants' purported conduct ***was*** authorized by U.S. government policies as to the CIA's use of "enhanced interrogation techniques," Compl. ¶¶ 43-45; whereas in *Gomez*, the defendant's actions in sending unsolicited text messages were ***not*** consistent with the authority conferred by the U.S. Navy.

In addition, although *Yearsley* arose in the context of a service contract for a public works project, its progeny have not restricted the application of Derivative Sovereign Immunity to such matters, as *Gomez* incorrectly implies. For example, the Supreme Court did not limit *Yearsley*'s application to public works projects in *Boyle* and, in discussing *Yearsley*, simply referred to the contract at issue as a general "performance contract." *Boyle*, 487 U.S. at 506. The Fourth Circuit has also consistently applied *Yearsley* outside the sphere of public works projects in *Butters*, 225 F.3d at 464, and *Mangold*, 77 F.3d at 1448.

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Finally, the *Gomez* court relied on the fact that Congress "expressly created a federal cause of action affording individuals like Gomez standing to seek compensation for violations of the TCPA." 768 F.3d at 871. Conversely, here, although courts have observed that "Congress has frequently legislated" on "torture or war crimes," it has ***never*** created a cause of action against "private U.S. persons, whether or not acting in concert with government employees." *Saleh*, 580 F.3d at 16 (construing Congress's decision not to create such a cause of action as "deliberate"). Plaintiffs' claims must therefore be dismissed under Rule 12(b)(1).

III. PLAINTIFFS HAVE NOT ALLEGED PROPER ATS CLAIMS.

A. Plaintiffs' Claims Do Not Overcome the Presumption Against Extraterritorial Application of the ATS.

It is well-settled that litigants are precluded from enjoying the jurisdiction of U.S. courts when the conduct alleged does not concern the territory of the U.S. Indeed, when a "statute gives no clear indication of an extraterritorial application," conduct that occurs abroad is ***presumed*** to be outside the statute's reach. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (citing *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010)).

Here, because the ATS contains no indication of extraterritorial application, "the presumption against extraterritoriality applies to claims that have been brought under it." *Id.* This presumption is only overcome when "the claims ***touch and concern*** the ***territory*** of the United States . . . with sufficient force to displace

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the presumption." *Id.* at 1669 (emphasis added); *see, e.g., Ben-Haim v. Neeman*, 543 Fed. Appx. 152, 155 (3d Cir. 2013) (affirming dismissal of ATS claims because alleged tortious conduct "took place in Israel") (*per curiam*); *Kaplan v. Cent. Bank of Islamic Republic of Iran*, 961 F. Supp. 2d 185, 205 (D.D.C. 2013) (barring ATS claims based on "actions that took place in Israel and Lebanon").

The Supreme Court has also explained that the mere physical presence of a defendant in the U.S. "in and of itself is not enough to touch and concern the United States with sufficient force for the ATS to apply." *Kiobel*, 133 S. Ct. at 1669. Though the Supreme Court has not further elaborated upon the meaning of the "touch and concern" standard set forth in *Kiobel*, courts in the Ninth Circuit have made clear that it is a difficult standard to meet. *See, e.g., Mujica v. Air Scan Inc.*, 771 F.3d 580, 584 (9th Cir. 2014); *Doe I v. Cisco Sys., Inc.*, 66 F. Supp. 3d 1239, 1240-41 (N.D. Cal. 2014); *Dacer v. Estrada*, 2013 WL 5978101, at *2 (N.D. Cal. Nov. 8, 2013). In *Mujica*, for example, the court held that "speculation" that the U.S.-based defendants executed a contract in the U.S. related to the alleged tortious conduct, which took place abroad, was inadequate to "touch and concern" the territory of the U.S. 771 F.3d at 584. In *Cisco*, which involved allegations that a corporation headquartered in California designed and implemented a security system for Chinese officials knowing that the system would be used to perpetrate human rights abuses, the court held that the plaintiffs' claims did not "touch and concern" the territory of the U.S. because they made no showing that the alleged

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human rights abuses were planned, directed, or committed in the U.S. 66 F. Supp. 3d at 1246.

Despite conclusory statements to the contrary, Compl. ¶ 18, Plaintiffs fail to advance any facts to rebut the presumption against the extraterritorial application of the ATS. For example, while Plaintiffs allege that Defendants "supervised their plan's implementation from the U.S., including pursuant to contracts they executed with the CIA in the United States," *id.*, the only contracts referenced are: (1) a contract that the CIA allegedly entered into with Defendant Mitchell in April 2002 to "provide real-time recommendations to overcome Abu Zubaydah's resistance to interrogation"; and (2) a contract the CIA allegedly entered into with Dr. Jessen "to join Defendant Mitchell to assist him in testing and developing the Defendants' theory on Abu Zubaydah." Compl. ¶¶ 32, 42. These alleged contracts—even if they were alleged to have been executed in the U.S. or its territories (which they are not)—do not relate to any purported interrogation of Plaintiffs.

Plaintiffs' allegations do not sufficiently "touch and concern" the territory of the U.S. to displace the presumption against extraterritorial application of the ATS. Therefore, Plaintiffs are not entitled to this Court's jurisdiction over their claims.

B. Plaintiffs' Allegations Fail to Demonstrate that Defendants' Alleged Conduct Constituted A Violation of the Law Of Nations.

Even if Plaintiffs overcame the presumption against extraterritorial application of the ATS (which they cannot), they have not and cannot sufficiently allege tortious conduct violative of the "law of nations."

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"Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations"—a prerequisite to potential ATS liability. *Nat'l Coal. Gov't of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 344 (C.D. Cal. 1997). Indeed, when the ATS was first enacted in 1789, Congress contemplated that it would give rise to causes of action only for piracy, infringement on the rights of ambassadors, and violation of safe conducts. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). Though conduct that constitutes a violation of the "law of nations" today has been extended to include a number of additional torts, ATS jurisdiction still does not apply "for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar" when the law was enacted in 1789. *Id.* at 732. Moreover, while the "judicial power" to recognize actionable international norms may still be exercised, it must be "subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." *Id.* at 729.

Here, the Complaint fails to allege that Defendants' conduct constituted a violation of the "law of nations." Specifically, with respect to their claims that Defendants committed torture[2], Plaintiffs admit that Defendants' conduct did not

[2] Under the ATS, Plaintiffs must establish that governmental actors carried out the alleged torture. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005); *Kadic v. Karadzic*, 70 F.3d 232, 243-44 (2d Cir.

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constitute the ***intentional*** infliction of ***severe pain or suffering***—as required under the ATS. *See, e.g.*, *Aldana*, 416 F.3d at 1251. That is, Plaintiffs acknowledge that the OLC authorized the interrogation techniques that were allegedly used on them. Compl. ¶ 45. Indeed, the referenced OLC memoranda specifically found these alleged techniques would ***not*** constitute torture because they did not inflict a ***severe*** level of pain and suffering, and because the techniques were not applied with the

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1995). Or that Defendants—as non-governmental officials—acted "together with state officials," or with "significant state aid." *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1145 (E.D. Cal. 2004). Here, Plaintiffs allege that Defendants were acting under "color of law," and acting alongside the CIA. Compl. ¶¶ 16, 32, 57, 61. If Plaintiffs now, instead, opted to dispute that Defendants were state actors for purposes of challenging the application of Derivative Sovereign Immunity, then their claims for torture, cruel, inhuman, and degrading treatment, and non-consensual human medical experimentation under the ATS must fail. *Kadic*, 70 F.3d at 239-40; *Pfizer*, 562 F.3d at 188. Quite simply, Plaintiffs "cannot allege that conduct is state action for [ATS] jurisdictional purposes but private action for sovereign immunity purposes." *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 14 n.3 (D.D.C. 2005); *Saleh*, 580 F.3d at 16 (noting that admission that "contractors are state actors" would "virtually concede" sovereign immunity).

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intention of causing such severe pain or suffering.[3] Because Plaintiffs admit that the OLC and CIA authorized Defendants' alleged conduct and because the OLC memoranda specifically concluded that the interrogation techniques purportedly applied by Defendants did ***not*** result in the intentional infliction of severe pain or suffering, Plaintiffs have not—and cannot—claim Defendants committed torture in violation of the "law of nations."

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[3] Case authority somewhat delineates the type of "intentional" conduct that results in "severe" pain and suffering. In *Price*, the court held that allegations that plaintiffs endured cramped cells, a lack of medical care and inadequate food, and beatings by prison guards did not result in a "severe" level of pain and suffering. 294 F.3d at 93-94 (D.C. Cir. 2002). By contrast, in *Al-Saher v. I.N.S.*, the court found that an individual subjected to sustained beatings for a month and burned with cigarettes over an 8 to 10-day period was tortured. 268 F.3d 1143, 1147 (9th Cir. 2001), *amended*, 355 F.3d 1140 (9th Cir. 2004); *see also Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996) (severe pain or suffering inflicted when individuals were blindfolded and severely beaten while handcuffed and fettered, threatened with electric shock and death, denied sleep, and imprisoned for seven months shackled to a cot in a hot, unlit and tiny cell.). The conduct alleged in the Complaint is not analogous to cases involving "intentional" infliction of "severe" pain or suffering.

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Plaintiffs also fail to claim that Defendants' conduct constituted non-consensual human medical experimentation. For one, the Complaint offers this Court no basis for concluding that allegations of non-consensual human medical experimentation constitute a violation of the "law of nations"—particularly given the narrow application of the ATS. Indeed, the prohibition against non-consensual human medical experimentation is not "a norm that is specific, universal, and obligatory" for three reasons. *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 738 (9th Cir. 2008). First, it is not ***specific*** in that the parameters of what constitutes non-consensual human medial experimentation are not defined. Second, it is not a sufficiently ***universal*** norm abided by civilized nations out of a sense of mutual concern because non-consensual human medical experimentation does not "threaten[] serious consequences in international affairs" in the same manner as the three offenses originally contemplated by the ATS (*i.e.*, piracy, rights of ambassadors, and safe conduct). *Cf. Sosa*, 542 U.S. at 715 (assault against an ambassador "impinged upon the sovereignty of the foreign nation and if not adequately addressed could rise to an issue of war"). And third, it is not ***obligatory*** because the prohibition is not enshrined in international treaties or custom. *See, e.g.*, *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 250 (2d Cir. 2003) ("In determining whether a particular rule is a part of customary international law—*i.e.*, whether States universally abide by, or accede to, that rule

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out of a sense of legal obligation and mutual concern—courts must look to concrete evidence of the customs and practices of States.").[4]

Moreover, even if this Court recognizes the prohibition against non-consensual human medical experimentation as a norm sufficient to lead to a violation of the "law of nations," Plaintiffs have not—and cannot—allege that Defendants engaged in such conduct. Plaintiffs attempt to claim that the alleged interrogation program was an "experiment" because the underlying theories had never been tested on prisoners. Compl. ¶ 63. This, however, is contradicted by Plaintiffs' concessions that the enhanced interrogation program was based on the U.S. Air Force Survival, Evasion, Resistance and Escape ("SERE") training program, with which Defendants had years of experience, and that the interrogation techniques allegedly applied to Plaintiffs were developed ***after*** they

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[4] Although the Second Circuit in *Pfizer* recognized that non-consensual human medical experimentation may constitute a violation of the "law of nations" under the ATS, that case is inapposite. The sources of law *Pfizer* relied upon are "incapable of carrying the weight" needed to support a conclusion that non-consensual medical experimentation is universal and obligatory. *Pfizer*, 562 F.3d at 202 (dissenting, Wesley, J.). *Pfizer* also related to obvious medical experiments involving pharmaceutical testing, and the court's reasoning therefore was based, in part, upon domestic/international laws specifically applicable to pharmaceuticals. 562 F.3d at 178.

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were first applied to Abu Zubaydah. *Id.* ¶¶ 12-13, 27, 57. Plaintiffs also do not allege a "medical" experiment; instead they refer to the interrogation program as having a "scientific veneer," and as "pseudoscientific." *Id.* ¶¶ 2, 5. This is far removed from what took place in *Pfizer*, where the defendant's medical experimentation involved controlled groups of patients receiving different drugs, a test protocol, and a research headquarters. 562 F.3d at 169-70. Simply put, Plaintiffs cannot allege that Defendants engaged in non-consensual human medical experimentation because the purported conduct is not, nor can it be, characterized as either "experimentation" or "medical" in nature. Therefore, this Court should dismiss for failure to state a claim.

IV. PLAINTIFF OBAID ULLAH LACKS THE CAPACITY TO SUE.

The ability to act in a representative capacity is determined by the law of the state where the court is located. *See* FED. R. CIV. P. 17(b). In Washington, upon a party's death, the proper party to assert a legal action in the decedent's name (or on their behalf) is their "personal representative." *See* RCW 4.20.020; 4.20.046 4.20.060; *Beal v. City of Seattle*, 954 P.2d 237, 240 (Wash. 1998). A personal representative must be appointed by a court. *See* RCW 11.128.110; 11.28.170; 11.28.185; *Williams-Moore v. Estate of Shaw*, 96 P.3d 433, 436 (Wash. Ct. App. 2004).

Here, the bare assertion that "Plaintiff Obaid Ullah is an Afghan citizen and the personal representative of the estate of Gul Rahman" does not address whether

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Plaintiff Ullah has been properly appointed as a personal representative. Compl. ¶ 11. Absent such an allegation, Plaintiff Ullah's claims must be dismissed.

CONCLUSION

For the above reasons, this Court should grant Defendants' Motion to Dismiss.

DATED this 8th day of January, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of January, 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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