UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

AMIR MESHAL, Plaintiff, v. CHRIS HIGGINBOTHAM, *et al.*, Defendants.	)	No. 09-cv-2178 (EGS)

REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT FILED BY DEFENDANTS CHRIS HIGGINBOTHAM, STEVE HERSEM, JOHN DOE 1, AND JOHN DOE 2

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INTRODUCTION

This case does not concern the propriety of torture, or the United States' alleged role in either directing or condoning torture during the period pled in the Amended Complaint ("AC"). *See* Motion to Dismiss ("MTD") at 2 n.3. Nor, indeed, with respect to most of the conduct alleged, do the well-pled allegations even identify the actions of individual United States officials. MTD at 31-34. Rather, Plaintiff Amir Meshal points to foreign officials as the principal actors in his detention in Kenya, Somalia and Ethiopia while in the custody of those sovereigns, and his transfer between those countries; speculates on the role each defendant might have played in his detention and transfer; and characterizes a handful of statements allegedly made during "interrogations" as "torture" while none evidenced certain consequences to Meshal. From this unwieldy collection of allegations, Meshal asks this Court to recognize a private cause of action against individual federal officials.

Ultimately, this Court must resolve two distinct legal questions: 1) the availability of an implied legal remedy for the constitutional claims asserted by Meshal; and 2) qualified immunity as a defense to the constitutional and statutory claims. As Defendants Hersem, Higginbotham, and John Does 1 and 2 (the "Defendants") stated in their Motion to Dismiss, this suit is, at its core, a challenge to an alleged extraterritorial national security operation of the Executive Branch. In his Opposition ("Opp."), Meshal seeks to deny the obvious implications of this suit by disavowing any intent to challenge the United States' alleged counter-terrorism operations and cooperation with foreign governments in the Horn of Africa. However, the Amended Complaint is replete with allegations of such alleged operations and cooperation, and these allegations are essential to the legal theory that underlies all of Meshal's claims – that United States officials directed or were complicit in Meshal's detention in Kenya, Somalia, and

Ethiopia, by the authorities of those countries, and his transfer between those countries at the hands of foreign officials, so that he could be interrogated. *See, e.g.,* AC ¶ 2. Thus Meshal's suit, were it permitted to proceed, would have implications for the United States' alleged national security interests in the Horn of Africa, and Meshal cannot, as he attempts to do in his Opposition, now distance himself from the consequences of the allegations he has pled.

Under such circumstances, the Court should decline Meshal's invitation to create a personal capacity damages remedy in this instance because special factors counsel against recognition of such a remedy in the novel, previously unrecognized, and highly sensitive context presented here. In the alternative, if the Court recognizes a *Bivens* remedy, all of the Defendants are entitled to qualified immunity on Counts I-III, and Higginbotham and Hersem (the only defendants named) are entitled to qualified immunity for Count IV. Meshal fails in his Amended Complaint to include adequate allegations demonstrating that Defendants personally participated in any of the violations he claims save one – Count IV, and he fails in his Opposition to identify any caselaw or persuasive authority that even remotely demonstrates that the actions allegedly taken against him violated his clearly established rights under the specific circumstances at issue.

ARGUMENT

I. SPECIAL FACTORS BAR THE *BIVENS* REMEDY MESHAL SEEKS

According to Meshal, the Supreme Court's decision in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), authorizes suit as a matter of course whenever a person claims federal officials violated his or her constitutional rights and the person lacks another remedy. Opp. at 6-8. In Meshal's view, the starting points for a *Bivens* analysis are two alleged purposes of *Bivens* claims. *Id.* at 7-8. But caselaw makes clear that before even considering the purpose behind *Bivens*, courts must first determine whether the suit arises in a proper context for the

implication of a damages remedy at all. The Supreme Court has recognized that a plaintiff alleging a constitutional violation has no automatic, unqualified right to a *Bivens* remedy, *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597 (2007), and has "in most instances . . . found a *Bivens* remedy unjustified," *id.* Because the power to create a new constitutional-tort cause of action is "not expressly authorized by statute," it must be exercised with great caution, if at all. *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 66-70 (2001). Thus, the Supreme Court has determined that a wide range of factors may make it inappropriate for federal courts to create a *Bivens* remedy in a particular context. Contrary to Meshal's argument, *see* Opp. at 7-8, such factors will bar the creation of a *Bivens* action even where a plaintiff has no alternative statutory remedy available. *See, e.g., Wilkie*, 127 S. Ct. at 2598 ("even in the absence of an alternative [existing process to protect a constitutional interest], a *Bivens* remedy is a subject of judgment").[1]

The Supreme Court has also "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68. While Meshal argues in conclusory fashion that the context of his suit – national security operations on foreign soil in which, as alleged, officials of the United States and foreign governments worked together to identify and apprehend suspected terrorists, *see* AC ¶¶ 24-29, 56-57 – is not "new in any material respect," *see* Opp. at 7, he offers not a single example of a *Bivens* remedy that was recognized in a similar context. This failure is unsurprising because no case involving such joint actions exists. In fact, the only court to consider a remedy in a *remotely* similar context – in that it also involved allegations of unlawful transfer and abuse with the complicity of foreign governments – refused to

[1] Ironically, while pressing this position, Meshal is simultaneously pursuing alternative remedies. With respect to his interrogation, there is no question that a remedy would be available under the TVPA if he could meet its terms. Opp. at 8 n.6. In any event, it is "irrelevant" to the special factors analysis whether the "laws currently on the books" afforded Meshal an adequate remedy. *U.S. v. Stanley*, 483 U.S. 669, 683 (1987).

recognize one. *See, e.g.*, *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc), *cert. denied*, No. 09-923, 2010 WL 390379 (U.S. Jun. 14, 2010). This Court should decline Meshal's invitation to create a *Bivens* remedy here because Congress, not the Judiciary, is the appropriate branch to create any damages action in this context. *See Chappell v. Wallace*, 462 U.S. 296 (1983); *Stanley*, 483 U.S. at 681-83.

1. In their Motion to Dismiss, the Defendants showed that the remedy Meshal seeks would impinge upon the Executive Branch's ability to pursue cooperative arrangements with foreign governments aimed at protecting our nation from terrorist attack. As a result, special factors do counsel hesitation in permitting Meshal's claims to proceed, as they risk injecting this Court into sensitive overseas national security and intelligence matters into which the judiciary should be hesitant to wade. *See* MTD at 11-16. Meshal characterizes this argument as "specious," Opp. at 9, but apart from hyperbole, offers no convincing refutation in caselaw.

Meshal begins by declaring that his lawsuit "is *not* 'a constitutional challenge to the extraterritorial national security operations of the Executive Branch.'" Opp. at 9 (emphasis in original) (quoting MTD at 8). However, this self-serving characterization ignores the reality that the allegations Meshal asserts in support of his claims make clear that permitting this suit to proceed would implicate the United States' relationships with governments in the Horn of Africa and their purported joint counter-terrorism operations to identify, apprehend, detain, and question suspected terrorists in that region. *See, e.g.*, AC ¶¶ 24-29, 31. For example, Meshal specifically avers he was apprehended in a "joint U.S.-Kenyan-Ethiopian operation along the Somalia-Kenya border" and that his detention by three foreign sovereigns "was at the direction or behest of U.S. officials, was carried out with their active and substantial participation, and/or was the result of a conspiracy between the Defendants and foreign officials." *See id.* ¶ 2. Indeed, it

is from alleged actions of the United States and foreign officials that Meshal asks the court to infer that the Defendants were personally involved in his detention and transfer.[2] Notwithstanding the fact that the clear focus of the Amended Complaint is an alleged national security operation of the United States and foreign governments on foreign soil, Meshal claims in conclusory fashion that recognizing the *Bivens* remedy he seeks in this context "would not prevent the government from carrying out counter-terrorism operations in the Horn of Africa or anywhere else." Opp. at 9. But this argument sets the bar too high. Defendants need not show that a *Bivens* remedy in this context would "prevent" extraterritorial counter-terrorism operations; it is enough that such a remedy has the potential to complicate or interfere with such operations. The Defendants have clearly shown this. *See* MTD at 11-18.

Contrary to Meshal's argument, *see* Opp. at 12-13, the fact that the Detainee Treatment Act and the Military Commissions Act of 2006 barred civil actions by non-citizens designated as "Alien Enemy Combatants" does not "show that Congress presumed that *Bivens* would remain available to U.S. citizens to remedy unconstitutional violations by U.S. officials." This argument has the relevant special factors inquiry precisely backwards. In fact, once Congress has legislated in an area, congressional silence as to whether a civil remedy is available to address a particular harm indicates a presumption that a remedy is unavailable. *See In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 107 n.23 (D.D.C. 2007) (stating that the absence of any provision for damages actions in the Detainee Treatment Act is "some indication that Congress'

[2] *See, e.g.*, Opp. at 21 (citing as "corroborating" evidence of the Defendants' personal participation "reports [] that U.S. officials controlled the detention in Kenya of individuals who had been seized fleeing Somalia and the detention and interrogation in Ethiopia of individuals rendered from Kenya and Somalia"); Opp. at 20 (alleging detention "by proxy through foreign agents" or participation in a "joint venture with foreign authorities to detain him").

inaction in this regard has not been inadvertent"), *appeal docketed sub nom*., *Ali v. Rumsfeld*, No. 07-5178 (D.C. Cir. May 31, 2007). It is Congress' failure to provide, not Congress' failure to preclude, a civil remedy in particular legislation addressing the concerns at issue that may make it inappropriate for courts to create one. *See Spagnola v. Mathis*, 859 F.2d 223, 229 (D.C. Cir. 1988) ("[I]t is quite clear that if Congress has 'not inadvertently' omitted damages against officials in the statute at issue, the courts must abstain from supplementing Congress' otherwise comprehensive statutory relief scheme with *Bivens* remedies . . .").[3]

There is no question that Meshal's *Bivens* claims directly implicate and would require inquiry into the involvement, if any, of many foreign officials despite Meshal's insistence that the suit "challenges only U.S. action and requires inquiry only into conduct by U.S. officials against a U.S. citizen," *see* Opp. at 14. For instance, it is axiomatic that Meshal cannot hold the Defendants personally responsible for his detention in Kenya, Somalia, or Ethiopia, or his transfer between these countries, if those actions were solely due to decisions made by foreign authorities and not Defendants. Meshal does not allege that he had a constitutional right to be "rescued" once Defendants learned that he was being detained by foreign authorities, or that the Defendants can be liable for his detention even if those authorities detained Meshal for their own purposes. A plain reading of the Amended Complaint makes clear that the core theory of Meshal's detention and rendition claims is that he was detained in Kenya, Somalia, and Ethiopia, and transferred between

[3] Meshal's reference to the State Department's representation to the United Nations that *Bivens* remedies are available to torture victims, Opp. at 12 n.10, is fatally incomplete. Meshal neglects to include the Department's opening qualification stating that the availability of *Bivens* and other remedies "depend[s] on the location of the conduct, the actor, and other circumstances." United States Written Response To Questions Asked By Committee Against Torture ¶ 5 (Apr. 28, 2006), *available at* http://www.state.gov/g/drl/rls/68554.htm. Here, as the Defendants have shown, all three of these factors counsel against the recognition of a *Bivens* remedy in this case.

these countries solely, or at least largely, at the Defendants' behest. *See* AC ¶ 2. Thus litigating these claims necessarily requires inquiry into the actions of Kenyan, Somalian, and Ethiopian officials in Meshal's detention and transfer between countries. This inquiry, in turn, involves seeking discovery from, including deposing, foreign diplomatic, intelligence, and/or other officials on the exact nature of their countries' actions with respect to Meshal. It would also likely require identifying and deposing the Kenyan and Ethiopian officials who allegedly brought Meshal to, and in some cases were allegedly present during, the questioning by Defendants.

It takes little imagination to construct what the reasonable, practical implication of embroiling foreign officials in domestic litigation over international terrorism activities might be, if required to explain either their alleged actions or the alleged actions of U.S. officials in U.S. courts.[4] Foreign sovereigns might well be disinclined to cooperate with the United States in future terrorism or national security matters. Meshal all but concedes that his detention and transfer claims are of the sort that would require inquiry into communications between United States officials and their counterparts in Kenya, Somalia and Ethiopia that may impact sensitive intelligence and national security relations.[5] That he chose not to sue these foreign officials in no way diminishes the necessity, as a practical matter, of litigating their involvement in order to prove or disprove Meshal's claims in regard to the Defendants herein. That is especially so since, as alleged, the only identified actors who detained and transferred Meshal were foreign officials.

In an effort to distance his claims from their natural and practical consequences, Meshal

[4] If indeed individual officers were cooperating with or taking direction from the United States, participating in such litigation might place them or their families at personal risk from individuals or groups hostile to the United States' anti-terrorism efforts.

[5] *See, e.g.*, Opp. at 11 (arguing that with non-interrogation claims, "U.S. officials cannot avoid accountability for violating the constitutional rights of U.S. citizens by directing or colluding with foreign actors or hiding behind the fig-leaf of a foreign custodian").

focuses instead on claims arising out of alleged "torture and abuse," during interrogation, Opp. at 11, suggesting that those claims are somehow distinct for special factors purposes. But to suggest that Meshal's "coercive interrogation" claims can be viewed in a vacuum, absent surrounding context, defies both logic and common sense. To the contrary, the surrounding circumstances would necessarily inform the conclusion of any factfinder with respect to whether or not the alleged statements made by the Defendants during these "coercive interrogations" were tantamount to "torture and abuse." At least as importantly, Meshal alleges that foreign officers were present during numerous of the purportedly unconstitutional exchanges between Meshal and the Defendants, and would be key witnesses in any litigation. Foreign sovereigns might well hesitate in the future to cooperate with the United States and allow access to question terrorist suspects if it meant embroiling their officers and officials in U.S. domestic civil proceedings. These potential consequences, whatever their scope and extent, must be weighed by the political branches, particularly Congress – and not the courts – before deciding whether to create a private right of action in this sensitive arena.

Meshal cites *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), and *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004), for the novel proposition that in matters affecting national security, the principle of constitutional separation of powers compels a judicial role in "vindicating the rights of a U.S. citizen against unlawful detention and mistreatment." Opp. at 10. However, all of these cases are readily distinguishable because all involved petitions for habeas corpus, a well-established statutory cause of action and one for which the remedy itself is rooted in the Constitution.[6] In none of these cases was the court asked to

[6] *See, e.g.*, *Boumediene*, 128 S. Ct. at 2247 ("The [Suspension] Clause protects the rights of the detained by affirming *the duty and authority of the Judiciary* to call the jailer to account.")

imply a damages remedy under the Constitution against an individual federal officer – the remedy Meshal seeks here and that which the special factors doctrine addresses. Moreover, the Supreme Court has recognized that even a statutory habeas remedy may be improper in light of "sensitive foreign policy issues." *See Munaf v. Geren*, 128 S. Ct. 2207, 2220-2225 (2008).[7]

Meshal dismisses the Defendants' argument, *see* MTD at 13-16, that judicial restraint is counseled here because of the limited institutional experience of the judiciary in the areas of national security, intelligence operations, and foreign policy. Meshal argues that "lower federal courts have considered challenges to government counter-terrorism policies and have demonstrated competence to resolve lawsuits implicating sensitive national security considerations." Opp. at 13. Meshal, however, misses the point. The Defendants have not argued that the judiciary has no capacity in general to examine matters involving national security, intelligence operations, or foreign policy, *per se*.[8] Rather, Defendants have argued that an implied right of action without congressional sanction is not the proper vehicle to examine the national security, intelligence operations, and foreign policy considerations at issue in the specific

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(emphasis added).

[7] Because habeas relief like that in *Munaf* is grounded in a statute, it is irrelevant to the special factors analysis whether, as Meshal claims, it is "more disruptive of executive affairs and intelligence operations than a retrospective damages action." Opp. at 12. That said, damages remedies that run to individual federal defendants can be especially disruptive and that disruption, particularly in the arena of national security, warrants special consideration in the special factors analysis. *Cf. Stanley*, 483 U.S. at 683 ("Even putting aside the risk of erroneous judicial conclusions . . . the mere process of arriving at correct conclusions would disrupt the military regime.").

[8] Indeed, in some exceptional instances, courts are required, by constitutional necessity or by a clear grant of authority by Congress, to adjudicate issues directly pertaining to such matters. *See Boumediene*, 128 S. Ct. at 229; *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). The general rule, however, is that "unless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988).

context presented by Meshal's Amended Complaint.[9] *See* MTD at 8-18. Defendants' argument is proven by the fact that Meshal cites no *Bivens* case (or case of any kind) involving foreign national security operations in cooperation with foreign sovereigns as alleged here in his examples of "[judicial] competence to resolve lawsuits implicating sensitive national security considerations," and judicial "competence and 'institutional experience'" to conduct inquiries into "the U.S. government's cooperation and communications with foreign governments." *See* Opp. at 13-15 & nn. 13-14 (citing non-*Bivens* cases from FOIA, other federal statutes, or the criminal arena).[10] As the D.C. Circuit recognized in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985), "[w]here [] 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.'"

2. Lending "further support" to the special factors identified by the Defendants as counseling hesitation in creating a *Bivens* remedy in this sensitive context is the likelihood that the Court will have to inquire into "classified information that may undermine ongoing covert operations" in order to adjudicate Meshal's claims. *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008); *see also* MTD at 16-18. Meshal discounts this concern by arguing that any security

[9] The *en banc* Second Circuit has explicitly recognized this proposition in the context of an alleged "rendition." *See Arar*, 585 F.3d at 574. Meshal's attempt to discount the import of *Arar* is unavailing. The possibility of foreign citizens using federal courts to obstruct U.S. foreign policy, *see* Opp. at 15, was only *one* of the concerns identified by the Second Circuit in *Arar* as precluding the creation of a *Bivens* remedy in that case. Moreover, the identity of the plaintiff simply does not control how suits are likely to impact or disrupt national security or intelligence operations.

[10] The "remedy for constitutional violations," Opp. at 14, that was considered in *U.S. v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008), *U.S. v. Yousef*, 327 F.3d 56 (2d Cir. 2003), and *U.S. v. Karake*, 281 F. Supp. 2d 302 (D.D.C. 2003), was the potential exclusion of evidence from a criminal trial. *See Abu Ali*, 528 F.3d at 226-30; *Yousef*, 327 F.3d at 123; *Karake*, 281 F. Supp. 2d at 308-09. In the federal criminal arena, the Executive Branch is the ultimate arbiter of the impact of the disclosure of evidence and can choose to forego prosecution in order to protect against it.

concerns could be addressed through "sealed records." *See* Opp. at 16-17. However, absent congressional guidance, the necessity to close court proceedings to adjudicate claims is itself a special factor that counsels hesitation in recognizing a *Bivens* remedy.[11] Moreover, as is the case with his argument against the exercise of judicial restraint in this context, *see* Opp. at 13-16, Meshal's "open courts" argument is supported not by *Bivens* cases, but solely by cases where federal courts had pre-existing statutory authority.[12] Because special factors are considered in the aggregate, or "taken together,"[13] the likely need to consider classified information is one among the numerous identified factors at issue in this context, which makes clear that only Congress, and not the courts, should speak to the question of remedy here. *Accord Wilson*, 535 F.3d at 710.[14]

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[11] *See Arar*, 585 F.3d at 577.

[12] *See Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (appellate review of criminal trial ruling); *In re Terrorist Bombings*, 552 F.3d 157 (2d Cir. 2008) (same); *U.S. Info. Agency v. Krc*, 989 F.2d 1211 (D.C. Cir. 1993) (appellate review of administrative decision); *In re Guantánamo Bay Detainee Litigation*, 630 F. Supp. 2d 1 (D.D.C. 2009) (habeas review); *In re Guantánamo Bay Detainee Litig.*, 624 F. Supp. 2d 27 (D.D.C. 2009) (same).

[13] *See Chappell*, 462 U.S. at 304.

[14] Meshal argues that the Defendants' reference to the potential availability of a state secrets assertion "undermines" the special factors argument. Opp. at 17, n. 16. Again, Meshal has the relevant inquiry backwards. The bar to litigation set by the special factors doctrine is much lower than the bar set by the state-secrets privilege. This is because the special factors doctrine addresses the fundamental question of whether the Judicial Branch should recognize an implied cause of action itself, while the state-secrets doctrine addresses the secondary question of whether particular evidence must be excluded when adjudicating a claim brought under an existing cause of action created by Congress. Whereas the state-secrets doctrine is concerned only with preventing the disclosure of state-secrets, the special factors doctrine is concerned with preserving the role of Congress in enacting causes of action, shielding Executive Branch officials from unwarranted judicially created personal liability, and limiting separation of powers concerns that arise from judicial second-guessing of actions committed by the Constitution to the Executive or Congress. *See Wilson*, 535 F.3d at 710 ("Here, although *Totten* [*v. U.S.*, 92 U.S. 105 (1875)] does not bar the suit, the concerns justifying the Totten [justiciability] doctrine provide further support for our decision that a *Bivens* cause of action is not warranted.").

II. THE DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

A. Counts I, II, And III Are Barred By The Defense Of Qualified Immunity Because None Alleges Clearly Established Violations Of The Fourth Or Fifth Amendments

The determination of whether the Defendants' actions are shielded by qualified immunity traditionally requires a two-step inquiry: 1) whether the alleged facts show that the defendant's conduct violated a statutory or constitutional right; and 2) whether that right was clearly established at the time of the conduct. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). In light of the Supreme Court's decision in *Pearson v. Callahan*, 129 S. Ct. 808 (2009), this Court's qualified immunity analysis can and should both begin and end with the "clearly established law" inquiry because it is plain that at the time of the events alleged, it was far from clearly established that the Fourth and Fifth Amendment rights Meshal asserts in Counts I-III applied in the manner and to the extent necessary to support his claims in the factual context presented. *Id.* at 818.

A qualified immunity inquiry must be "fact specific," *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), and "undertaken in light of the specific context of the case, not as a broad general proposition," *Saucier*, 533 U.S. at 201. The D.C. Circuit has cautioned that "'courts must not define the relevant constitutional right in overly general terms, lest they strip the qualified immunity defense of all meaning.'" *Int'l Action Ctr. v. U.S.*, 365 F.3d 20, 25 (D.C. Cir. 2004) (quoting *Butera v. District of Columbia*, 235 F.3d 637, 646 (D.C. Cir. 2001)). Meshal, however, ignores this caution, defining the claimed constitutional rights in exceedingly general terms, and arguing "it was well settled that Meshal was protected by the Fourth and Fifth Amendments from undue deprivations of his liberty and coercive interrogations by U.S. officials." Opp. at 24. While Defendants do not dispute that the Constitution protects U.S. citizens abroad, Meshal's broad and abstract assertions are wholly inadequate for qualified immunity purposes.

1. Meshal has not shown that clearly established law supported the particular applications of the Fourth and Fifth Amendments upon which Counts I-III rely

Contrary to Meshal's assertion, the Defendants do not argue that they are entitled to qualified immunity "simply because the challenged conduct of U.S. officials occurred abroad." Opp. at 22. Defendants argue that they are entitled to qualified immunity because Meshal cites no case, then or now, in which a federal court held that the specific Fourth and Fifth Amendment protections he invokes apply to a U.S. citizen detained in the territory and physical custody of another sovereign, in any context remotely similar to that alleged here. Meshal cannot rest his claims simply upon the "clearly established law . . . that the Fourth and Fifth Amendments apply to the conduct of U.S. officials against U.S. citizens abroad." *See* Opp. at 24. To define "clearly established law" at this level of generality truly "strip[s] the qualified immunity defense of all meaning." *Int'l Action Ctr.*, 365 F.3d at 25.[15] It is not *that* the Constitution applies abroad but *how* it applies abroad in the specific context alleged here that is the controlling inquiry. In keeping with this principle, Meshal must show that it was clearly established in 2007 that a citizen apprehended and detained by foreign authorities on foreign soil with the alleged cooperation of U.S. officials was entitled to the particular Fourth and Fifth Amendment protections Meshal claims here with respect to the particular conduct that the U.S. officials here are alleged to have committed, given the specific governmental and private interests at stake. *See Anderson,* 483 U.S. at 641; *Int'l Action Ctr.*, 365 F.3d at 25. Meshal has not met this burden.

[15] *See also Dunn v. Castro*, No. 08-15975, 2010 WL 3547637, at *7 (9th Cir. Sep. 14, 2010) (finding court erred by defining the "right at issue" as "an abstract right to familial association" rather than evaluating it "with[] regard to the relevant fact-specific circumstances").

Both the Fourth and Fifth Amendments recognize a balancing of interests. *See* MTD at 22. Meshal has presented no caselaw in which courts have recognized the balance to be struck in regard to the particular Fourth and Fifth Amendment rights claimed here, *see id.*, in a specific international context remotely similar to this case. Thus, even if this Court were to determine that, given the specific factual context of this case and the balancing of government and private interests at issue, Meshal has stated violations of his Fourth and Fifth Amendment rights, it cannot be said that at the time of the conduct at issue "the contours of [either] right was sufficiently clear that a reasonable officer would understand that what he [was] doing violate[d] that right." *Butera*, 235 F.3d at 646 (second and third alteration in original) (citations omitted).[16]

a) Meshal's Fourth Amendment claim

Meshal claims that the Fourth Amendment violation here was the failure to be presented before a neutral magistrate at some point during his temporary detention in Kenya, Somalia, and Ethiopia to determine if there was probable cause to justify his continued detention. Opp. at 25. Meshal relies upon cases involving domestic criminal law as support for this claim. *Id.* at 25-26. However, he offers no authority to support the proposition that the presentment requirements applicable in the garden variety criminal cases he cites are similarly applicable to the allegations

[16] *Hope v. Pelzer*, 536 U.S. 730 (2002), is not to the contrary. While caselaw does not have to hold the exact conduct at issue to be unconstitutional for the law to be clearly established, the principle that the law be clearly established necessarily applies in a context specific manner. *Hope* involved the application of the Eighth Amendment's proscription against cruel and unusual punishment in a prison facility – a context that, at the time, had been addressed by numerous federal courts. *See id.* at 737-38, 742-43 (citing cases). To suggest that the particular manner in which the Constitution regulates conduct by U.S. officials abroad has been addressed to a comparable extent by federal courts ignores the lack of clarity in – and significant debate over – caselaw in this area. This constitutional question "is by no means open and shut." *See Wilson v. Layne*, 526 U.S. 603, 615 (1999).

here, where Meshal claims he was detained in the physical custody and under the legal authority of a foreign government, thousands of miles from any U.S. court. Indeed, to require the United States to ensure a prompt probable cause hearing while a detainee is in foreign custody overseas would be replete with the sort of practical obstacles courts would be required to explore before any law on this question could be established, let alone clearly established.[17] Thus it is not surprising that Meshal cites no case that suggests how such a standard developed in the domestic criminal context might apply when an individual is in detention in a foreign country, in the physical custody of a foreign sovereign, under the authority of foreign laws. Concepts like the 48-hour presentment rule applicable in domestic criminal cases simply may not be presumed to apply to the context presented.[18]

The Defendants, on the other hand, have shown that in 2008, the year after Meshal returned to the U.S., the United States District Court for the District of Columbia rejected the argument that a U.S. citizen detained abroad – a citizen clearly in U.S. custody – had a clearly established Fourth

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[17] *See, e.g., U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J. concurring) ("The conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous . . . The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country.").

[18] Notwithstanding Meshal's generalized descriptions of the reach of *U.S. v. Behety*, 32 F.3d 503 (11th Cir. 1994); *U.S. v. Maturo*, 982 F.2d 57 (2d Cir. 1992); *U.S. v. Mount*, 757 F.2d 1315 (D.C. Cir. 1985), and *Powell v. Zuckert*, 366 F.2d 634 (D.C. Cir. 1966), these cases do not support his Fourth Amendment claim. The Fourth Amendment issue in each case was the exclusionary rule. The defendants challenged the alleged role of U.S. officials in seizures of evidence by foreign authorities on foreign soil, and argued that that role required the evidence seized to be excluded from any subsequent criminal prosecution. The requirement of prompt presentment to judicial authorities that Meshal asserts here is a qualitatively different right, which is much more difficult to administer to a U.S. national detained by foreign sovereigns abroad. In any event, none of those cases recognized a *Bivens* remedy under the Fourth Amendment for the seizures at issue.

Amendment right to a "prompt" probable cause hearing to challenge the basis for his detention. *See Kar v. Rumsfeld*, 580 F. Supp. 2d 80, 85 (D.D.C. 2008). Meshal argues that *Kar* is inapposite because the detention in *Kar* took place in a "war zone." Opp. at 30. However, this distinction does not buttress Meshal's claims because nothing in *Kar* can be read to stand for the proposition that a similar detention on foreign soil outside of a war zone would (or would not) be treated differently. Although Meshal asserts that "Fourth and Fifth Amendment protections against prolonged and arbitrary detention by U.S. officials towards a U.S. citizen in peaceful territories abroad is well established," *see* Opp. at 30, he cites no authority clearly delineating the specific contours of the right in the context at issue in this case; nor does he allege that his detention was solely "by U.S. officials."[19]

Meshal argues that "*Kar* undermines Defendants' assertion that U.S. citizens do not enjoy Fourth and Fifth Amendment rights abroad" because it states that "[t]he Fourth and Fifth Amendments certainly protect U.S. citizens detained in the course of hostilities in Iraq." Opp. at 29 n.32 (quoting *Kar*, 580 F. Supp. 2d at 83). This argument again commits the classic qualified immunity error of defining the right too generally. *See Int'l Action Ctr.*, 365 F.3d at 25 ("It does no good to allege that police officers violated the right to free speech, and then conclude that the right to free speech has been 'clearly established' in this country since 1791."). Personal liability for a constitutional violation requires a finding that clearly established law supports the application of the specific right claimed under the specific type of factual circumstances alleged. It is for this reason that while Judge Robertson in *Kar* found that the Fourth Amendment generally

[19] Nor does Meshal allege that the conduct at issue took place in "peaceful territories." He specifically alleges that he left Somalia because of unrest within Somalia that led Kenya to close its border with Somalia and as a result of fighting involving Ethiopia's armed forces and Somalia. *See* AC ¶¶ 34-36, 39-41.

applied to U.S. citizens detained *by the United States* in *Iraq*, he also found that there was no clearly established law supporting a right to a prompt probable cause hearing – the specific application of the Fourth Amendment to which *Kar* argued he was entitled. *Kar*, 580 F. Supp. 2d at 85. No different result is warranted in the even more unusual context alleged here.[20]

b) Meshal's Fifth Amendment Substantive Due Process claims

Meshal is no more successful in identifying clearly established law to support his substantive due process claims in regard to his interrogations and alleged "rendition."

1) Meshal's "rendition"[21]

Meshal does not specify with any clarity the right(s) he claims the Defendants violated with respect to his alleged "rendition" or transfer. No court has ever described whether and how constitutional protections apply to an alleged "rendition" in which U.S. officials are alleged to have been involved in the transfer of a person to a foreign country for an alleged unlawful purpose. The one court that has considered a *Bivens* claim in this context did not reach the constitutional question and held instead that special factors counseled against the creation of a *Bivens* remedy for such claims. *Arar*, 585 F. 3d at 581-82. In rejecting a *Bivens* remedy for the rendition at issue in *Arar*, the *en banc*

[20] Similarly, with respect to Meshal's Fifth Amendment procedural due process claims that he was held "near-incommunicado" and detained without charge (Count II), Meshal cites general statements by federal courts about the interests protected by the Fifth Amendment. *See* Opp. at 26-27. Again, Meshal cites no caselaw applying these general propositions to an alleged joint detention with foreign authorities on foreign soil, or even to any analogous context, and makes little if any effort to directly address any aspect of his procedural due process claim.

[21] As the Defendants stated in their Motion to Dismiss, the only aspect of Meshal's treatment that should be considered under the substantive due process claim in Count I, and in any event, the only alleged conduct for which there are any colorable allegations of personal participation by the Defendants here, is the alleged conduct of Defendants Higginbotham and Hersem during Meshal's "custodial interrogations" in Kenya. Nonetheless we address his rendition/detention claim here.

Second Circuit stated that "the context of extraordinary rendition is so different, involving as it does a complex and rapidly changing legal framework beset with critical legal judgments that have not yet been made, as well as policy choices that are by no means easily reached." *Id.* at 580. Meshal misapprehends the reason *Arar* was cited.[22] *By its terms*, *Arar* does not resolve the question of the constitutionality of alleged "extraordinary renditions." However, *Arar*'s recognition of "the complex and rapidly changing legal framework" of such claims, and the fact that it is the only caselaw specifically addressing the issue should inform this Court's inquiry on whether Meshal, on whom the burden lies, has shown that the law is clearly established in a way that the Defendants would have been on notice. *See Kalka v. Hawk*, 215 F.3d 90, 99 (D.C. Cir. 2000) (citing "the judiciary's exceedingly vague guidance, in the face of a complex and novel question" as the basis for the determination that the defendants' actions did not violate "clearly established" law.).[23] Moreover, the context alleged by Meshal here involves an even more "complex and rapidly changing legal framework" than *Arar*, where Maher Arar was plainly in the physical custody of the United States. Here, even accepting Meshal's conclusory allegations at face value, the actions taken by foreign authorities were allegedly encouraged or influenced by the U.S. – but they were still the actions of foreign officials, making this context all the more novel with respect to the constitutional rules that would apply. The

[22] Meshal's attempt to distinguish *Arar* on the basis that it involved a "policy" of extraordinary rendition is puzzling since Meshal repeatedly refers to a U.S. policy of "proxy detention" that purportedly facilitated his rendition from Kenya to Ethiopia through Somalia. *See* AC ¶¶ 31, 122-24. Meshal also specifically alleges that the Defendants acted pursuant to procedures established by the Attorney General and directions they received from high-ranking officials in Washington, D.C. *Id.* ¶¶ 56-57, 124.

[23] *See also Brouseau v. Haugen*, 543 U.S. 194, 202 (2004) (Stevens, J., dissenting) ("Law enforcement officers should never be subject to damages liability for failing to anticipate novel developments in constitutional law.").

Defendants do not suggest that there might not be constitutional restrictions on "renditions" or transfers. Rather, the Defendants' argument is that there is simply no way, given the state of the law, that any reasonable officer could have been on notice of the constitutional rules that might apply to the "rendition" alleged by Meshal. Thus, as a constitutional matter, even if this Court concluded, as a matter of first impression, that substantive due process rights were implicated by the conduct alleged by Meshal, it cannot be said that this right was clearly established in the context and at the time of the events alleged in the Amended Complaint.

2) Meshal's interrogation

As a preliminary matter, Meshal's repeated use of the phrase "coercive interrogation" to describe his substantive due process claim is misplaced. Absent evidence obtained through a coercive interrogation (in violation of a defendant's Fifth Amendment right against self-incrimination) being used in a criminal trial, there is no such thing as a standalone claim for "coercive interrogation" in violation of substantive due process rights. *See Chavez v. Martinez*, 538 U.S. 760 (1994) (finding "coercive interrogation" does not violate the Fifth Amendment absent use of a compelled statement in a criminal proceeding). Certainly, *some* interrogations could be so coercive in manner and degree that they were tantamount to "torture," what Meshal refers to as "the rack and the screw," Opp. at 34, in violation of substantive due process. That some interrogations that lack physical abuse may nonetheless shock the conscience in no way means that all "coercive interrogations" violate substantive due process.

Meshal alleges a limited number of specific acts by certain defendants in support of his interrogation claim. The only physical contact Meshal alleges is that Agent Higginbotham grabbed him once, forced him to a window, and told him that "Allah is up in the clouds," and that

"the U.S. is almost as powerful as Allah." *See* AC ¶ 86. He also alleges that Agent Hersem yelled at him once and poked him "vigorously" in the chest. *See id.* ¶ 87. All other alleged conduct was non-physical.[24] As shown in the Defendants' Motion to Dismiss, at the time of the conduct alleged, there was no precedent which clearly established that this limited conduct alleged by Meshal – an isolated grab and poke and psychological "coercion" amounting to one incident of yelling, and vague threats of potential future actions by unidentified other actors at another location at some unspecified time in the future – taken in the context of all the surrounding circumstances, amounted to conduct clearly established as conscience shocking. *See* MTD at 35-37.[25] *Meshal effectively concedes this point.* He cites no case from the D.C. Circuit, or any other federal court, recognizing that such conduct constitutes a substantive due process violation in even any domestic context.[26] Instead, Meshal argues that "previous cases are not required to be on all fours with the challenged conduct for a right to be clearly established." Opp. at 36 (citing *Hope*, 536 U.S. at 741). While that may be true, Meshal cites no cases involving either

[24] Meshal alleges Defendants said: they "had ways of getting the information they want;" he would or could be sent to Israel and the Israelis would "make him disappear;" he would be returned to Somalia if he refused to answer questions; the Egyptians were interested in him and had ways of making him talk; he could meet the same fate as the lead character in the movie "Midnight Express" if he did not cooperate; and his "grandkids" would be affected by his actions. *See* AC ¶¶ 86-88.

[25] Contrary to Meshal's suggestion, the Defendants have not argued that the "physical aspects" of his interrogations should be analyzed under the Fourth Amendment excessive force standard. Rather, the Defendants urge that the Supreme Court's recognition that limited physical contact does not suffice to establish a constitutional violation under the Fourth Amendment, *see Graham v. Connor*, 490 U.S. 386, 396 (1989), indicates that such contact would not satisfy the *more demanding standard* of Fifth Amendment substantive due process.

[26] *Pfeifer v. U.S. Bureau of Prisons*, 615 F.2d 873, 877 (S.D. Cal. 1980), is inapposite for the same reasons as the criminal cases cited by Meshal in support of his Fourth Amendment claim. *See infra* § II.A.1.a). Like the defendants in those cases, the claimant in *Pfeifer* argued that evidence should have been excluded from his criminal trial because of the alleged role of U.S. officials in gathering that evidence outside of the U.S. *Id.* at 877. Meshal makes no such argument here.

"materially similar," or "fundamentally similar" facts to those he presents, or any other basis upon which the Court could conclude that "the state of the law in [2007] gave [Defendants] fair warning that their alleged treatment of [Meshal] was unconstitutional." *See Hope*, 536 U.S. at 741.[27] Nor is Meshal's new-found reliance on an FBI Office of Inspector General report, Opp. at 35-36, compelling because the language Meshal cites refers to factors a court may consider in determining whether to exclude a confession in a criminal proceeding, *i.e.*, a well-established remedy in the *criminal* law context.[28]

The absence of caselaw that would compel the conclusion that the alleged conduct was unconstitutional is especially apparent when considering other surrounding circumstances alleged. For example, Meshal does not allege that the interrogations occurred in an inherently coercive setting. Instead, he acknowledges that he was questioned in a suite that had a sitting room, a bedroom, a bathroom and an efficiency kitchen. *See* AC ¶ 69. At the beginning of each interrogation, Meshal was notified of his right to refuse to answer questions. *Id.* ¶¶ 71, 83. During the same period of time that these interrogations occurred, Meshal was allowed to talk in the evenings to a Kenyan human rights group, *id.* ¶¶ 92-95, and was visited twice by a consular affairs officer from the U.S. Embassy in Nairobi, who told him that he had spoken to Meshal's family in New Jersey and was working to get him home, *id.* ¶¶ 102-04, 107. Notwithstanding Meshal's florid characterizations, the interrogations and their surrounding context as described by Meshal come nowhere close to "the rack and the screw."

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[27] Meshal's claim is not proven by *Vance v. Rumsfeld*, No. 06-C-6964, 2010 WL 850173 (N.D.Ill. March 5, 2010), *appeal docketed*, No. 10-1687 (7th Cir. Mar. 22, 2010), presently on appeal. The *Vance* plaintiffs were unquestionably within U.S. custody. *See id* at *1-2.

[28] *See* "A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantánamo Bay, Afghanistan, and Iraq," U.S. Department of Justice, Office of the Inspector General (October 2009) (Revised) at 47-49, *available at* http://www.justice.gov/oig/reports/FBI/index.htm.

B. Count IV Is Barred By The Defense Of Qualified Immunity Because Meshal Has Not Stated A Clearly Established Violation Of The Torture Victim Protection Act

In Count IV, Meshal alleges that Agents Higginbotham and Hersem violated his rights under the Torture Victim Protection Act (the "TVPA"), 28 U.S.C. § 1350, note. The TVPA creates a civil cause of action against "[a]n individual, who, under actual or apparent authority, or color of law, *of any foreign nation* (1) subjects an individual to torture . . ." 28 U.S.C. § 1350, note (emphasis added). As the Defendants explained in their opening brief, Meshal's TVPA claim fails because he has not alleged facts establishing that Defendants Higginbotham and Hersem acted under the authority or color of foreign law, or that these defendants subjected Meshal to any treatment that was clearly established to be "torture" under the TVPA. *See* MTD at 38-45.

1. Agents Higginbotham and Hersem did not act "under actual or apparent authority, or color of law, of any foreign nation"

In Meshal's view, a TVPA claim that a U.S. official acted under the authority or color of foreign law requires nothing more than allegations that either: 1) the official was a "willful participant in joint action" or conspired with foreign authorities; or 2) foreign officials "play[ed] a significant role" in the alleged torturous conduct. *See* Opp. at 38. Meshal, however, cites no case in which a federal court has recognized these standards as applicable to TVPA claims against U.S. officials.[29] That no federal court has ever held a U.S. official liable under the TVPA

[29] Therefore, should this Court decide to be the first to do so, Hersem and Higginbotham would still be entitled to qualified immunity because if the general legal standards have not been established in caselaw, their application to particular facts could not place individual officers on notice that the standards were clearly established. The availability of this qualified immunity defense to TVPA claims does not mean that U.S. officials are not accountable if they commit torture abroad, alone or in concert with foreign officials. To the contrary, federal law makes it a criminal offense to engage in torture, to attempt to commit torture, or to conspire to commit torture

pursuant to *any* standard, including the exceptionally broad liability proposed by Meshal, compels the conclusion that Meshal is incorrect.

Meshal's error is evidenced by *Arar*, *Harbury v. Hayden*, 444 F. Supp. 2d 19 (D.D.C. 2006), *aff'd*, 552 F.3d 413 (D.C. Cir. 2008), and *Schneider v. Kissinger*, 310 F.Supp.2d 251 (D.D.C. 2004), *aff'd on other grounds*, 412 F.3d 190 (D.C. Cir. 2005). In each of these cases, the factual allegations averred that U.S. officials either willfully participated in joint action or conspired with foreign authorities, or that foreign authorities played a significant role in torturous conduct, in violation of the TVPA. Yet in each case the TVPA claims against U.S. officials were rejected.[30] It is impossible to reconcile the rejection of the TVPA claims in these cases with the broad standards of liability Meshal has proposed.[31] It is also impossible to reconcile the standards offered by Meshal with the narrower standard stated by the *en banc* Second Circuit in *Arar*, which requires that a TVPA plaintiff adequately allege that the defendant U.S. officials possessed power under foreign law, and that the alleged tortuous acts derived from an exercise of that power or that the officials could not have committed those acts absent such power. 585 F.3d at 568.[32] This clearly requires more than mere willful participation in joint action or conspiracy with foreign authorities, or a "significant role" being played by foreign authorities.[33]

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outside the United States. *See* 18 U.S.C. 2340A.

[30] *See Arar*, 585 F.3d at 568; *Harbury*, 444 F. Supp. 2d at 42; *Schneider*, 310 F. Supp. 2d at 267.

[31] Even if general principles of agency law *can* inform the interpretation of the TVPA's "under actual or apparent authority" requirement, *see* Opp. at 40, *Arar*, *Harbury*, and *Schneider* reject, at least implicitly, the imposition of TVPA liability on the basis of the agency relationship embodied in the standard proposed by Meshal – i.e., "willful joint action" with foreign authorities.

[32] Contrary to Meshal's argument, *see* Opp. at 41, it was immaterial to the Second Circuit's formulation of this standard that the complaint in *Arar* "only" alleged "encourage[ment] and facilitat[ion]" by U.S. officials. Thus Meshal's attempt to remove his TVPA claim from the ambit of *Arar* on this ground fails.

[33] *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005),

Contrary to Meshal's contention, Opp. at 38, the Second Circuit's decision in *Kletchka v. Driver*, 411 F.2d 436 (2d Cir. 1969), does not support, and is in fact contrary to the construction of the TVPA he advocates. In *Kletschka*, the plaintiff claimed that state and federal defendants conspired under color of state law to deprive him of due process with respect to certain employment decisions made by the Syracuse Veterans Administration (VA) hospital, a federal institution. In concluding that summary judgment for the Syracuse (local) VA defendants was not appropriate, the Second Circuit found that, if proven, certain indicia of control of the local federal defendants by the state actors would make it clear that "the chief administrators of the [state] medical school are in a position to exert a powerful influence over the personnel policies" of the VA hospital. *Id.* at 448. Conversely, the court dismissed the plaintiff's claims against the federal employees in the VA's office in Washington, D.C. As to those defendants, the Second Circuit concluded, "[t]here is no indication" that their involvement "was under the control or influence of the State defendants." *Id*. at 449.[34] In this case, although Hershem and Higginbotham were "on the ground" in the Horn of Africa, they were not acting, as alleged, "under the control or influence" of the foreign powers at issue. On the contrary, Meshal argues in broad fashion that it was the FBI defendants who were controlling or influencing the acts of foreign officials, not vice versa. *See, e.g.*, AC ¶¶ 2, 96-98, 123.[35] Because it is not clearly established

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provides no support for Meshal. The "joint action" alleged in that case involved a foreign official and a private company, not a federal employee allegedly acting pursuant to U.S. policy. *Id.* at 1247-50.

[34] *Accord Williams v. U.S.*, 396 F.3d 412, 415 (D.C. Cir. 2005) (holding that federal employee did not act under color of D.C. law for purposes of § 1983, and that D.C. had "no authority" over him and "thus did not exercise . . . coercive power through him") (citation and internal quotation marks omitted).

[35] As the district court concluded in *Arar*, there is another reason that "it is perfectly reasonable to hold federal officials liable for constitutional wrongs committed under color of state law," and not find federal officials liable under color of foreign law for carrying out the United

that the TVPA applies to the actions of federal officials carrying out national security functions under color of domestic law, Hersem and Higginbotham are entitled to qualified immunity.

2. Meshal fails to allege acts that were clearly established as "torture" within the definition of the TVPA

The Defendants have shown that Meshal's TVPA claim does not allege any actions that have been recognized to be clearly established as "torture" within the statutory definition of the TVPA, either in the D.C. Circuit, or in any other federal court. *See* MTD at 41-43 and cases cited therein. Rather than grapple with the implication of these cases on his TVPA claim, Meshal brushes past them with the conclusory declaration that "[his] allegations of intentionally inflicted emotional pain and suffering adequately allege torture prohibited by the TVPA." Opp. at 43.

The "mental pain or suffering" actionable as "torture" under the TVPA is defined as "prolonged mental harm" resulting from "the intentional infliction or threatened infliction of severe physical pain or suffering;" "the threat of *imminent* death;" or, "the threat that another individual will *imminently* be subjected to death [or] severe physical pain and suffering . . ." 28

States' sovereign interests. In short,

> federal officials, when acting under color of state law, are still acting under a legal regime established by our constitution and our well-defined jurisprudence in the domestic arena. However, this equation of the duties and obligations of federal officials under state and federal law is ill-suited to the foreign arena. The issues federal officials confront when acting in the realm of foreign affairs may involve conduct and relationships of an entirely different order and policy-making on an entirely different plane. In the realm of foreign policy, U.S. officials deal with unique dangers not seen in domestic life and negotiate with foreign officials and individuals whose conduct is not controlled by the standards of our society. The negotiations are often more delicate and subtle than those occurring in the domestic sphere and may contain misrepresentations that would be unacceptable in a wholly domestic context. Thus, it is by no means a simple matter to equate actions taken under the color of state law in the domestic front to conduct undertaken under color of foreign law. That arena is animated by different interests and issues.

Arar v. Ashcroft, 414 F.Supp.2d 250, 266 (E.D.N.Y. 2006), *aff'd on other grounds*, 585 F.3d 559 (2d Cir. 2009) (en banc), *cert. denied*, No. 09-923, 2010 WL 390379 (U.S. Jun. 14, 2010).

U.S.C. § 1350, note, Sec. 3(b)(1)-(2)(A), (C), &(D) (emphasis added). The sole case Meshal cites, *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, (which the Defendants also cited, *see* MTD at 43 n.40), is of no help to Meshal because the plaintiffs in *Aldana* were subjected to specific threats of *imminent and certain* death by heavily armed security forces that repeatedly told the plaintiffs, over a period of several hours, that they would be killed "not sometime in the future, but that very night." 416 F.3d at 1252. Meshal does not contend that he was similarly threatened.[36] It is in no way clearly established that positing what other unidentified foreign actors not even present might do at some unidentified point in the future falls within the statutory ambit. Meshal ignores the TVPA's requirements of a "threat of *imminent* death" or "threatened infliction of severe physical pain or suffering," and how these requirements relate to the allegations of threat and speculative harm here. 28 U.S.C. § 1350, note, Sec. 3(b)(1)-(2)(B) & (C). Meshal cannot state a TVPA claim – and certainly not a clearly established one for qualified immunity purposes – based on alleged psychological coercion to obtain a confession where the alleged coercion does not amount to torture as defined in the TVPA.

Meshal's attempt to distinguish his TVPA claim from the claim rejected by the D.C. Circuit in *Simpson v. Socialist People's Libyan Jamahiriya*, 326 F.3d 230 (D.C. Cir. 2003), fails completely. Contrary to Meshal's argument, the TVPA claim in *Simpson* was not rejected because the plaintiff did not allege that the "intended purpose behind her detention was to compel anyone to do or abstain from doing any act." *See* Opp. at 43 n.49. The court's discussion of the "intended purpose" behind the detention in *Simpson* was only relevant to the plaintiff's "hostage

[36] Had Congress intended to include purely speculative threats of the future "infliction of severe physical pain or suffering" in the definition of "torture" for purposes of the TVPA, it obviously would have included all threats of death, not just threats of "imminent death," within that definition. Threats of death, after all, constitute the ultimate threat of severe harm.

taking" claim, which was asserted in addition to a torture claim. *See Simpson*, 326 F.3d at 232.[37] In its finding that subjecting the plaintiff to interrogation, incommunicado detention, and threats of death "reflect[ed] a bent toward cruelty on the part of the[ir] perpetrators, [but] . . . not . . . so unusually cruel or sufficiently extreme and outrageous as to constitute torture," the D.C. Circuit made no mention of any purpose, or lack thereof, behind the perpetrators' acts. *See id.* at 234.

3. It was not clearly established that U.S. officials could violate the TVPA while acting under color of federal law

As recognized in *Harbury v. Hayden*, the presidential signing statement that accompanied the TVPA made clear that "the [TVPA's] 'under foreign color of law' requirement was understood to serve as an important limitation of the Act that would *preclude* its application to United States operations abroad." 444 F. Supp. 2d at 41 (emphasis added) (rejecting TVPA claim against U.S. officials). Meshal discounts the import of the signing statement, *see* Opp. at 44-45, yet admits, as he must, that the plain language of the signing statement was one of the bases for the dismissal of the TVPA claims in *Harbury*, *see id.* at 45 n.52.[38] In *Schneider v. Kissinger*, Judge Collyer rejected a TVPA claim against then National Security Advisor Henry Kissinger, finding that Kissinger was "most assuredly" acting pursuant to U.S. law because he was carrying out direct orders from the President, even if his alleged foreign co-conspirators were acting under color of foreign law. 310 F. Supp. 2d at 267.[39] While *Harbury* and *Schneider* may not be binding on this

[37] "Hostage taking" and "torture" were separate exceptions under the Foreign Sovereign Immunities Act. *See Simpson*, 326 F.3d at 234-35.

[38] That the signing statement was *one of three* bases for dismissing the TVPA claim in *Harbury* does not help Meshal.

[39] Meshal offers a distinction without a difference in his attempt to evade *Schneider*. Nothing in *Schneider* supports the proposition that Dr. Kissinger would not have been found to have acted under U.S. law if he had personal contact with the victim in *Schneider* or had been "on the ground" in Chile. *See* Opp. at 40 n.43. Geography is not the foundation for the *Schneider* decision. It is the fact that Kissinger was clearly acting under color of U.S. domestic law, not

Court with respect to their analysis of the TVPA, Meshal presents no contrary authority, either from the D.C. Circuit or any other federal circuit, to support his TVPA claim. Thus *Harbury* and *Schneider* are dispositive for qualified immunity purposes.

Like the plaintiff in *Harbury*, Meshal "has failed to cite a single case that stands for the principle that a U.S. official serving the interests of the United States and acting within his or her employment can be held liable pursuant to the TVPA." 444 F. Supp. 2d at 42.[40] The Defendants are not aware of *any federal court* that has held a U.S. official liable under the TVPA. Should this Court accept Meshal's invitation to be the first to hold a U.S. official liable under the TVPA, the Defendants would nonetheless be entitled to qualified immunity.[41]

C. Meshal Has Failed To Establish That Each Defendant Personally Participated In Violating His Constitutional Rights

1. Counts I-III should be dismissed as to Doe 2 for lack of personal participation

Counts I, II, and III should be dismissed *in their entirety* as to Doe 2 for lack of personal participation in any of the wrongful conduct alleged by Meshal. The sole specific conduct by Doe 2 alleged in the Amended Complaint is that Doe 2 "participated in several of the interrogations in

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under color of foreign law.

[40] *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1264 (D.C. Cir. 2006), is of no help to Meshal because Meshal does not allege the Defendants were "rogue agent[s]." *Id.* at 1264. In fact, the concept of the Defendants as "rogue" agents is completely inconsistent with the allegations of the Amended Complaint, which claim that the Defendants' actions were "ordered, directed, authorized, and/or approved" by government officials following procedures established by the Attorney General of the United States, *see* AC ¶¶ 56-57, and that the Defendants' actions took place in furtherance of a U.S. policy and practice of "proxy" detentions of suspected terrorists, *see, e.g.*, *id.* ¶¶ 31, 40, 44, 52, 56-57.

[41] The D.C. Circuit's statement in *Gonzalez-Vera* that it can "imagine a case" where a U.S. official could be subjected to TVPA liability, *see* 449 F.3d at 1264, is not sufficient to provide clearly established law on the issue. Nor is clearly established law that supports Meshal's claims supplied by the Convention Against Torture or a legal analysis prepared by an FBI agent. *See* Opp. at 43-44.

Ethiopia led by Doe Defendant 1." AC ¶ 150. Meshal, however, has withdrawn his interrogation claims against Doe 2. *See* Opp. at 2 n.1. Meshal offers no factual description of any specific act by Doe 2 establishing that he had any personal role in Meshal's alleged detention in Kenya. Meshal does not allege that Doe 2 was ever in Kenya. Apart from wholly conclusory allegations, *see, e.g.*, AC ¶¶ 123, 189, Meshal offers no factual description of any specific act by Doe 2 which establishes that Doe 2 had any personal role in Meshal's alleged rendition from Kenya to Ethiopia through Somalia, or any personal role in Meshal's alleged detention in Ethiopia. For these reasons, all claims against Doe 2 (Counts I-III) should be dismissed.

2. Count I should be dismissed as to Doe 1 for lack of personal participation

Meshal does not attribute any of the wrongful conduct that allegedly occurred during his interrogations – physical touching, "threats of torture, serious injury, disappearance, and other serious harms" – to Defendant Doe 1. The mere fact of Doe 1's presence in an interrogation in which other Defendants allegedly engaged in this conduct is not sufficient to establish his personal participation. *Simpkins v. District of Columbia Government*, 108 F.3d 366, 369 (D.C. Cir. 1997) (complaint must alleged federal official was "personally involved" in unlawful conduct). That is especially so as, again, Meshal fails to allege any sort of conduct Doe 1 could have prevented even assuming that he had a constitutional duty to do so.

3. Counts II-III should be dismissed as to all of the Defendants for lack of personal participation

In *Ashcroft v. Iqbal*, the Supreme Court recognized two "working principles" applicable to resolving a motion to dismiss. First, conclusory allegations offered in support of a right to relief are not accepted as true. 129 S. Ct. 1937, 1949 (2009). Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.* With respect to plausibility, "[w]here

the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id.* (citing Fed. R. Civ, P. 8(a)(2)). With respect to Counts II and III, Meshal has not established that any of the Defendants is personally responsible for any wrongful conduct towards Meshal because the non-conclusory allegations of his Amended Complaint establish no more than the mere possibility that these Defendants were responsible for Meshal's alleged detention and transfer.

Beyond conclusory allegations devoid of any factual content, Meshal offers nothing that, if proven true, would establish that any of the Defendants was responsible for his alleged detention or transfer by foreign authorities.[42] Meshal contends that he unlawfully entered Kenya, *see id.* ¶¶ 38-40, 46, from Somalia, a country he alleges was in the midst of armed fighting in which he further alleges Ethiopia's armed forces were also engaged, *id* ¶¶ 34-36. According to Meshal, Kenya closed its border with Somalia for "security concerns," *id.* ¶ 40, and the Kenyan military had mobilized on that border "to capture those fleeing Somalia on the belief that they were al Qaeda members or fighters." *Id.* ¶ 41. Somalia was believed to be a haven for foreign terrorists. *Id.* ¶ 26, 41. After Meshal was captured by the Kenyan military, he was detained by Kenyan authorities for ten days before he had any contact with any of the Defendants, *id.* ¶¶ 46, 58, and it is not even suggested that the Defendants played any role in this detention.[43] Meshal was detained by Ethiopian authorities for ten days before he had any contact with any of the Defendants in Ethiopia. *Id.* ¶¶ 118,140. Meshal repeatedly identifies only Kenyan, Somali, and Ethiopian actors as the persons who kept him detained in Kenya and Ethiopia, and transported him

[42] *Compare* AC ¶ 2 *with* ¶¶ 40, 46, 51, 58, 64, 76, 81-82, 108-09, 115-19, 141-43, 155.

[43] In fact, Meshal alleges that it was only after his capture and detention by Kenyan authorities that U.S. officials learned of his presence and detention in Kenya. AC ¶ 56.

from Kenya to Ethiopia through Somalia. *See id.* ¶¶ 81-82, 90, 108-112, 115-19. 130-34. Meshal alleges that he remained under the watch of Kenyan, Somali, and Ethiopian officials during the entirety of his time in Kenya, Somalia, and Ethiopia. *id.* ¶¶ 90, 142-43. While the Defendants were allowed to question Meshal in Kenya and Ethiopia for certain periods of time, Meshal does not allege that any of the Defendants took any action at any time that indicated an ability to leave either country with Meshal or to otherwise remove him from foreign custody.

In his Opposition, Meshal identifies "corroborating" allegations that purportedly support the conclusion that each defendant had a personal role in Meshal's alleged detention and transfer. However, the "corroborating" allegations offered by Meshal describe the actions or inactions of others, not the actions or inactions of any of the Defendants. For example, as support for the proposition that the Defendants are personally responsible for Meshal's alleged detention and transfer, Meshal references claims by media and advocacy groups that the United States engaged in a policy of proxy detention. *Id.* ¶¶ 31, 136-38. The policy of a federal agency, however, is not subject to *Bivens* liability, *FDIC v. Meyer*, 510 U.S. 471 (1994), nor could such a policy subject individuals to liability where facts as to their individual responsibility for Meshal's custodial detention by foreign authorities are not pled. Moreover, the Defendants can only be held liable for their own individual actions. *Simpkins*, 108 F.3d at 369. Thus Meshal cannot rely on a supposed (and unidentified) agency policy of proxy detention in the Horn of Africa to establish anything more than a "mere possibility" that any Defendant personally participated in the specific detentions and rendition alleged here, particularly since the more specific factual allegations raise no inference of personal participation in anything other than Meshal's interrogations.[44]

[44] Meshal's argument that all four named Defendants can be held liable for his rendition "[e]ven if [they] did not control or actively work with foreign authorities to direct or execute

Meshal further seeks to evade the requirements of *Iqbal* by asking this Court to draw an inference of unlawful conduct by the Defendants (without particularly pled, non-conclusory allegations of personal participation) when a conclusion of lawful conduct is available. To the extent that Meshal cites statements allegedly made by Hersem, Higginbotham, or Doe 1, at some point during his interrogations, *see* AC ¶¶ 71, 148, Meshal rests his claims upon the proposition that since two of these defendants interrogated him in Kenya, and one interrogated him in Ethiopia, all of the Defendants were necessarily responsible for Meshal's detentions in Kenya, Somalia, and Ethiopia, as well as for his alleged transfer between those countries. In addition to being conclusory, and thus not entitled to any presumption of truth, *Iqbal*, 129 S. Ct. 1949-50, it is also contrary to *Iqbal*'s caution that factual allegations do not create an entitlement to relief where those factual allegations, if taken as true, are "'merely consistent with' a defendant's liability," *id.*

From the facts alleged, it is clear that Kenya, Somali, and Ethiopia had a plausible reason to have an interest in Meshal independent of any interest on the part of the United States. It is not surprising that Kenyan officials would be interested in someone who unlawfully entered their country from Somalia – a haven for foreign terrorists. It is not surprising that Kenya would return that individual to the country from which he entered, Somalia, if Kenya decided it had no basis to continue to detain him. Nor is it surprising that Ethiopia would be interested in detaining an individual who appeared to have fled Somalia – a country with whom Ethiopia was in conflict – in advance of the Ethiopian military.[45] While Meshal's allegations may suggest some possibility that he may have been detained in Kenya, Somalia, and Ethiopia at the behest of the United States,

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Meshal's rendition," Opp. at 31-32, cannot be squared with the Supreme Court's reasoning in *Iqbal*.

[45] *See, e.g.*, AC ¶ 37 (fear of capture by Ethiopian soldiers advancing on Meshal's location); ¶ 155 (alleging Meshal was brought before a military tribunal and told he would be classified as "innocent," "enemy combatant," or "unlawful enemy combatant").

the allegations more plausibly suggest that Defendants were merely allowed to question Meshal while he was being held by Kenyan and Ethiopian authorities for those countries' own purposes.

CONCLUSION

For the reasons stated above, and in the Defendants' Motion to Dismiss, Counts I-IV of Meshal's Amended Complaint should be dismissed with prejudice.

Respectfully submitted,

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