UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S RESPONSE TO DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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INTRODUCTION

Plaintiff Amir Meshal further amended his complaint to provide additional allegations showing that the Defendants—all FBI agents—used foreign proxies to illegally detain him for more than four months without any modicum of process, and to forcibly transfer him from Kenya to Ethiopia (via Somalia) to effect that illegal detention for purposes of securing his confession. The new allegations confirm what has been true all along: in this case, a U.S. citizen seeks redress for precisely the sort of gross investigative misconduct by federal law enforcement officers that spurred the Supreme Court to first recognize an implied cause of action to vindicate constitutional rights in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

Defendants use Meshal's modest amendment of the complaint to rebrief and reargue what has already been argued at length, calling for a sweeping "national security" and "foreign affairs" exemption for violations of an American citizen's core Fourth and Fifth Amendment rights under the guise of "special factors counseling hesitation." The upshot of Defendants' argument is that this Court is powerless to provide a remedy to a U.S. citizen abroad for gross misconduct by federal law enforcement officers no matter how brutally those officers treated him or how long they locked him away in a secret jail, as long as they engaged foreign officials to shield their illegal conduct. That argument remains as unpersuasive now as before. This Court should accordingly deny Defendants' motion for dismissal of Meshal's constitutional claims on *Bivens* special factors grounds. It should likewise reject their request for qualified immunity from Meshal's claims under the Constitution and the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note.[1]

[1] Meshal hereby incorporates by reference all of the arguments made in his Memorandum in Opposition to Defendants' Motion to Dismiss the Amended Complaint, ECF No. 35 ("Opp. Br."); his Notice of Supplemental Authority and Response to Defendants' Notice of Supplemental Authority filed in support thereof, ECF Nos. 44 & 42; and at the July 12, 2011 oral argument on Defendants' Motion to Dismiss.

I. Meshal Properly Seeks Redress Under *Bivens.*

Defendants repeat their arguments that special factors preclude a *Bivens* remedy for Meshal because separation of powers concerns relegate national security, intelligence, and foreign affairs to the Executive Branch, Defs.' Supplemental Mem. in Supp. of their Mot. to Dismiss, ECF No. 52, 3–5 ("Supp. Br."); the judiciary purportedly has "limited institutional experience" in national security, intelligence, and foreign affairs, *id*. at 6; and adjudication of Meshal's suit may involve the consideration of classified information, *id*. at 7. Defendants' sole new special factors argument concerns the Fourth Circuit's decision in *Lebron v. Rumsfeld*, No. 11-6480, 2012 WL 213352 (4th Cir. Jan. 23, 2012), which, even if it were correctly decided (and Meshal maintains it is not), is distinguishable. In response to Defendants' supplemental brief, Meshal makes the following points.

1. Defendants misconstrue the concerns underlying *Bivens* special factors analysis. *Bivens* special factors seek to protect *legislative*, not *executive*, prerogatives. *See, e.g.*, *Bivens*, 403 U.S. at 396 (special factors present in suits involving "federal fiscal policy" and congressional delegation of authority); *id*. at 418 (Harlan, J., concurring); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring); *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). Here, Congress has not acted in any way to cause this Court to stay its *Bivens* hand. To the contrary, Congress has demonstrated recognition that *Bivens* is available to U.S. citizens to remedy misconduct by U.S. officials at home and abroad. *See* Opp. Br. 12–13 (discussing congressional limitation of civil actions for designated "alien enemy combatants," but not U.S. citizens, in Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a)(2), 120 Stat. 2600, 2635–36 (2006), and Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2740, 2741–42 (2005)).

2. The "context" of Meshal's action is not "new" in any material respect. *See* Opp. Br. 6–7. This case, like *Bivens*, challenges misconduct by federal law enforcement officials who violated a

U.S. citizen's Fourth and Fifth Amendment rights when investigating him for a crime. Challenges to federal officers' use of torturous interrogation techniques and deprivation of an individual's physical liberty without adequate process do not present a new context for *Bivens*. *See, e.g., Tellier v. Fields*, 280 F.3d 69, 73, 76 (2d Cir. 2000) (*Bivens* claim challenging prisoner's detention in segregated housing without due process); *Wilkins v. May*, 872 F.2d 190, 191–92, 195 (7th Cir. 1989) (*Bivens* due process claim against FBI agents' interrogation of suspect by pointing gun at his head). Meshal's Fifth Amendment due process claim against interrogations involving threats of torture and forced disappearance does not challenge foreign conduct even though the interrogations occurred abroad. Likewise, his Fourth and Fifth Amendment claims against his four-plus months of secret, extrajudicial detention challenges only the actions of the FBI agents responsible, in whole or in part, for that detention. While Defendants may have communicated and cooperated with foreign agents to detain him, Meshal does not challenge any conduct by those agents.[2]

Meshal's supplemental allegations underscore that this case involves core *Bivens* territory. According to a U.S. State Department official stationed in Ethiopia at the time of the events in question, "U.S. officials used foreign proxies to detain Mr. Meshal when said foreign governments would not normally have detained [him]." Second Am. Compl. ¶ 170D, ECF No. 51. The official confirmed that the purpose of Meshal's forced transfer from nominal Kenyan custody to nominal Ethiopian custody was "to further US interrogations of this US citizen," and that "FBI/JTTF was given carte blanche to do as they pleased with Mr. Meshal." *Id*. ¶¶ 170C–170D. These allegations make it more than plausible that the Defendants used foreign proxies who had no independent interest in Meshal to detain him illegally and to carry out the rendition that enabled his continued, prolonged and extrajudicial detention to further interrogate him. Meshal thus seeks

[2] As Meshal has noted, Defendants do not invoke the "act of state" doctrine, underscoring that his suit challenges only the unconstitutional conduct of U.S. officials, not the public acts of any foreign governments. Opp. Br. 12 n.9.

redress for precisely the sort of investigative misconduct by federal law enforcement officers that the Supreme Court sought to deter in permitting *Bivens* remedies for constitutional claims. *Cf. Roth v. U.S. Dep't. of Justice*, 642 F.3d 1161, 1188 (D.C. Cir. 2011) (identifying *Bivens* as a way to protect "the public interest in ensuring that innocent people are not . . . subjected to . . . investigative misconduct").

3. Even if this Court finds that this case presents a new context, separation of powers supports recognition of a *Bivens* remedy here for a U.S. citizen seeking redress for misconduct by U.S. officials. The availability of a *Bivens* remedy ultimately is "a subject of judgment" in which judges weigh *Bivens* purposes against any congressional directives or other special factors counseling hesitation. Opp. Br. 7; *see* Supp. Br. 2 (recognizing that courts retain the "power to create a new constitutional-tort cause of action"). In making this judgment, this Court must consider the importance of Meshal's citizenship along with any national security and foreign affairs concerns.

The D.C. Circuit has implicitly recognized that the plaintiff's citizenship matters in the analysis of *Bivens* special factors concerning separation of powers. It underscored plaintiffs' non-U.S. citizenship in denying a *Bivens* remedy in *Sanchez-Espinoza v. Reagan.* 770 F.2d 202, 209 (D.C. Cir. 1985) ("[T]he special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of *foreign subjects* causing injury abroad.") (emphasis added); *id*. ("[T]he danger of *foreign citizens* using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist.") (emphasis added). The D.C. Circuit has followed the reasoning of *Sanchez-Espinoza* in holding that national security and foreign affairs concerns precluded *Bivens* remedies for *non-citizens* abroad. *Ali v. Rumsfeld*, 649 F.3d 762, 774 (D.C. Cir. 2011); *Rasul v. Myers*, 563 F.3d

527, 532 n.5 (D.C. Cir. 2009). Outside the *Bivens* context, the Supreme Court and this Circuit have recognized that the principle of separation of powers itself grants the judiciary an important role in protecting, and in providing a remedy for violations of, the constitutional rights of U.S. citizens against U.S. misconduct, even when abroad. *See* Opp. Br. 10–12 (discussing *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *rev'd on other grounds*, 471 U.S. 1113 (1985); *see also Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004)).[3]

Defendants argue incorrectly that this Court cannot adjudicate this *Bivens* action without discovery harmful to U.S. national security, intelligence operations, or foreign relations. Supp. Br. 5. Adjudication of Meshal's claim against the abusive interrogations does not require inquiry into *any* U.S. cooperation or communications with foreign officials. Opp. Br. 14.[4] Although resolution of Meshal's claims against his illegal detention and rendition may involve some inquiry into Defendants' interactions with foreign officials, the inquiry would necessarily be limited because the suit challenges only Defendants' treatment of Meshal during their investigation—not the actions of foreign officials or governments. *See* Opp. Br. 9. This Court could also limit discovery to U.S. officials, if it deemed it appropriate to protect legitimate government interests.

Finally, Defendants' continued reliance on *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc) is misplaced. The divided *en banc* Second Circuit recognized that Arar, a non-citizen, presented "a private action for money damages against individual policymakers" and "a suit seeking a damages remedy against senior officials who implement an extraordinary rendition policy," *Arar*,

[3] That several of these cases arise in habeas bolsters Meshal's argument because "if anything, habeas is more disruptive of executive affairs and intelligence operations than a retrospective damages action: it demands that the executive do something now that it does not wish to do, rather than declaring later that what was done was wrong." Opp. Br. 12.
[4] Defendants mischaracterize Meshal's Opposition Brief as contending that adjudication of *none* of Meshal's claims would require *any* inquiry into U.S. officials' cooperation and communication with foreign officials. Supp. Br. 4. Meshal recognized that although evaluating the detention and rendition claims may require some such inquiry, it would be limited and plainly within the Court's competence. Opp. Br. 14.

585 F.3d at 574–75. In that context, it held that national security and foreign affairs precluded an implied damages remedy. *Id*. at 576. But not only is this case brought by a U.S. citizen, it also does not seek relief against senior policymakers. Rather, it concerns the Defendants' direct role in violating Meshal's constitutional rights, including through threats of torture and forced disappearance. Even Meshal's rendition claim can be distinguished: Meshal seeks a *Bivens* remedy against Defendants for their direct participation in depriving him of his physical liberty (through a forced transfer) for the purpose of securing him for further coercive interrogations—not for their creation or implementation of an executive policy of extraordinary rendition.

4. Meshal's Opposition Brief squarely rebutted Defendants' claim that the "limited institutional experience of the judiciary" in national security, intelligence operations, and foreign affairs counsels against recognition of a *Bivens* remedy here. *See* Opp. Br. 13–16; *Abu Ali*, 350 F. Supp. 2d at 61–64 (demonstrating that courts proceed with due caution and care when inquiring into U.S.-foreign cooperation and communication to evaluate violations of citizens' constitutional rights abroad in a variety of contexts). The D.C. Circuit has recognized, moreover, that even where constitutional claims may implicate foreign relations and military affairs, courts are nonetheless competent to adjudicate them. *Ramirez de Arellano*, 745 F.2d at 1512–13 (permitting U.S. citizen to sue U.S. officials for expropriation of his property in Honduras and rejecting argument that foreign relations concerns precluded suit).[5]

If, as Defendants allude, litigation of Meshal's claims could impact foreign relations or place people at risk, Supp. Br. 5 n.7, the Court may employ calibrated tools to protect such interests, including evidentiary privileges. *Bivens* actions have proceeded even where the state secrets

[5] The D.C. Circuit afforded the U.S. citizen plaintiff in *Ramirez de Arellano* equitable relief, which posed an even greater threat of interference with the government's conduct of military and foreign affairs matters abroad than the relief sought by Meshal in this *Bivens* action: simple monetary redress for past misconduct by U.S. law enforcement officers.

privilege removed certain evidence. *See, e.g.*, *In re Sealed Case*, 494 F.3d 139, 151 (D.C. Cir. 2007).[6] Courts are well equipped to protect classified information where necessary and appropriate. *See* Opp. Br. 16–17.[7] This Court should accordingly reject Defendants' plea to extinguish a citizen's right to a remedy for constitutional violations based on speculative concerns that may never come to pass and a distortion of Article III judges' competence in dealing with those concerns if, and when, they arise.

5. The *Lebron* case in the Fourth Circuit was wrongly decided and is distinguishable. First, *Lebron* is inconsistent with D.C. Circuit decisions relying on plaintiff's citizenship (even when abroad) to determine whether to permit a remedy for constitutional rights, notwithstanding the government's assertion of national security and foreign affairs concerns. *See Ramirez de Arellano*, 745 F.2d at 1512–13 (permitting U.S. citizen's constitutional claims for equitable relief); *Sanchez-Espinoza*, 770 F.2d at 209 (relying on plaintiffs' non-citizenship in precluding *Bivens* remedy); *Ali*, 649 F.3d at 774 (same); *Rasul*, 563 F.3d at 532 n.5 (same); *see also Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 108–111 (D.D.C. 2011), *appeal docketed* No. 11-5209 (D.C. Cir. Aug. 22, 2011) (permitting *Bivens* remedy for U.S. citizen against detention and abuse in overseas war zone).[8] Second, the Fourth Circuit's decision rested on the fact that the plaintiff there, Jose Padilla, had been

[6] Defendants again refer to possible invocation of the "state secrets" privilege. Supp. Br. 5 n.7. Meshal has noted that Defendants' ability to invoke this privilege itself undermines their special factors argument because, when appropriately applied, this privilege permits courts to protect national security information without dismissing the action. Opp. Br. 17 n.16; *Arar*, 585 F.3d at 603 (Sack, J. dissenting) (preclusion of *Bivens* remedy on basis of executive branch concern for secrecy was an "unfortunate form of double counting" because the concern "can be, should be, and customarily is, dealt with case by case by employing the . . . state-secrets doctrine"); *cf. Sealed Case*, 494 F.3d at 151 ("[A]llowing the mere prospect of a privileged defense to thwart a citizen's efforts to vindicate his or her constitutional rights would run afoul of the Supreme Court's caution against precluding review of constitutional claims.").

[7] Defendants overstate the weight this Court should place on the possible introduction of classified evidence in this case in its *Bivens* special factors analysis. Supp. Br. 7. *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008), is inapposite as that case asked a court to delve into the "job risks and responsibilities of covert CIA agents," concerns not present here.

[8] The Fourth Circuit's decision is squarely contrary to *Padilla v. Yoo*, a *Bivens* case brought by the same plaintiff raising substantially similar claims. *Compare Lebron*, 2012 WL 213352, with *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1022–29 (N.D. Cal. 2009), *appeal docketed* No. 09-16478 (9th Cir. July 14, 2009). It is also contrary to *Doe v. Rumsfeld*, 800 F. Supp. 2d at 108–111, and *Vance v. Rumsfeld*, 653 F.3d 591, 618–622 (7th Cir. 2011), *rehearing en banc granted, opinion vacated* (7th Cir. Oct. 28, 2011).

designated an enemy combatant pursuant to the Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), and held in military custody. *Lebron*, 2012 WL 213352 at *1. This case, however, does not concern Congress and the President's exercise of "military responsibilities in concert," or seek review of "sensitive military decisions made after extensive deliberations within the executive branch" with the potential of disrupting "established chains of military command." *Id*. at *6–9. The conclusion that "[s]pecial factors do counsel judicial hesitation in implying causes of action *for enemy combatants held in military detention*," *id*. at *5 (emphasis added), is inapplicable to this suit by a U.S. citizen civilian against mistreatment during an FBI investigation. Third, Meshal, like the plaintiff in Bivens, sued low-level officials directly involved in his detention and mistreatment, whereas the Fourth Circuit viewed Padilla's claims as targeting supervisory or senior government officials responsible for broader policy. *See id*. at *7 (Padilla's suit challenged the "detention and interrogation policies developed by Senior Defense Policy defendants," which "proximately and foreseeably caused" him harm). Fourth, *Lebron* rested in part on Padilla's eventual challenge to his detention through habeas, *id*. at *12, an alternative remedy never made available to Meshal. For Meshal, as for Bivens, it is "damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring); *see* Opp. Br. 7–8.

II. Defendants Are Not Entitled to Qualified Immunity.

Defendants rehash their argument that Meshal has purportedly failed to identify clearly established constitutional rights protecting him from Defendants' misconduct. Supp. Br. 12–15.[9] Those arguments remain unpersuasive for three reasons.

[9] This Court should consider first the threshold question of whether the facts adequately allege the violation of any constitutional right because following this "two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). At oral argument, Defendants conceded that Meshal met "[t]he first prong" of the qualified immunity analysis. Oral Arg. Tr. 82.

1. Meshal has defined with sufficient specificity the following clearly established rights that protected him, as a civilian U.S. citizen, from gross misconduct by U.S. law enforcement officers: his Fifth Amendment right to due process protection from coercive interrogations involving "severe . . . mental harm," *Wilkins*, 872 F.2d at 195; *see* Opp. Br. at 35–37; his Fourth Amendment right to prompt presentment before a court following warrantless arrest and detention, *Gerstein v. Pugh*, 420 U.S. 103, 112–14 (1975);[10] *see* Opp. Br. 28–30; his Fourth Amendment right to protection from delay in presentment for the impermissible "purpose of gathering additional evidence to justify . . . arrest," *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *see* Opp. Br. 28–30; his Fifth Amendment right to some form of process prior to undue deprivations of his physical liberty, including deprivations arising from four-plus-months-long detention and his forcible transfer from one country to another for the purpose of extrajudicial detention and coercive interrogation, *Hamdi*, 542 U.S. at 529 (plurality opinion) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (due process protects "[f]reedom from bodily restraint")); *see* Opp. Br. 29–30, 32–34;[11] and, his Fifth Amendment right to protection from conscience-shocking treatment, *Rochin v. California*, 342 U.S. 165, 174 (1952), and state-created danger, *Butera v. District of Columbia*, 235 F.3d 637, 651–52 (D.C. Cir. 2001); *see* Opp. Br. 32–34.

That Defendants used foreign proxies to effect the detention and forced transfer that violated Meshal's Fourth and Fifth Amendment rights does not alter that these rights were clearly established. *See* Opp. Br. 28–29. Nor does it matter that the misconduct took place abroad, as it was clearly established that each of these core Fourth and Fifth Amendment rights protected a civilian

[10] While some delay beyond the 48-hour requirement for presentment in the domestic context may have satisfied the Fourth Amendment, *County of Riverside*, 500 U.S. at 55, there is no question that Meshal had a clearly established right to a probable cause hearing prior to being subject to four-plus months of near incommunicado detention.

[11] Should this Court determine that Defendants violated the more stringent Fourth Amendment standard requiring a prompt probable cause hearing prior to prolonged detention, it should also find that the detention violated the lower Fifth Amendment standard requiring *some* process prior to that detention.

U.S. citizen against U.S. misconduct, regardless of where he was located. *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (plurality opinion); *see* Opp. Br. 23–25.

2. There is no way to square the Supreme Court's holding in *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), that "officials can still be on notice that their conduct violates established law even in novel factual circumstances" with Defendants' repeated contention that they merit qualified immunity because of the "uniqueness" of the facts of this case, Supp. Br. 15. Meshal is not required to produce a case with "materially" or "fundamentally" similar facts. *Hope*, 536 U.S. at 741. Meshal has shown that any reasonable FBI agent was on notice that he was forbidden from subjecting a civilian U.S. citizen to interrogations involving threats of torture and forced disappearance, prolonged and extrajudicial detention, and forced transfer, *regardless* of where he did so or whether he used foreign proxies to conceal his role. Defendants essentially request cases that address *each* specific right identified above *and* concern misconduct on foreign soil through use of foreign proxies or U.S.-foreign cooperation. This demand for a "case directly on point" is misplaced. *Al-Kidd v. Ashcroft*, 131 S. Ct. 2074, 2083 (2011).

3. Meshal's supplemental allegations confirm that he has shown violations of his Fourth and Fifth Amendment rights by pleading multiple corroborating facts that establish Defendants' direct role in his detention and forced transfer, notwithstanding their use of foreign proxies, to permit "further US interrogations." 2d Am. Compl. ¶ 170C; Opp. Br. 18–21.[12] Qualified immunity should be denied.

Respectfully submitted,

/s/ Nusrat J. Choudhury

Nusrat J. Choudhury

[12] Meshal has more than adequately pled Doe Defendant 1's personal involvement in the more than thirty coercive interrogations that violated his Fifth Amendment rights. *See* Opp. Br. 21, 34–35. He has also shown that Defendants Higgenbotham and Hersem's specific use of torturous threats violated the Fifth Amendment and his clearly established TVPA rights. *Id*. at 34–35, 37–45.

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