

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

_____	)	
AMIR MESHAL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 09-cv-2178 (EGS)
	)	
CHRIS HIGGINBOTHAM, <i>et al.</i> ,	)	
	)	
Defendants.	)	
_____	)	

**DEFENDANTS’ NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendants Steve Hersem, Chris Higginbotham, John Doe 1, and John Doe 2 (collectively, the “Defendants”) respectfully submit this Notice to alert the Court to the recent decision of the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, in *Vance v. Rumsfeld*, Nos. 10-1687 & 10-2442, 2012 WL 5416500 (7<sup>th</sup> Cir. Nov. 7, 2012). In a Notice of Supplemental Authority filed on August 22, 2011, Plaintiff Amir Meshal argued that the panel opinion in *Vance*, *see* 653 F.3d 591 (7<sup>th</sup> Cir. 2011), was relevant to the Court’s consideration of the Defendants’ Motion to Dismiss Plaintiff’s Second Amended Complaint. *See* Docket Nos. 33, 37, 52. In that opinion, the Seventh Circuit held that special factors counseling hesitation did not preclude a *Bivens* action based upon the Fifth Amendment right to substantive due process against former Secretary of Defense Donald Rumsfeld by two civilian U.S. citizens allegedly imprisoned, coercively interrogated, and abused in Iraq by agents of the U.S. government. The Seventh Circuit also denied Rumsfeld’s assertion of qualified immunity.

On October 28, 2011, the panel opinion and judgment cited by Plaintiff was vacated and a petition for rehearing *en banc* was granted. *See Vance v. Rumsfeld*, Nos. 10-1687 & 10-2442,

Document No. 70 (7<sup>th</sup> Cir. Oct. 28, 2011). On November 7, 2012, after rehearing *en banc*, the Seventh Circuit reversed the panel opinion and held that special factors barred the *Vance* plaintiffs' *Bivens* claim. *Vance*, 2012 WL 5416500, at \*--. Among the considerations cited by the Seventh Circuit was the fact that the *Bivens* remedy the *Vance* plaintiffs sought – which the court characterized as “a judicial order that would make the Secretary of Defense care less about the Secretary’s view of the best military policy, and more about the Secretary’s regard for his own finances” – “would come at an uncertain cost in national security.” *Id.* at \*--. The *en banc* court also found that the plaintiffs’ U.S. citizenship did not affect the special factors determination “one way or the other.” *Id.* at \*--.

Thus, *Vance* provides no support for Plaintiff’s *Bivens* claims in this case but rather supports the Defendants’ argument that *Bivens* actions should not be created in new contexts, particularly where federal courts would be required to inject themselves into sensitive matters of national security. *See* Docket Nos. 33, 52. *Vance* also refutes Plaintiff’s contention that his status as a U.S. citizen defeats the Defendants’ argument that special factors counseling hesitation bar the *Bivens* remedy he seeks. *See* Plaintiff’s Opposition to Defendants’ Motion to Dismiss the Amended Complaint at 8-12 (Docket No. 35).

A copy of the decision is attached as an exhibit to this motion.

Respectfully submitted,

Dated: December 5, 2012

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