[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 14-5194

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMIR MESHAL,

Plaintiff-Appellant,

v.

CHRIS HIGGENBOTHAM, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

JOYCE R. BRANDA
Acting Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

MATTHEW M. COLLETTE
HENRY C. WHITAKER
(202) 514-3180
Attorneys, Appellate Staff
Civil Division, Room 7256
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

MARY HAMPTON MASON
GLENN S. GREENE
Attorneys, Torts Branch
Civil Division
U.S. Department of Justice
1425 New York Ave., N.W.
Washington, D.C. 20005

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Appellant in this Court, and plaintiff below, is Amir Meshal. Appellees in this Court, defendants below, are Chris Higgenbotham, Steve Hersem, John Doe 1, and John Doe 2. The United States, which intervened in district court, is also an appellee.

B. Ruling Under Review

The ruling under review is Judge Emmet G. Sullivan's June 13, 2014, decision granting defendants' motion to dismiss and is reported at 2014 WL 2648032.

C. Related Cases

Undersigned counsel is aware of no related cases.

/s/ Henry C. Whitaker
Henry C. Whitaker

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STATEMENT OF JURISDICTION

Plaintiff Amir Meshal invoked the jurisdiction of the district court under 28 U.S.C. § 1331. JA 18. On June 13, 2014, the district court entered a final order dismissing this case. JA 10. Plaintiff filed a timely notice of appeal on August 7, 2014. *Id.*

STATEMENT OF THE ISSUES

Plaintiff seeks damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), from four United States officials in their personal capacity for claimed unconstitutional actions allegedly taken in connection with plaintiff's detention during counterterrorism operations in war-torn East Africa. The issues are:

1. Whether special factors counsel caution before creating a common-law damages action under *Bivens* by an individual formerly detained abroad by foreign officials on suspicion of terrorist activity arising from his alleged detention.

2. Whether defendants are entitled to qualified immunity because plaintiff has not plausibly alleged that defendants personally violated

any clearly established constitutional principles that may be applicable in this exceptional context.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. Nature Of The Case

Plaintiff Amir Meshal brought this action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note, against Federal Bureau of Investigation agents Chris Higgenbotham, Steve Hersem, and two unnamed defendants, designated John Doe 1 and John Doe 2,[1] for allegedly unconstitutional actions taken in connection with plaintiff's detention during counterterrorism operations in East Africa. JA 15-17. Plaintiff claimed violations of his Fourth and Fifth Amendment rights. The district court dismissed the suit, concluding that plaintiff's *Bivens* claims should be

[1] The district court ordered the government to effect service on John Doe 1 and John Doe 2, and the government provided their true names both to the Court under seal and to plaintiff under the terms of a protective order. *See* JA 5.

dismissed because his suit implicated a variety of special factors that counseled hesitation before implying a common law *Bivens* action. JA 107-13. The district court also concluded that plaintiff did not state a claim under the Torture Victim Protection Act. JA 94 n.5. Plaintiff appeals only the dismissal of his *Bivens* claims. Pl. Br. 5 n.1.

II. Statement of Facts

The complaint alleges that, at least since 2002, the United States has engaged in counterterrorism operations in the Horn of Africa region, in part based on the government's belief that Somalia, a war-torn country on the East Coast of Africa, was a potential haven for members of al Qaeda fleeing Afghanistan. Compl. ¶¶ 26-27; JA 24.[2] In October 2002, the United States established the Combined Joint Task Force-Horn of Africa, which operates in that region, and consists of uniformed members of each service branch, civilian employees, and representatives from coalition countries. Compl. ¶ 28; JA 24.

Plaintiff Amir Meshal, a U.S. citizen from New Jersey, traveled to Somalia in November 2006, purportedly so he could study Islam in a country governed by Islamic law. Compl. ¶¶ 1, 22-23, 32; JA 15, 23, 26.

[2] References to the complaint are to the Second Amended Complaint, which is the operative pleading. JA 15.

The month after he arrived, heavy fighting broke out between the Supreme Council of Islamic Courts—an Islamist entity that had at the time recently seized control of much of Somalia—and the Ethiopian-backed Transitional Federal Government of Somalia. Compl. ¶¶ 21, 32, 34-36; JA 22, 26.

In early January 2007, plaintiff attempted to flee the fighting into Kenya. Compl. ¶¶ 38-39; JA 27. He claims that he was wandering in the forest for around three weeks near the Kenyan border before Kenyan forces apprehended him, allegedly as part of a joint U.S.-Kenyan military operation designed to capture suspected al Qaeda members who were fleeing Somalia into Kenya. Compl. ¶¶ 2, 35-39, 41-42, 46-49; JA 15, 26-30. The Kenyans took him to a local jail in Kiunga, and then transferred him to another Kenyan jail in Nairobi, where Kenyan authorities questioned him. Compl. ¶¶ 48-52; JA 29-31.

The Federal Bureau of Investigation participates in the U.S. Combined Joint Task Force's counterterrorism efforts in Africa. Compl. ¶ 29; JA 24-25. Plaintiff alleges that defendants Higgenbotham and Hersem were members of an FBI counterterrorism unit sent to Kenya. Compl. ¶¶ 59, 61; JA 33-34.

Between February 3 and 10, 2007, plaintiff was questioned by Hersem, Higgenbotham, and John Doe 1, another FBI agent, on at least four occasions during plaintiff's detention in Nairobi. Compl. ¶ 69; JA 36. This questioning was conducted under guidelines issued by the Attorney General for FBI overseas national security investigations, and pursuant to authorization from the Attorney General and the Director of Central Intelligence. Compl. ¶¶ 30, 56-57; JA 25, 31-32. The questioning explored plaintiff's suspected involvement in terrorist activities, including weapons training in an al Qaeda training camp. Compl. ¶¶ 70, 73, 84; JA 36, 38, 40. A Kenyan official escorted plaintiff to the interview site, a hotel room, on the morning of the first session, and took him back to the Kenyan jail in the evening; for the remainder of the sessions, Kenyan officials took plaintiff from his jail cell to the agents, who drove him from the jail to the hotel and back in the evening. Compl. ¶¶ 69, 76-82, 86, 88; JA 36, 38-42. He was in the Kenyan jail when he was not being interviewed. Compl. ¶ 90; JA 43.

Before each interview, defendants presented plaintiff with a document notifying him that he had the right not to answer questions without a lawyer present, and each time plaintiff signed the document

waiving any right he might have had to counsel. Compl. ¶¶ 71, 83; JA 37, 40. Plaintiff was also while in Kenyan custody several times visited by members of a Kenyan human rights organization, who filed a habeas corpus petition on plaintiff's behalf in the Kenyan courts under Kenyan law. Compl. ¶¶ 92-96, 100; JA 43-45. Plaintiff was as well visited by a U.S. consular officer from the U.S. Embassy in Nairobi, who indicated that he was trying to coordinate plaintiff's return to the United States and contact plaintiff's family. Compl. ¶¶ 103-07; JA 46-48.

Plaintiff claims he was threatened during these sessions by defendants Hersem and Higgenbotham. Plaintiff alleges that Hersem verbally threatened to send him to Israel and Egypt, and implied that those countries might mistreat him in some unspecified way. Compl. ¶¶ 6, 88; JA 41, 42. Plaintiff also alleges that Hersem offered to return plaintiff to the United States if plaintiff admitted involvement in terrorist activities. Compl. ¶ 87; JA 41. He claims that Hersem asked plaintiff about a person plaintiff knew, Daniel Maldonado, who was seized and detained by Kenyan authorities under circumstances similar to plaintiff, and later pleaded guilty in United States courts of involvement in terrorist activities. Compl. ¶¶ 65-67; JA 35-36; *see*

United States v. *Maldonado*, No. 4:07-mj-125-1 (S.D. Tex. 2007). Two instances of physical violence are also alleged: on one occasion during the questioning in Nairobi, Higgenbotham allegedly "grabbed [plaintiff] and forced him to the window of the hotel room." Compl. ¶ 86; JA 41. On another, Hersem assertedly "approached [plaintiff], removed his (Defendant Hersem's) sunglasses, and proceeded to yell at [plaintiff] merely inches from his face while vigorously poking him in the chest." Compl. ¶ 87; JA 41.[3]

In early February 2007, plaintiff alleges, Kenyan officials transported plaintiff from Nairobi to a location plaintiff believed to be Somalia. Compl. ¶¶ 108-11; JA 48-49. The Somalis kept plaintiff handcuffed in a dark cell for two days. Compl. ¶ 112; JA 49. During this time, a U.S. consular officer told plaintiff's father that he did not know where plaintiff was and that he could not help him. Compl. ¶ 113; JA 49. The Somalis transferred plaintiff to Ethiopian forces, who took plaintiff shortly thereafter to Ethiopia. Compl. ¶ 116-19; JA 36. The

[3] Plaintiff alleges that John Doe 1 violated his rights during these interviews by "actively and substantially participating," Compl. ¶ 174; JA 69, but does not allege that John Doe 1 made any specific threats to him or that John Doe 2 was involved in any way in any of the interviews in Kenya.

complaint alleges that "one or more" of the defendants "directed, authorized, conspired to effect, actively and substantially participated in, and/or took affirmative action(s) demonstrating consent and acquiescence to" plaintiff's transfer to Somalia and Ethiopia. Compl. ¶ 123; JA 52.

On his arrival in Ethiopia, plaintiff was held in an Ethiopian prison facility and questioned by Ethiopian officials. Compl. ¶ 132; JA 55. After he had been in the prison for about a week, plaintiff started to be interviewed by defendants John Doe 1 and John Doe 2 (a member of the Joint Terrorism Task Force), on his suspected involvement in terrorist activity, including weapons training, training in counter-interrogation techniques, and serving as an al Qaeda translator. Compl. ¶¶ 137-50; JA 56-60. These interviews were conducted regularly over the course of three months under guidelines issued by the Attorney General for FBI national security investigations overseas, and pursuant to authorization from the Attorney General and the Director of Central Intelligence. Compl. ¶¶ 139, 141; JA 57-58.

Before each interview, plaintiff signed a document waiving any right to refuse to answer questions without counsel just as he had in

Kenya. Compl. ¶ 149; JA 60. Ethiopian guards transported plaintiff to and from the prison and the interview site, a gated villa. Compl. ¶¶ 141-43, 147; JA 57-60. John Doe 1 told plaintiff that whether he could go home depended on whether plaintiff told the truth about his involvement in terrorist activities. Compl. ¶¶ 148-50, JA 60-61. Three times, plaintiff was permitted to appear before an Ethiopian military tribunal, which conducted proceedings to determine whether plaintiff was innocent, an enemy combatant, or an unlawful enemy combatant. Compl. ¶ 155; JA 62. Plaintiff also was visited by a U.S. consular officer on three occasions, each time in the presence of an Ethiopian official. Compl. ¶¶ 157, 159; JA 63.

In late May 2007, an Ethiopian guard informed plaintiff that he would be released. Compl. ¶ 166; JA 65. Plaintiff was flown to the United States and released.

III. Proceedings Below

Plaintiff brought this action under *Bivens* and the Torture Victim Protection Act against FBI agents Chris Higgenbotham, Steve Hersem, and two unnamed defendants, John Doe 1 and John Doe 2, for allegedly

unconstitutional actions taken in connection with plaintiff's detention. JA 15-17.

Plaintiff's complaint claims that two basic categories of conduct infringed his Fourth and Fifth Amendment rights. First, plaintiff alleged that defendants Hersem and Higgenbotham violated his Fifth Amendment rights by threatening him during interviews, and that defendant John Doe 1 did as well by "actively and substantially" participating in those interviews. Compl. ¶¶ 173-74, 177; JA 68-69. Second, plaintiff claimed that all defendants violated his Fourth and Fifth Amendment rights assertedly by detaining him and "rendering"—that is, transferring—him to Kenya, Somalia, and Ethiopia for interrogation without formal charges, access to counsel or the courts, or a prompt judicial hearing. Compl. ¶¶ 175-76, 184-89, 196-99; JA 69-73. Plaintiff also claimed that defendants Higgenbotham and Hersem violated the Torture Victim Protection Act. *Id.*

The district court granted defendants' motion to dismiss the suit. Before discussing the grounds for dismissal, the district court first concluded that plaintiff had made a threshold allegation that defendants violated plaintiff's Fourth and Fifth Amendment rights. JA

89-92. The district court did not, however, decide whether those rights were clearly established in this context. Nor did the district court explicitly address the argument that the complaint did not plausibly allege defendants' personal participation in many of the alleged constitutional violations.

Instead, the district court found it unnecessary to reach the issue of qualified immunity because it concluded that a variety of special factors counseled against implying a common law *Bivens* damages remedy absent action by Congress to create one. The court observed that plaintiff's claims "implicate national security threats in the Horn of Africa region; substance and sources of intelligence; the extent to which each government in the region participates or cooperates with U.S. operations to identify, apprehend, detain, and question suspected terrorists on their soil . . . ." JA 108 (internal quotation marks omitted). Furthermore, plaintiff alleges that foreign officials participated in his detention and transfer between countries, and that this treatment was authorized by U.S. officials designated by the Attorney General and the Director of Central Intelligence. JA 110. This case, the district court concluded, therefore squarely presents sensitivities "involving national

security and intelligence," which are special factors that counsel against creating a *Bivens* action here absent action by Congress to create a damages action. JA 107 (citing, among other cases, *Doe* v. *Rumsfeld*, 683 F.3d 390, 395 (D.C. Cir. 2012)).

Adding to those sensitivities, the district court noted, is that "Congress has legislated with respect to detainee rights both in the United States and abroad" without creating a damages action in this context. JA 112. That " 'evidence of congressional inaction . . . supports [the] conclusion that this is not a proper case for the implication of a *Bivens* remedy.' " *Id.* (quoting *Doe*, 683 F.3d at 397 (ellipsis in original)).[4]

SUMMARY OF ARGUMENT

Plaintiff, an individual formerly detained on suspicion of terrorist activity, asks the Court to create a nonstatutory damages action under *Bivens* arising from his detention and alleged transfer by the governments of Kenya, Somalia, and Ethiopia in the course of a counterterrorism investigation jointly undertaken abroad by U.S.

[4] The district court also rejected plaintiff's Torture Victim Protection Act claim based on this Court's holding that the statute does not apply to U.S. government officials. *See* JA 94 n.5. Plaintiff does not appeal this holding.

officials and foreign governments in the Horn of Africa. Plaintiff alleges that defendants mistreated him in the course of that investigation during interviews conducted in Kenya and Ethiopia.

1. The district court correctly declined to create such an action because special factors counsel hesitation in this sensitive context. This suit, if permitted to proceed, would enmesh the judiciary in the evaluation of national security threats in the Horn of Africa region; the substance and sources of intelligence; the extent to which the governments of Kenya, Somalia, and Ethiopia cooperate with U.S. officials in counterterrorism efforts in those areas; and the extent to which defendants' alleged actions were authorized by officials up and down the U.S. chain of command. Plaintiff's suit thus implicates a variety of national security and foreign policy considerations that preclude the Court from exercising its common lawmaking powers here to create a damages action for extraterritorial conduct absent congressional action doing so.

As the district court correctly recognized, this Court and others have repeatedly declined to create *Bivens* actions where doing so would implicate national security and foreign policy sensitivities. *See, e.g.*,

Doe v. *Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012); *Wilson* v. *Libby*, 535 F.3d 697 (D.C. Cir. 2008); *Vance* v. *Rumsfeld*, 701 F.3d 193, 198-99 (7th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 2796 (2013). Contrary to plaintiff's contentions, there is no basis for limiting those decisions, or the special factors that counsel hesitation in *Bivens* cases more generally, to cases that threaten interference with the military command structure or conduct in a combat zone. Nor, as this Court recognized in *Doe*, are those sensitivities erased by plaintiff's U.S. citizenship. 683 F.3d at 395. The Supreme Court has repeatedly recognized that matters of national security and foreign affairs are rarely proper subjects for judicial intervention, and that is especially true where, as here, the question is whether to create a nonstatutory damages action for conduct that occurred abroad.

There is equally no basis for supposing that Congress has implicitly sanctioned a *Bivens* remedy in this context. On the contrary, there is a strong presumption that Congress does not intend remedies to govern extraterritorial conduct. As the district court noted, Congress has repeatedly legislated on the subject of detainee treatment abroad.

But it has never created a damages action applicable in this context. The judiciary should therefore not reach out to create one on its own.

2. There is no need for the Court to reach the issue of qualified immunity if it agrees with the district court that no *Bivens* action should be created in this sensitive context. But should the Court conclude otherwise, the district court's judgment may also be affirmed on the alternative ground that defendants are entitled to qualified immunity.

Plaintiff asserts two basic categories of claims: claims that defendants unlawfully detained and "rendered"—that is transferred—plaintiff to other countries; and claims that some of the defendants (Hersem, Higgenbotham, and John Doe 1) mistreated plaintiff during interrogations.

a. There is no plausible allegation that any of the defendants were personally responsible for detaining and transferring plaintiff to other countries for mistreatment. The complaint alleges instead that plaintiff was apprehended and detained by Kenyan, Somali, and Ethiopian authorities; held in Kenyan, Somali, and Ethiopian facilities; and controlled by Kenyan, Somali, and Ethiopian officials. There is no

plausible allegation that defendants were personally responsible for controlling or directing the circumstances of plaintiff's detention. While the complaint does allege that some of the defendants questioned plaintiff while he was in Kenyan and Ethiopian custody, the most plausible explanation for that is that the Kenyans and Ethiopians simply granted those defendant officials access to him for law enforcement and intelligence purposes, while Kenya and Ethiopia retained ultimate control over plaintiff's detention.

With regard to the mistreatment claims, moreover, there is no plausible allegation that John Doe 1 or John Doe 2 personally participated in threatening plaintiff during interviews.

b. Defendants are entitled to qualified immunity because the alleged conduct violated no clearly established constitutional rights.

The Supreme Court has made clear that there is no categorical rule that constitutional protections apply to the same manner and extent to U.S. citizens everywhere in the world under all circumstances. The constitutional protections that plaintiff invokes—the Fourth and Fifth Amendments—establish standards of conduct that are highly context sensitive. Plaintiff appears to ask the Court to extrapolate

clearly established law largely from principles established in domestic criminal cases, and apply them to a circumstance in which an individual is detained in foreign countries in the course of a counterterrorism investigation. But clearly established law is not defined at that high level of generality. Because plaintiff has cited no case defining with any specificity the relevant standards that might be applicable to counterterrorism investigations of U.S. citizens undertaken halfway around the world jointly with foreign governments, plaintiff has not established a violation of clearly established constitutional law.

STANDARD OF REVIEW

This appeal presents questions of law that the Court reviews de novo.

ARGUMENT

I. The District Court Correctly Concluded That Special Factors Preclude The Creation Of A *Bivens* Action Arising From A National Security Investigation Abroad.

Plaintiff asserts a common-law damages action under *Bivens* for the defendants' alleged conduct undertaken in the course of a national security investigation of terrorist activity abroad undertaken jointly with foreign governments. The district court correctly concluded that

this case presents special factors counseling hesitation before creating a new *Bivens* action in this sensitive context absent action by Congress.

A. The National Security And Foreign Policy Sensitivities Involved In This Case Present Special Factors Counseling Hesitation.

1. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court, for the first time, recognized a common-law damages action against federal officials who had violated the plaintiff's Fourth Amendment rights by conducting a warrantless search of the plaintiff's home in the United States in connection with a narcotics investigation. In recognizing that common-law action, however, the Court noted that there were "no special factors counseling hesitation in the absence of affirmative action by Congress." *Id.* at 396-97.

The Supreme Court has explained that "[b]ecause implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability to any new context or new category of defendants." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009) (internal quotation marks omitted)—that is, a new "potentially recurring scenario that has similar legal and factual components." *Arar* v. *Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009)

(en banc). In the decades since *Bivens* was handed down, "only twice has [the Supreme Court] extended *Bivens* remedies into new classes of cases—once in the context of a congressional employee's employment discrimination due process claim, *Davis* v. *Passman*, 442 U.S. 228 (1979), and once in the context of a prisoner's claim against prison officials for an Eighth Amendment violation, *Carlson* v. *Green*, 446 U.S. 14 (1980)." *Doe* v. *Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012). And because the power to create a new constitutional-tort cause of action is "not expressly authorized by statute," *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 66-70 (2001), "[t]he implication of a *Bivens* action . . . is not something to be undertaken lightly," *Doe*, 683 F.3d at 394. Where for a category of cases " 'special factors counsel[] hesitation in the absence of affirmative action by Congress' or if Congress affirmatively has declared that injured persons must seek another remedy, courts should not imply a cause of action where none exists." *Id.* at 393 (alteration in original) (quoting *Bivens*, 403 U.S. at 396).

The "special factors" counseling hesitation in recognizing a common-law damages action "relate not to the merits of the particular remedy, but 'to the question of who should decide whether such a

remedy should be provided.' " *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (Scalia, J.) (quoting *Bush* v. *Lucas*, 462 U.S. 367, 380 (1983)). Where an 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.' " *Id.* (quoting *Bush*, 462 U.S. at 380). In any such legislation, Congress could "tailor any remedy" and take steps to reduce the possible harmful effects of such civil damages claims. *Wilkie* v. *Robbins*, 551 U.S. 537, 562 (2007).

Even outside the context of *Bivens*, the courts are "reluctant to intrude upon the authority of the Executive in military and national security affairs," "unless Congress specifically has provided otherwise." *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988). "In the context of national security and intelligence, the [Supreme] Court has cautioned that '[m]atters intimately related to . . . national security are rarely proper subjects for judicial intervention.' " *Doe*, 683 F.3d at 395 (quoting *Haig* v. *Agee*, 453 U.S. 280, 292 (1981)). But the case for judicial hesitation is even stronger where, as here, the judiciary is asked to create an implied damages remedy directly under the

Constitution. *See United States* v. *Stanley*, 483 U.S. 669, 682 (1987); *see also Chappell* v. *Wallace*, 462 U.S. 296, 301-04 (1983); *Arar*, 585 F.3d at 573 (special factors include "national security concerns" and "foreign policy considerations").

2. Contrary to plaintiff's notion that this case is a garden-variety challenge to domestic law enforcement activity, Pl. Br. 38-39, plaintiff asks the Court to create a new, unprecedented kind of *Bivens* action in a context that Congress has not sanctioned: a damages action for alleged conduct that occurred in the course of a national security investigation abroad allegedly undertaken jointly with foreign government officials, and while plaintiff was detained by foreign governments. Neither this Court nor the Supreme Court has ever before "implied a *Bivens* remedy in a case involving the military, national security, or intelligence." *Doe*, 683 F.3d at 394. The Supreme Court has also never "created or even favorably mentioned a non-statutory right of action for damages on account of conduct that occurred outside the borders of the United States." *Vance* v. *Rumsfeld*, 701 F.3d 193, 198-99 (7th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 2796 (2013). On the contrary, as the district court correctly recognized, this Court—and every other court of

appeals that has addressed the question—has repeatedly held that it is for Congress, not the courts, to provide any damages remedy in this sensitive context.

The district court rightly held that this Court's decision in *Doe* v. *Rumsfeld* is controlling here. JA 103-04. In *Doe*, this Court held that special factors precluded a *Bivens* action by a U.S. citizen who claimed that he was mistreated by U.S. officials during his detention by the U.S. military in Iraq. 683 F.3d at 393-97. The Court explained that a nonstatutory damages action would "require a court to delve into the military's policies regarding the designation of detainees as 'security internees' or 'enemy combatants,' as well as policies governing interrogation techniques"; "raise[d] questions regarding" a former Secretary of Defense's "control over the treatment and release of specific detainees"; and would "hinder our troops from acting decisively in our nation's interest for fear of judicial review of every detention and interrogation." *Id.* at 395-96. As the district court observed, JA 101-02, 105-06, the Fourth and Seventh Circuits have likewise held that courts must look to Congress and cannot on their own provide a damages action when U.S. citizens allegedly mistreated during detention assert

damages actions that implicate national security concerns. *See Vance*, 701 F.3d at 197-203; *Lebron* v. *Rumsfeld*, 670 F.3d 540, 547-56 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012).

This Court's decision in *Doe* followed the solid wall of authority in this circuit and others declining to recognize *Bivens* actions in cases implicating national security and foreign policy. In *Wilson* v. *Libby*, 535 F.3d 697 (D.C. Cir. 2008), this Court declined "to imply a *Bivens* remedy to allow a Central Intelligence Agency operative and her husband to recover damages for injuries they allegedly suffered when her covert status was made public." *Doe*, 683 F.3d at 395 (citing *Wilson*, 535 F.3d at 701, 704). This Court held that the " 'require[d] judicial intrusion' into national security and intelligence matters was itself a special factor counseling hesitation because such intrusion would subject sensitive operations and operatives to judicial and public scrutiny." *Id.* (citing *Wilson*, 535 F.3d at 710).

Similarly, in *Ali* v. *Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011), and *Rasul* v. *Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009), this Court held that special factors—including "[t]he danger of obstructing U.S. national security policy"—barred recognition of a *Bivens* action brought

by foreign nationals alleging that they were unlawfully detained and mistreated by U.S. officials at Guantanamo Bay, Cuba (*Rasul*) and in Afghanistan and Iraq (*Ali*). *Rasul*, 563 F.3d at 528, 532 n.5; *Ali*, 649 F.3d at 764-66, 773-74.

In *Arar* v. *Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc), the Second Circuit concluded that a dual citizen of Canada and Syria could not bring a *Bivens* claim based on allegations that the United States transferred him to Syria in order to subject him to interrogation under torture. *Id.* at 566. The court reasoned that such an action " 'would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation, and that fact counsels hesitation.' " *Doe*, 683 F.3d at 395 (quoting *Arar*, 585 F.3d at 574).

3. This case, as the district court correctly concluded, implicates the same national security and foreign policy sensitivities that the courts have repeatedly held counsel hesitation before implying a constitutional damages action absent specific statutory authorization. Plaintiff alleges that defendants were part of "a joint counterterrorism operation with nations in the Horn of Africa region." JA 108. Plaintiff alleges that, based on authorization granted by the Attorney General,

the Director of Central Intelligence, and other unnamed officials located in Washington, D.C., defendants unconstitutionally detained plaintiff, mistreated plaintiff during interviews, and were somehow responsible for plaintiff's various transfers among Kenya, Somalia, and Ethiopia—all in order to obtain information in a counterterrorism investigation, Compl. ¶¶ 56-57, 71-88, 108-119, 123-24, 137-50; JA 31-32, 37-42, 48-50, 52, 56-61. "A central theme of [plaintiff's] claims is that Defendants in this case acted with the cooperation of the foreign governments, which held him in their prisons, transferred him between nations, and permitted Defendants access to him." JA 108.

As the district court observed, adjudication of those allegations would require inquiry into: "national security threats in the Horn of Africa region; substance and sources of intelligence; the extent to which each government in the region participates in or cooperates with U.S. operations to identify, apprehend, detain, and question suspected terrorists on their soil; [and] the actions taken by each government as part of any participation or cooperation with U.S. operations." JA 108 (alteration in original) (internal quotation marks omitted). Plaintiff's claims implicate the government's policies with regard to conducting

counterterrorism investigations abroad, and whether those policies were correctly applied in this case, Compl. ¶¶ 30, 56, 139; JA 25, 32, 57; the consistency of plaintiff's detention and treatment with Kenyan, Somali, and Ethiopian law and policy, Compl. ¶ 30, 100; JA 25, 45; and the substance of diplomatic and confidential communications between the United States and foreign governments. Even if plaintiff himself avers that he does not wish to pursue some or all of those avenues of inquiry—a promise that he likely could not keep given the allegations of the complaint—these areas would certainly have to be explored in defending the case.

Litigation of this claim would require discovery from both foreign counterterrorism officials, and U.S. intelligence officials up and down the chain of command, as well as evidence concerning the conditions at alleged detention locations in Ethiopia, Somalia, and Kenya. Plaintiff also "claims that his treatment and the similar treatment of others was authorized by and/or conducted with full awareness of other U.S. officials 'including officials designated by the Attorney General and the Director of Central Intelligence.' " JA 110 (quoting Compl. ¶ 139; JA 57). " '[I]t takes little enough imagination to understand that a

judicially devised damages action would expose past executive deliberations affecting sensitive matters of national security' as well as sensitive matters of diplomatic relations, 'to the prospect of searching judicial scrutiny.' " JA 111 (quoting *Lebron*, 670 F.3d at 551). Absent action by Congress to create a damages remedy, in which Congress could craft safeguards designed to minimize the potential impact of such litigation on national security and foreign relations, the judiciary should not reach out to create one in this sensitive context.

B. Plaintiff Unpersuasively Minimizes The Significance Of The Sensitive National Security And Foreign Policy Implications Of This Case.

1. Plaintiff does not deny that litigation of his case implicates national security and foreign policy sensitivities. Instead, plaintiff dismisses those sensitivities as largely irrelevant. Plaintiff submits that national security and foreign policy interests are limited to cases that intrude on "the disciplinary structure of the military establishment"; claims against "military officials"; or conduct in a "war zone." Pl. Br. 29; *see also* Pl. Br. 33-38.

As the district court correctly recognized, "[t]he cases cannot be read that narrowly." JA 107. This Court, the Fourth Circuit, and the

Seventh Circuit have all recognized that "the same special factors compelling hesitation in military cases also compel hesitation in cases involving national security and intelligence." *Id.*; *see Doe*, 683 F.3d at 394-95; *Lebron*, 670 F.3d at 548-49; *Vance*, 701 F.3d at 199-200; *see also Rasul*, 563 F.3d at 532 n.5; *Arar*, 585 F.3d at 565-66. For example, in *Wilson*, a case that did not involve military officials or a combat zone, this Court held that the risk of "judicial intrusion into matters of national security and sensitive intelligence information" precluded a *Bivens* remedy to address allegations that the identity of a covert CIA operative was unconstitutionally disclosed. 535 F.3d at 710. And this Court's decision in *Doe*, contrary to plaintiff's suggestion, did not remotely hinge on the fact that the plaintiff happened to be a defense contractor. Pl. Br. 34. The Court instead reasoned that "[m]ilitary detainee cases" implicate sensitive "national security and intelligence" concerns. 683 F.3d at 395; *see also Ali*, 649 U.S. at 773-74 (national security and foreign policy implications preclude claim by nonservicemember plaintiff arising from his detention at Guantanamo Bay).

More fundamentally, plaintiff's underlying premise—that national security and foreign policy concerns in *Bivens* cases matter only when they specifically concern the military disciplinary structure or a combat zone—is untenable. It is true that the Supreme Court disallowed *Bivens* actions by military servicemembers in *Stanley*, 483 U.S. at 683-84, and *Chappell*, 462 U.S. at 304, where those actions would interfere with the military command structure. But the Court has never held—and it would be illogical to conclude—that a *Bivens* action that implicates sensitivities about national security and foreign policy may proceed simply because the case does not involve the military or an active field of combat (though at the time of the events at issue here, parts of East Africa were indeed "war torn," Pl. Br. 20 n.4).

Stanley and related cases in which the Supreme Court has counseled caution rest on the more general ground that the court should not interfere with military affairs, an area in which the political branches possess the constitutional authority and expertise. *See* 483 U.S. at 683; *id.* at 681-82 (noting that caution was warranted because "here we are confronted with an explicit constitutional authorization for *Congress* '[t]o make Rules for the Government and Regulation of the

land and naval Forces'" (alteration in original) (quoting U.S. Const. Art. I, § 8, cl. 14); *see Chappell*, 462 U.S. at 304. That is equally true in this case because under the Constitution "decision-making in the fields of foreign policy and national security is textually committed to the political branches of government." *Schneider* v. *Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005); *see Egan*, 484 U.S. at 530; *Doe*, 683 F.3d at 395 (citing *Haig,* 453 U.S. at 292). As the Seventh Circuit explained:

> The Justices concluded in *Chappell* and *Stanley* that Congress and the Commander-in-Chief (the President), rather than civilian judges, ought to make the essential tradeoffs, not only because the constitutional authority to do so rests with the political branches of government but also because that's where the expertise lies.

Vance, 701 F.3d at 200. The creation of a damages action in the sensitive field of foreign affairs and national security is likewise best left to Congress.

2. Plaintiff misses the point in relying on criminal and habeas corpus cases involving national security in support of the proposition that the judiciary has the institutional competence to adjudicate this

nonstatutory damages action. Pl. Br. 29-30, 48-53.[5] In some exceptional instances, courts are required, by constitutional necessity or by a clear grant of statutory authority, to adjudicate matters pertaining to war and national security, neither of which is true when the question is whether to imply a nonstatutory *Bivens* action. *See, e.g.*, *Al Janko* v. *Gates*, 741 F.3d 136, 146-47 (D.C. Cir. 2014); *Al-Zahrani* v. *Rodriguez*, 669 F.3d 315, 319-20 (D.C. Cir. 2012). Notably, even in habeas corpus cases, the Supreme Court has rejected the idea that the court should exercise habeas jurisdiction over claims that would require the judiciary to adjudicate claims that the U.S. government unlawfully transferred a

[5] Plaintiff relies a number of times on the vacated decision in *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *vacated* 471 U.S. 1113 (1985), which involved a challenge to alleged expropriation of property by the United States in Honduras, as "rejecting the government's claim that the court lacked competence to adjudicate the constitutional claims because the conduct occurred on foreign territory." Pl. Br. 51-52. The cited passage, however, simply rejected the argument that the suit in question was barred by the act-of-state doctrine, *Ramirez de Arellano*, 745 F.2d at 1542-43, which is not at issue here. On remand, this Court rejected the plaintiff's claim that the suit would not intrude into foreign and military affairs because, given intervening circumstances, "equitable relief would not halt an asserted, ongoing violation but would merely forestall a potential violation." *De Arellano* v. *Weinberger*, 788 F.2d 762, 764 (D.C. Cir. 1986) (en banc) (per curiam). Plaintiff identifies no "ongoing violation" in this case.

U.S. citizen to a foreign country based on the allegation that the foreign government would mistreat him—the kind of case that raises "sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally" that "the political branches are well situated to consider." *Munaf* v. *Geren*, 553 U.S. 674, 702 (2008); *see Omar* v. *McHugh*, 646 F.3d 13, 21 (D.C. Cir. 2011) (same). Criminal cases, unlike *Bivens* cases, moreover, are brought at the election of the Executive Branch, which has discretion to decline to bring a prosecution whose adjudication threatens interference with Executive Branch and congressional prerogatives. Civil cases against individual federal officers thus present a far greater risk of interfering with national security and foreign policy. *See United States* v. *Reynolds*, 345 U.S. 1, 12 (1953).

If Congress wishes to provide a civil money damages remedy for claims relating to detention or treatment that occurred in the course of counterterrorism operations undertaken abroad in alleged cooperation with foreign governments, Congress could craft such legislation while taking steps to reduce the possible harmful effects of such civil damages claims on national security and foreign policy. In such contexts,

"Congress is in a far better position than a court to evaluate the impact of a new species of litigation" and may "tailor any remedy to the problem perceived. . . ." *Wilkie*, 551 U.S. at 562 (internal quotation marks omitted).

"[W]hen Congress deems it necessary for the courts to become involved in sensitive matters, . . . it enacts careful statutory guidelines to ensure that litigation does not come at the expense of national security concerns." *Lebron*, 670 F.3d at 555. Congress, for example, "created the special Foreign Intelligence Surveillance Court to consider wiretap requests in the highly sensitive area of" foreign intelligence investigations. *Id.* For criminal cases, Congress enacted the Classified Information Procedures Act to regulate the use and disclosure of sensitive information in such cases. *See generally United States* v. *Yunis*, 867 F.2d 617 (D.C. Cir. 1989). Hesitation here is appropriate precisely because no such congressionally created statutory safeguards exist in a case of this kind.

Plaintiff contends that any concerns with the use and disclosure of sensitive information in *Bivens* cases implicating national security and foreign policy concerns are fully addressed by other doctrines, such as

executive-immunity principles and the state secrets doctrine. Pl. Br. 54-57. The "short answer" to the former "argument" is that "*Bivens* itself explicitly distinguished the question of immunity from the question whether the Constitution directly provides the basis for a damages action against individual officers." *Stanley*, 483 U.S. at 684.

And this Court has rejected the latter argument, noting that the risks posed by the disclosure of certain sensitive information may counsel caution before implying a *Bivens* action. *See Wilson*, 535 F.3d at 710 (relying on the risk that the suit would "require an inquiry into classified information that may undermine covert operations" (internal quotation marks omitted)). "When the state-secrets privilege did not block the claim," as the Seventh Circuit explained, "a court would find it challenging to prevent the disclosure of secret information," thus exposing the government to the threat of "graymail (the threat of disclosing secrets) to extract an undeserving settlement." *Vance*, 701 F.3d at 202-03 (citing *Arar*, 585 F.3d at 578-81). A court thus "need not await the formal invocation of doctrines such as qualified immunity or state secrets to say that the prospect of adverse collateral consequences confirms [the] view that Congress rather than the courts should decide

whether a constitutional claim should be recognized in these circumstances." *Lebron*, 670 F.3d at 555 (citing *Wilson*, 535 F.3d at 710).

3. Plaintiff argues that his U.S. citizenship outweighs the national security and foreign policy sensitivities implicated by this case. Pl. Br. 39-42. This Court in *Doe* rejected much the same argument in holding that a U.S. citizen could not prosecute a *Bivens* action arising from his asserted mistreatment by the U.S. military abroad, noting that Doe's citizenship did "not alleviate the other special factors counseling hesitation . . . discussed above." *Doe*, 683 F.3d at 396. This Court did say that "Doe's United States citizenship . . . remove[s] concerns [this Court] had in [prior] cases about the effects that allowing a *Bivens* action would have on foreign affairs." *Id.* at 396 (citing *Ali*, 649 F.3d at 773-74). But contrary to plaintiff's suggestion, Pl. Br. 41-42, that was not because U.S. citizenship, in and of itself, weighed in favor of providing a *Bivens* remedy, but instead because it lessened the particularized risk that, in cases involving foreign citizens, "enemy litigiousness" would harm U.S. foreign policy. *Ali*, 649 F.3d 773-74.

The special factors that counsel hesitation in this case sweep far beyond that narrow concern.

In a special-factors case, "[t]he source of hesitation is the nature of the suit and the consequences flowing from it, not just the identity of the plaintiff." *Lebron*, 670 F.3d at 554; *see Vance*, 701 F.3d at 203 (plaintiff's U.S. citizenship is not "dispositive one way or the other"). The Supreme Court has repeatedly held that special factors preclude *Bivens* actions when U.S. citizens bring suits implicating sensitivities without once suggesting that the plaintiff's citizenship weighed in favor of providing a nonstatutory damages remedy. *See, e.g.*, *Stanley*, 483 U.S. at 683; *Chappell*, 462 U.S. at 304. The Supreme Court has also held that the courts should not exercise habeas jurisdiction over claims by U.S. citizens where doing so would interfere with foreign policy and extraterritorial operations. *See Munaf*, 553 U.S. at 694-95, 700, 702; *see also Omar*, 646 F.3d at 21. U.S. citizenship is therefore not a trump card that overrides otherwise-present sensitivities that counsel caution in a case.

As in *Doe*, *Lebron*, and *Vance*, plaintiff's U.S. citizenship does not mitigate the sensitivities this case raises. Citizenship does not change

that plaintiff's case would require inquiry into: "national security threats in the Horn of Africa region; substance and sources of intelligence; the extent to which each government in the region participates in or cooperates with U.S. operations to identify, apprehend, detain, and question suspected terrorists on their soil; [and] the actions taken by each government as part of any participation in or cooperation with U.S. operations." JA 108 (internal quotation marks omitted). Plaintiff's U.S. citizenship is relevant in determining the extent of his clearly established constitutional rights. *See United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 266-67 (1990). But whether a federal court should extend *Bivens* to a new, sensitive context "is analytically distinct from the question of official immunity from *Bivens* liability." *Stanley*, 483 U.S. at 684.

4. Plaintiff appears to suggest that the fact that he lacks any alternative damages remedy is relevant to whether special factors counsel hesitation in the sensitive field of national security and foreign relations. Pl. Br. 25, 32, 42. A number of law professors, appearing as amici, advance this argument more aggressively, contending that a *Bivens* action should be available unless an alternative damages

remedy exists (except perhaps in a case involving a "servicemember plaintiff"). Pfander et al. Amicus Br. 14-15. Those arguments are directly contrary to the Supreme Court's teaching, which this Court has repeatedly followed, that "even in the absence of an alternative" a court should not recognize a *Bivens* claim if "any special factors counsel[] hesitation . . . ." *Wilkie*, 551 U.S. at 550; *see also id.* (a *Bivens* remedy "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest"); *Stanley*, 483 U.S. at 683; *Davis* v. *Billington*, 681 F.3d 377, 386 (D.C. Cir. 2012); *Wilson*, 535 F.3d at 709; *Spagnola* v. *Mathis*, 859 F.2d 223, 227 (D.C. Cir. 1988) (en banc).[6] And here, as we will discuss in more detail in the following

[6] Certainly nothing in *Minneci* v. *Pollard*, 132 S. Ct. 617 (2012), suggests otherwise. *Contra* Pl. Br. 25, 32; Pfander et al. Amicus Br. 20-21. *Minneci* held only that a *Bivens* remedy was precluded under *Wilkie*'s first step when there were adequate state-law tort remedies against private-prison employees. *Minneci*, 132 S. Ct. at 625. The Court reiterated that "even in the absence of an alternative" remedy, courts must "pay[] particular heed" to "any special factors counseling hesitation before authorizing a new kind of federal litigation." *Id.* at 621 (quotation marks omitted). *Minneci* thus contains no hint that a *Bivens* remedy is appropriate whenever alternative tort-like remedies do not exist.

section, there is every reason to suppose that Congress's failure to create a damages remedy in this sensitive context was not inadvertent.

C. Congressional Legislation In This Field Further Supports That This Court Should Not Create A Damages Action For Conduct Arising From Detention Abroad During A National Security Investigation.

Adding to the special factors that counsel hesitation against implying a *Bivens* action in this context is that Congress has not created an extraterritorial damages action for former detainees who claim misconduct in the course of a counterterrorism investigation abroad.

1. As the district court recognized, JA 112-13, even where Congress has created no alternative remedy for a *Bivens* plaintiff, the Court should, as part of the special-factors inquiry, examine the legislation Congress has enacted in the field to see if " 'congressional inaction has not been inadvertent.' " *Doe*, 683 F.3d at 396 (quoting *Schweiker* v. *Chilicky*, 487 U.S. 412, 421-22 (1988)); *Spagnola*, 859 F.2d at 227-28. For it is precisely "in situations in which 'Congress has intentionally withheld a remedy . . . [this Court] must most refrain from providing one because it is in those situations that appropriate judicial deference is especially due to the considered judgment of Congress that

certain remedies are not warranted.' " *Doe*, 683 F.3d at 396 (quoting *Wilson*, 535 F.3d at 709) (ellipsis in original).

There is a strong presumption that judge-made causes of action do not apply extraterritorially, even where that common-law-making power is exercised under a statute. *See Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664-65 (2013). The case for presuming that Congress did not intend an extraterritorial remedy is even stronger where, as here, there is no such statute. "The Court has never created or even favorably mentioned a non-statutory right of action for damages on account of conduct that occurred outside the borders of the United States." *Vance*, 701 F.3d at 198-99.

Far from rebutting that presumption, federal statutes confirm that Congress did not intend to create a damages action for extraterritorial conduct in this context. "Congress has legislated with respect to detainee rights both in the United States and abroad," JA 112, yet has never created a damages action applicable to a case of this kind. In *Doe*, this Court pointed to the Detainee Treatment Act, which governs interrogation practices by U.S. officials, as evidence that Congress deliberately declined to create a damages action "for detainees

to sue federal military and government officials in federal court for their treatment while in detention." *Doe*, 683 F.3d at 397. The Detainee Treatment Act provides that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment." 42 U.S.C. § 2000dd(a). But it does not create a civil damages action.

Congress has also spoken to the remedies for abusive treatment in the Torture Victim Protection Act, 28 U.S.C. § 1350 note, and the federal torture statute, 18 U.S.C. §§ 2340-2340A. Of particular relevance to this case, Congress in the Torture Victim Protection Act created a damages action under which U.S. residents could sue foreign states for abusive treatment under color of foreign law, yet did not include American government officials acting under color of U.S. law as possible defendants. 28 U.S.C. § 1350 note; *see Doe*, 683 F.3d at 396 (citing *Saleh* v. *Titan Corp.*, 580 F.3d 1, 16 (D.C. Cir. 2009)). Plaintiff brought a damages claim under the Torture Victim Protection Act against Hersem and Higgenbotham for their alleged conduct during their questioning of plaintiff, but the district court dismissed it, JA 94

n.5, and plaintiff does not challenge that dismissal on appeal. In criminalizing torture, moreover, Congress provided explicitly that it did not also intend to create a civil action for abusive treatment abroad that violates the statute. *See* 18 U.S.C. § 2340B.

Where Congress has chosen to provide a remedy for injuries occurring abroad, it has created an administrative claims process, not a judicial damages remedy. *See* Military Claims Act, 10 U.S.C. § 2733(a)(3) (providing for military authorities to pay damages claims for deaths caused by military employees); Foreign Claims Act, 10 U.S.C. § 2734(a)(3) (providing for military authorities to pay damages claims for deaths and injuries to foreign nationals that occur outside the United States); *see also Vance*, 701 F.3d at 201. Recognizing the problems that can arise from the creation of an extraterritorial tort scheme, Congress in the Federal Tort Claims Act expressly precluded a tort remedy against the United States for the conduct of its officials acting within the scope of employment for injuries occurring outside the United States. *See Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004).[7]

[7] In *Carlson* v. *Green*, 446 U.S. 14, (1980), the Supreme Court held that a remedy under the Federal Tort Claims Act was not an adequate

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Despite all that legislation in this field, Congress never created an damages action against U.S. government officials to govern detention or interrogation that occurs in connection with extraterritorial national security investigations undertaken with foreign governments. "It would be inappropriate for this Court to presume to supplant Congress's judgment in a field so decidedly entrusted to its purview." *Doe*, 683 F.3d at 697.

2. Plaintiff and amici err in suggesting that two amendments to the Federal Tort Claims Act—one in 1974, and the other in 1988—demonstrate that Congress decided that *Bivens* actions should be presumptively available absent express indication to the contrary. Pl. Br. 42-48; Pfander et al. Amicus Br. 10-15.

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alternative remedy demonstrating that Congress intended to preclude resort to *Bivens* where a plaintiff could also recover under that Act. *See id.* at 19-20. In reaching that holding, however, the Supreme Court noted that "no special factors" counseled hesitation before creating a *Bivens* action. *Id.* at 19. And since *Carlson*, the Supreme Court has clarified that, if a context presents special factors and sensitivities that counsel hesitation before creating a court-inferred damages action, a *Bivens* action is not available, even if the plaintiff has no adequate alternative remedy. *See, e.g.*, *Wilkie*, 551 U.S. at 550; *Schweiker*, 487 U.S. at 422. Here, those factors include the fact that Congress foreclosed liability under the Federal Tort Claims Act for injuries that occur abroad.

Added to the Federal Tort Claims Act in 1988, the Westfall Act generally immunizes U.S. officials from personal tort liability, providing that a suit against the United States under the Federal Tort Claims Act is the exclusive means of recovering damages for a claim that a U.S. official acted tortiously within the scope of his employment. 28 U.S.C. § 2679(b)(1). The only mention of constitutional tort actions in the Federal Tort Claims Act is in one of the two exceptions to that rule, which provides that Westfall Act immunity does not apply to claims "brought for a violation of the Constitution." *Id.* § 2679(b)(2)(A). As the Supreme Court has held, however, all that exception means is that Westfall Act immunity does not apply to *Bivens* claims: Section "2679(b)(2)(A) by its terms applies only to the specific immunity set forth in" the Westfall Act. *Hui* v. *Casteneda*, 559 U.S. 799, 809 (2010). That refutes the argument that the Westfall Act somehow "ratif[ies]," Pfander Amicus Br. 13, the existence of *Bivens* claims generally (let alone where, as here, a nonstatutory damages action would implicate sensitive national security and foreign policy issues).[8] Plaintiff's and

[8] The law professors suggest that Congress's failure to "expand[]" *Bivens* in the Westfall Act "raises serious constitutional questions."

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amici's argument is also flatly inconsistent with the Supreme Court's repeated recognition—including after the Westfall Act—that the existence of a *Bivens* action is the exception, not the rule—even absent any alternative remedy. *See, e.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009); *Wilkie*, 551 U.S. at 550.[9]

This case is accordingly a textbook example in which the court should decline to fashion a common-law *Bivens* remedy, which would impermissibly supplant Congress's deliberate decision not to provide one in the in the field of overseas detention and interrogation by U.S. officials.

II. Defendants Are Entitled To Qualified Immunity.

There is no need for the Court to address the issue of qualified immunity given that, as we explain above, there is no basis for

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Pfander et al. Amicus Br. 15. This Court has held otherwise. *See, e.g., Al Janko,* 741 F.3d at 146-47*; Al-Zahrani,* 669 F.3d at 319-20.

[9] In district court, plaintiff relied on a provision of the Military Commissions Act of 2006 establishing that alien detainees cannot bring nonhabeas actions relating to, among other things, their detention and conditions of confinement. *See* 28 U.S.C. § 2241(e)(2); *see also Al Janko*, 741 F.3d at 139-40. This provision, which bars *all* nonhabeas actions concerning detention and conditions of confinement, in no way reflects an assumption that *Bivens* actions in which special factors counsel hesitation would otherwise available to aliens, much less to U.S. citizens. Nor does it evince Congress's intent to authorize such actions affirmatively. *See Vance*, 701 F.3d at 202 (rejecting similar argument).

recognition of a court-created damages action for counterterrorism operations abroad undertaken with foreign governments. The district court did not reach the issue of qualified immunity, though it did conclude that plaintiff had alleged a violation of his constitutional rights. JA 89-92. If, however, the Court reaches the issue, the district court's judgment should be affirmed on the alternative ground that defendants are entitled to qualified immunity.

The doctrine of qualified immunity protects public officials personally sued for damages "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Whether a right is clearly established is a "fact-specific" inquiry, *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987), that requires "existing precedent" to have put the question "beyond debate." *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2083 (2011).

Plaintiff has not plausibly pleaded that defendants personally violated any constitutional rights that were clearly established in this context.

A. Plaintiff Does Not Plausibly Allege That Defendants Personally Participated In Detaining And Transferring Him, Or That Doe 1 Or Doe 2 Threatened Him With Transfer.

To hold a government official personally liable in damages under *Bivens*, the plaintiff must demonstrate not only a violation of clearly established law, but also that the official personally violated that law. *See Iqbal*, 556 U.S. at 676. This showing requires plaintiff's complaint to offer more than " 'naked assertion[s]' devoid of 'further factual enhancement.' " *Id.* (quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007)). Instead, plaintiff must allege sufficient facts that "permit the court to infer more than the mere possibility of misconduct" on the part of defendants. *Id.* at 679.

1. Plaintiff has not done so with regard to his claim that the four defendants sued in this case were personally responsible for unconstitutionally detaining him and transferring him to other countries for interrogation—what plaintiff labels as a claim of "rendition." Pl. Br. 20 n.4. Instead, the most plausible inference to draw from the allegations of the complaint is that the governments of Kenya, Somalia, and Ethiopia were responsible for detaining and transferring plaintiff.

The allegations of plaintiff's complaint do not support the plausible inference that defendants personally were responsible for controlling the circumstances of his detention and transfer in Kenya, Somalia, and Ethiopia. Plaintiff was allegedly apprehended by Kenyan, not U.S. forces, who detained him in Nairobi in a Kenyan jail for the duration of his stay there. Compl. ¶¶ 35-39, 46-49, 50-52; JA 26-27, 29-20, 30-31. While Higgenbotham, Hersem, and John Doe 1 did question plaintiff on at least four occasions during that time, it was a Kenyan official who brought him to and from the hotel where the questioning occurred and plaintiff's Kenyan jail cell, where he remained when he was not being interviewed. Compl. ¶¶ 58, 64, 76-82, 90; JA 32-33, 35, 38-40, 43. Defendants Higgenbotham, Hersem, and John Doe 1 were members of an FBI counterterrorism unit sent to Kenya. Compl. ¶ 59; JA 33. But Kenya retained ultimate control and custody over terrorism suspects in similar circumstances when U.S. officials were permitted to question them. *See* Partial Tr. Prelim./Detention Hr'g, *United States* v. *Maldonado*, No. 4:07-mj-125-1, at 35 (S.D. Tex. 2007) (dkt. 17), 36, 46, 58[10] (repeatedly noting that Daniel Maldonado was in Kenyan, not U.S.,

[10] The court may consider this transcript in deciding whether the

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custody when being questioned in circumstances similar to those alleged by plaintiff). A human rights organization apparently even filed a habeas corpus petition on his behalf under Kenyan law. Compl. ¶ 100; JA 45. And it was Kenyan officials who eventually removed plaintiff from Kenya and transferred him to Somalia. Compl. ¶¶ 108-11; JA 48-49.

There is no allegation that any defendants questioned plaintiff in Somalia. And it was Somali government officials who transferred plaintiff to Ethiopia. Compl. ¶¶ 116-19; JA 36.

On his arrival in Ethiopia, plaintiff was escorted by Ethiopian officials to an Ethiopian detention facility, where he was held and questioned by Ethiopian officials. Compl. ¶¶ 130-35; JA 54-55. The complaint notes statements by a U.S. consular officer that plaintiff "was being transferred *to the custody of the Ethiopians*." Compl. ¶ 170C; JA 68 (emphasis added); *see also* Compl. ¶ 170D; JA 68 (stating that "U.S.

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district court correctly dismissed the complaint because plaintiff's complaint compares his situation to Maldonado's detention, and extensively relies on and quotes from this transcript. *See* Compl. ¶¶ 59, 61, 67, 70; JA 33-37; *see also* Fed. R. Civ. P. 10(c); *Tefera* v. *OneWestBank, FSB*, 19 F. Supp. 3d 215, 221-22 (D.D.C. 2014); *W. Wood Preservers Inst.* v. *McHugh*, 292 F.R.D. 145, 149 (D.D.C. 2013). Portions of the transcript are included as an attachment to this brief.

officials "used *foreign proxies* to detain [plaintiff] when said *foreign governments* would not normally have detained" plaintiff (emphasis and alteration added)). Though plaintiff in Ethiopia was questioned by Doe 1 and Doe 2, an Ethiopian official guarded and accompanied plaintiff to and from the interview sites and the Ethiopian detention facility. Compl. ¶¶ 141-43, 147; JA 57-58, 60. Three times, plaintiff appeared before an Ethiopian military tribunal, which conducted proceedings to determine whether plaintiff was innocent, an enemy combatant, or an unlawful enemy combatant, and did not release him. Compl. ¶ 155; JA 62.

2. Given these allegations, the assertion that plaintiff was in the personal control of defendants is implausible. In support of that idea, the complaint offers only boilerplate, wholly conclusory allegations that "one or more" of the defendants "directed, authorized, conspired to effect, actively and substantially participated, and/or took affirmative action demonstrating consent and acquiescence to" the alleged detention and transfer of plaintiff. Compl. ¶ 123; JA 52; *see* Compl. ¶¶ 3, 14-16, 124, 164; JA 16, 19-20, 52, 64. But the complaint

alleges no specific facts to support these bare conclusions, which is fatal to plaintiff's claims. *See Iqbal*, 556 U.S. at 681-82.

Plaintiff suggests that defendants "bore responsibility for his detention" because they allegedly made statements during those interrogations suggesting that defendants had the power to send him home or to other countries. Pl. Br. 21. When conjoined with the facts noted above, however, the most plausible explanation for those alleged statements—which themselves are not entirely clear statements that defendants would be personally responsible for sending plaintiff to those countries—is that defendants were exaggerating the degree of their control over plaintiff in the course of questioning him in order to obtain information relevant to their counterterrorism investigation. They do not show that plaintiff was in fact in defendants' custody or control.

Plaintiff also notes the allegation that defendants questioned him more extensively than Kenyan or Ethiopian officials when plaintiff was detained by the Kenyan and Ethiopian governments. Pl. Br. 21. But the more plausible explanation for that allegation is that the Kenyan and Ethiopian governments simply permitted defendants to access

plaintiff for law enforcement and intelligence-gathering purposes. They do not show that he was under defendants' personal control.

Finally, plaintiff cites a variety of statements suggesting generically that "the FBI," Compl. ¶ 96; JA 44, the "United States," Compl. ¶ 52; JA 31; *see* Compl. ¶¶ 121, 129, JA 51, 54; or unnamed "U.S. officials," Compl. ¶ 170D; JA 68, were responsible for various aspects of plaintiff's situation. Even if those statements—which are largely consistent with the notion that Kenya, Somalia, and Ethiopia retained ultimate say over plaintiff's circumstances—could be read to allege that the United States controlled plaintiff's detention and transfer, they do not suggest that defendants were the United States officials who were responsible.

In sum, the conclusion that plaintiff's detention and transfer was within the personal power of the defendants is not a plausible inference from the allegations of the complaint. Any claim that defendants personally participated in unconstitutionally detaining and transferring plaintiff should thus be dismissed.

3. With regard to the claim that plaintiff was threatened with transfer to other countries during interviews, there is also no plausible

allegation that John Doe 1 or John Doe 2 personally participated in that alleged conduct. John Doe 1 was allegedly present during the interviews that took place in Kenya, but plaintiff does not allege that he threatened him with anything specifically. *See* Compl. ¶ 174, JA 69 (alleging generically that Doe 1 "actively and substantially participated" in the Kenya interviews). And while John Doe 1 and John Doe 2 were present during his interviews in Ethiopia, there is no allegation that plaintiff was ever threatened with transfer during those interviews. *See* Compl. ¶¶ 148-56; JA 60-62.

B. Plaintiff Does Not Allege The Deprivation Of Any Clearly Established Constitutional Rights.

The complaint also does not state a claim that defendants violated any clearly established constitutional rights.

"Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 (2012). "To be clearly established, a right must be sufficiently clear 'that every "reasonable official would [have understood] that what he is doing violates that right." ' " *Id.* (quoting *al-Kidd*, 131 S. Ct. at 2078).

Whether the complaint states such a claim depends on two questions: first, whether such a constitutional right exists; and second, whether, at the time of the alleged misconduct, that right was clearly established. *See, e.g.*, *Bame* v. *Dillard*, 637 F.3d 380, 384 (D.C. Cir. 2011). Although this Court has discretion to consider those questions in either order, "[c]ourts should think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.' " *Al-Kidd*, 131 S. Ct. at 2080 (quoting *Pearson* v. *Callahan*, 555 U.S. 223, 236-37 (2009)).

Should the Court need to reach the issue of qualified immunity at all, "principle[s] of constitutional avoidance" counsel strongly in favor of ruling that plaintiff's asserted constitutional rights were not clearly established at the second step of the qualified-immunity analysis, without reaching whether such a right exists at the first step. *Bame*, 637 F.3d at 384; *see Ali*, 649 F.3d at 772-73.

1. Plaintiff contends that defendants violated his Fourth and Fifth Amendment constitutional rights in allegedly (1) threatening him during interviews, and (2) detaining him and transferring him to other

countries. Pl. Br. 17-20 & n.3. We have already shown in the previous section that the complaint does not plausibly allege that defendants were personally responsible for the latter alleged violations, and that Doe 1 and Doe 2 were not personally responsible for the former. But even if that is not correct, defendants are entitled to qualified immunity on all claims, because the metes and bounds of the asserted constitutional rights were not clearly established in this exceptional context.

As it made clear in *Boumediene* v. *Bush*, 553 U.S. 723, 760-61 (2008), the Supreme Court has never adopted a categorical rule that the Constitution applies, to the same manner and extent, to U.S. citizens wherever they are in the world. As Justice Harlan explained in his separate opinion in *Reid* v. *Covert*, 354 U.S. 1 (1957) (plurality op.):

> there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.

Id. at 74 (Harlan, J., concurring in the result). On the contrary, in deciding the extent of those protections, one must account for "the particular local setting, the practical necessities, and the possible

alternatives . . . ." *Id.* at 75; *see also Verdugo-Urquidez*, 494 U.S. at 277-78 (Kennedy, J., concurring). Although plaintiff stresses the rigid and abstract rule adopted by the plurality opinion in *Reid*—that the Constitution always and everywhere applies to the same extent globally to U.S. citizens, Pl. Br. 17—Justice Harlan's separate opinion in *Reid*, as the narrowest rationale supporting the result reached by the majority, is controlling, *see Marks* v. *United States*, 430 U.S. 188, 193 (1977), and was in any event later relied on by the Supreme Court in *Boumediene* as correctly stating the law. *See* 553 U.S. at 759-63.

For clearly established law to exist, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Taylor* v. *Reilly*, 685 F.3d 1110, 1114 (D.C. Cir. 2012) (quoting *Anderson*, 483 U.S. at 640). The Supreme Court has noted that, even for U.S. citizens detained within the United States, due process protections may not be coextensive with those of ordinary criminal detainees. *See Hamdi* v. *Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality op.). That holding makes it "murky whether an enemy combatant detainee may be subjected to conditions of confinement and methods of interrogation that would be

unconstitutional if applied in the ordinary prison and criminal settings," even for a U.S. citizen detained in the United States. *Padilla* v. *Yoo*, 678 F.3d 748, 761 (9th Cir. 2012).

Given that context-sensitive backdrop to the application of constitutional rights to U.S. citizens, the contours of none of the asserted constitutional rights were clearly established in the context of detention abroad by foreign sovereigns in the course of a counterterrorism investigation.

2. Plaintiff claims that defendants violated his Fourth Amendment rights in failing to afford him a prompt judicial hearing after he was detained. Pl. Br. 17-18; Compl. ¶¶ 195-203; JA 72-73. In support of that assertion, plaintiff cites domestic criminal cases that he reads to require that criminal suspects receive a probable-cause hearing within 48 hours. Pl. Br. 18.

While the Supreme Court does "not require a case directly on point" to defeat qualified immunity, it does require that "existing precedent must have placed the statutory or constitutional question beyond debate." *Al-Kidd*, 131 S. Ct. at 2083. Here, the fact that the alleged detention occurred abroad in the context of a counterterrorism

investigation in East Africa while plaintiff was detained by foreign sovereigns makes clear that, contrary to plaintiff's contention, domestic criminal cases do not make it beyond debate whether the same or similar requirements apply in this context. And plaintiff cites no case suggesting that the same principle necessarily applies here.

The Fourth Amendment requires reasonable conduct, a context-sensitive standard. *See, e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979). And as Justice Kennedy made clear in his concurrence in *Verdugo-Urquidez*, courts must tailor the requirements of the Fourth Amendment to "wholly dissimilar traditions and institutions" that may exist abroad. 494 U.S. at 278 (Kennedy, J., concurring) (internal quotation marks omitted). "The absence of local judges or magistrates available to issue warrants" and "the need to cooperate with foreign officials" would, for example, pose obvious difficulties in providing prompt probable-cause hearings in this context. *Id.*

Judge Robertson reached a similar conclusion in *Kar* v. *Rumsfeld*, 580 F. Supp. 2d 80 (D.D.C. 2008), in which the question was whether the plaintiff, a U.S. citizen detained by the U.S. military in Iraq, had a clearly established Fourth Amendment right to a probable-cause

hearing within 48 hours. The court rejected that argument, noting that the context of detention by the U.S. government abroad in in a "war zone" made the case materially different from a run-of-the-mine domestic criminal case. *Id.* at 85. Because the plaintiff had cited no case establishing a right to a hearing in that extraordinary context, the court found no violation of clearly established Fourth Amendment rights. *Id.* Plaintiff's failure to marshal any remotely comparable precedent is likewise decisive in the distinctive context of this case.

3. Plaintiff contends that defendants violated his Fifth Amendment substantive due process rights during their interviews of him based on the right to be free from "torture." Pl. Br. 18-19. Torture and cruel, inhuman, or degrading treatment, are indeed unlawful, *see, e.g.*, 42 U.S.C. § 2000dd, but this case does not concern the propriety of such treatment. The question here is whether plaintiff has established a violation of clearly established constitutional law for the alleged conduct in these specific circumstances. He has not.

Qualified immunity questions must be answered "in light of the specific context of the case, not as a broad general proposition." *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam). The

Supreme Court has thus "repeatedly" admonished courts "not to define clearly established law at a high level of generality." *Al-Kidd*, 131 S. Ct. at 2084. That is nowhere more true than in the "treacherous field" of substantive due process, *Hutchins* v. *District of Columbia*, 188 F.3d 531, 538 (D.C. Cir. 1999) (en banc) (internal quotation marks omitted), a concept that the courts have "always been reluctant to expand . . . because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins* v. *City of Harker Heights*, 503 U.S. 115, 125 (1992).

Plaintiff cites no case establishing that the threats alleged here, in this particular context, makes it beyond debate that the conduct "shocks the conscience." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846 (1998). That standard of liability, even when applied in a purely domestic context, is demanding, and "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Id.* at 849.

Plaintiff characterizes his complaint as alleging that defendants Hersem and Higgenbotham "threatened him with torture, disappearance, and death while interrogating him." Pl. Br. 18 (citing

JA 91-92 (in turn citing Compl ¶¶ 86-88; JA 41-42)). What plaintiff is referring to are allegations that Higgenbotham "threatened to send [plaintiff] to Israel, where he said the Israelis would 'make him disappear'"; that Hersem told plaintiff that if he refused to answer more questions "he would be sent back to Somalia"; that Hersem told plaintiff that he "had spoken with the Egyptians" who "were very interested in speaking with" plaintiff and "had ways of making him talk"; and that Hersem asked him whether plaintiff had ever seen the movie Midnight Express, which is about a man convicted of a crime in a foreign country who suffers mistreatment while in prison. Compl. ¶¶ 86-88; JA 41-42 (internal quotation marks omitted; second alteration in original). Those vague and contingent alleged threats of unspecified consequences by unspecified actors at some unspecified time in the future, while not to be condoned, do not establish a violation of clearly established constitutional law in this context.

The constitutional principles that apply to counterterrorism operations undertaken abroad, including to detention and interrogation, are not necessarily the same as those that apply in the purely domestic criminal context. Just as " 'the full protections that accompany

challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting,' " *Padilla*, 678 F.3d at 761 (quoting *Hamdi*, 542 U.S. at 535); *see id.* at 761 & n.7, so too do they apply differently in this context. The Ninth Circuit in *Padilla* thus declined to find allegations that the plaintiff was subjected to extreme interrogation techniques while detained in the United States rose to the level of a violation of clearly established constitutional law. *Id.* at 761-62, 767-68. As in *Padilla*, the domestic criminal cases that plaintiff relies on likewise do not establish a violation of clearly established constitutional law with the required specificity in this context.

In this case, moreover, the alleged threats were made during interviews in the course of a counterterrorism operation undertaken in the unstable region of the Horn of Africa. Plaintiff was notified before each interview that he had the right not to answer questions; and plaintiff was allowed to speak in the evenings with a Kenyan human rights group, which filed a habeas corpus petition under Kenyan law on plaintiff's behalf. Compl. ¶¶ 69, 71, 83, 92-95, 100; JA 36-37, 40, 43-45. Plaintiff was also visited twice by a U.S. consular officer, who told plaintiff that he had spoken to plaintiff's family and was trying to

coordinate his return to the United States. Compl. ¶¶ 103-04; JA 46-47. Plaintiff cites no case establishing that defendants' alleged conduct, in this broader context, is so extreme that it is akin to the "rack and the screw." Pl. Br. 19.[11]

4. Plaintiff also alleges that defendants violated the Fifth Amendment in various respects in detaining him and "rendering"—that is transferring him—to other countries where he might be mistreated. Pl. Br. 20 n.4. To the extent plaintiff's due process challenge to his detention is distinct from his Fourth Amendment claim that he was not afforded a prompt judicial hearing, plaintiff likewise cites no case establishing that he was due more process in these particular circumstances. The "degree to which citizens detained as enemy combatants must be afforded the constitutional protections granted other detainees remains unsettled, because 'the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting.' "

---

[11] Plaintiff also alleges that Higgenbotham "grabb[ed] him" and that Hersem "pok[ed]" him in the chest "vigorously," Compl. ¶¶ 86-87; JA 41-42, but "[n]ot every push or shove" violates the Constitution. *Graham* v. *Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks and citation omitted).

Padilla, 678 F.3d at 762 (quoting *Hamdi*, 542 U.S. at 535). Here, too, the constitutional principles that apply to counterterrorism investigations abroad are not necessarily the same as those that apply in a domestic law enforcement context.

We are aware of no court, moreover, that has ever held that transferring an individual to another country in these circumstances is a due process violation. But in *Omar* v. *McHugh*, 646 F.3d 13 (D.C. Cir. 2011), this Court did hold that a U.S. citizen who sought to enjoin his transfer to the government of Iraq on the ground that he was likely to be tortured in that country did not have a due process right to that relief. *See id.* at 21. It is even less plausible that plaintiff would have a clearly established constitutional right not to be transferred from one foreign sovereign to another that could be the basis of a retrospective damages action against U.S. officials in their personal capacities (even assuming, contrary to our argument above, that plaintiff had plausibly alleged defendants' personal participation in this alleged conduct).

In rejecting the availability of a *Bivens* action for a claim of unconstitutional removal, the Second Circuit in *Arar* observed 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." 585 F.3d at 580. The Second Circuit made that observation in the course of holding that special factors precluded a *Bivens* action. But the thought also highlights the need for more clear guidance from the case law before a court should hold that such conduct violates clearly established constitutional law.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

JOYCE R. BRANDA
Acting Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

MATTHEW M. COLLETTE

/s/ Henry C. Whitaker
HENRY C. WHITAKER
(202) 514-3180
Attorneys, Appellate Staff
Civil Division, Room 7256
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

MARY HAMPTON MASON
GLENN S. GREENE
Attorneys, Torts Branch,
Civil Division
U.S. Department of Justice
1425 New York Ave., N.W.
Washington, D.C. 20005

FEBRUARY 2015

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,819 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Henry C. Whitaker
HENRY C. WHITAKER

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I will cause 8 paper copies of this brief to be filed with the Court within two business days.

/s/ Henry C. Whitaker
HENRY C. WHITAKER

Addendum

TABLE OF CONTENTS

Military Claims Act

28 U.S.C. § 2733. Property loss; personal injury or death: incident to noncombat activities of Department of Army, Navy, or Air Force

(a) Under such regulations as the Secretary concerned may prescribe, he, or, subject to appeal to him, the Judge Advocate General of an armed force under his jurisdiction, or the Chief Counsel of the Coast Guard, as appropriate, if designated by him, may settle, and pay in an amount not more than $100,000, a claim against the United States for--

(1) damage to or loss of real property, including damage or loss incident to use and occupancy;

(2) damage to or loss of personal property, including property bailed to the United States and including registered or insured mail damaged, lost, or destroyed by a criminal act while in the possession of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be; or

(3) personal injury or death

either caused by a civilian officer or employee of that department, or the Coast Guard, or a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, acting within the scope of his employment, or otherwise incident to noncombat activities of that department, or the Coast Guard.

* * *

Foreign Claims Act

28 U.S.C. § 2734. Property loss; personal injury or death: incident to noncombat activities of the armed forces; foreign countries

(a) To promote and to maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned, or an officer or employee designated by the Secretary, may appoint, under such regulations as the Secretary may prescribe, one or more claims commissions, each composed of one or more officers or employees or combination of officers or employees of the armed forces, to settle and pay in an amount not more than $100,000, a claim against the United States for--

(1) damage to, or loss of, real property of any foreign country or of any political subdivision or inhabitant of a foreign country, including damage or loss incident to use and occupancy;

(2) damage to, or loss of, personal property of any foreign country or of any political subdivision or inhabitant of a foreign country, including property bailed to the United States; or

(3) personal injury to, or death of, any inhabitant of a foreign country;

if the damage, loss, personal injury, or death occurs outside the United States, or the Commonwealths or possessions, and is caused by, or is otherwise incident to noncombat activities of, the armed forces under his jurisdiction, or is caused by a member thereof or by a civilian employee of the military department concerned or the Coast Guard, as the case may be.

* * *

18 U.S.C. § 2340. Definitions

As used in this chapter--

(1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental

pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from--

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and

(3) "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

18 U.S.C. § 2340A. Torture

(a) Offense.--Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction.--There is jurisdiction over the activity prohibited in subsection (a) if--

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy.--A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

18 U.S.C. § 2340B. Exclusive remedies

Nothing in this chapter shall be construed as precluding the application of State or local laws on the same subject, nor shall anything in this chapter be construed as creating any substantive or procedural right enforceable by law by any party in any civil proceeding.

Torture Victim Protection Act

28 U.S.C. § 1350 note

Section 1. Short Title.

This Act may be cited as the "Torture Victim Protection Act of 1991".

Section 2. Establishment of Civil Action.

(a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

* * *

Section 3. Definitions.

* * *

(b) Torture.—For the purposes of this Act—

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

28 U.S.C. § 2241. Power to grant writ

*** * ***

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other

action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Westfall Act

28 U.S.C. § 2679. Exclusiveness of remedy

*** * ***

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government--

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

* * *

42 U.S.C. § 2000dd. Prohibition on cruel, inhuman, or degrading treatment or punishment of persons under custody or control of the United States Government

(a) In general

No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(b) Construction

Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against

cruel, inhuman, or degrading treatment or punishment under this section.

(c) Limitation on supersedure

The provisions of this section shall not be superseded, except by a provision of law enacted after December 30, 2005, which specifically repeals, modifies, or supersedes the provisions of this section.

(d) Cruel, inhuman, or degrading treatment or punishment defined

In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

ORIGINAL

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA	§	CASE NO. CR-H-07-125M
	§	
VERSUS	§	HOUSTON, TEXAS
	§	FEBRUARY 21, 2007
DANIEL JOSEPH MALDONADO	§	10:25 A.M. TO 11:47 A.M.

PRELIMINARY / DETENTION HEARING
(PARTIAL TRANSCRIPT - FROM 10:25:03 A.M. AND TESTIMONY OF LORETTA EGLEN-ANDERSON ONLY)

BEFORE THE HONORABLE CALVIN BOTLEY
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR PLAINTIFF:	SEE NEXT PAGE
FOR DEFENDANT:	SEE NEXT PAGE
COURT RECORDER:	BRENT LASWELL
COURT CLERK:	PAUL YEBERNETSKY

PREPARED BY:

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A In terms -- As far as I'm aware, the fly team were already present in Nairobi the beginning of January for other issues.
Q Okay.
A So, the personnel were already present.
Q Tell Judge Botley what a jump team is, and how they function in a country like this, regarding the types of terror investigations that the FBI conducts?
A The jump team is responsible for conducting investigations, assisting the local law enforcement agencies. They provide whatever assistance is necessary. They may do fingerprinting. They may conduct interviews. They assist the local authorities.
Q Okay. These are special teams that the FBI formed after the 9/11 attacks. Is that correct?
A Correct.
Q These are specially trained people that could travel around the world to conduct these types of investigations?
A Yes, they do.
Q Is it fair to say that this particular team coordinated all its efforts with the Houston Division of the FBI to ensure that everything was taking place properly?
A Yes, it was with their assistance we were able to travel to Nairobi.
Q If you will note then that on January 22nd, a jump team

was in Kenya?

(Witness writing on chalkboard)

Q Now, the defendant was in the custody of Kenyan officials; is that correct?

A Correct.

Q Did there come a time then when the Kenyans turned the Defendant Maldonado over to the custody of the FBI?

A That was on February -- if I'm not mistaken, the 3rd. And at that point, we were already at the airport.

Q I want to discuss this issue just a little bit so the Court is aware about the circumstances under which the defendant was housed and the circumstances under which the FBI conducted interviews while they're in Kenya.

The defense counsel asked yesterday, whose custody the defendant was in. And he said, Kenyan officials. Do you know where in Kenya he was being held?

A Yes. He was being held at one of the Kenyan police camps.

Q Did you or any other FBI officials go to those camps to see what they looked like and the conditions that were there?

A Myself, along with members of the fly team and Officer Gutierrez, we went on one occasion. And we were able to meet with Mr. Maldonado's children. And I was able to go just to the front reception desk, which is where we dropped

Q Okay. At one point the Kenyan officials gave custody of Mr. Maldonado to the FBI?
A No, sir. We did not have custody.
Q At one point the FBI did get custody? That's what I'm getting to.
A At the very end, February 3rd, yes.
Q Okay. Well, isn't it a fact that the FBI got custody of Mr. Maldonado before February 3rd?
A We had access to him. But during all of our interviews, the Kenyan police officer was present because he was still in their custody.
Q Okay. But I guess my point is: he didn't fly directly from Nairobi, Kenya to Houston, did he?
A No, sir.
Q He actually flew to another country before he flew to the United States?
A That's correct.
Q Now, in this second country, Mr. Maldonado was put up in officers' quarters and given all the food and drink that he asked for?
A That's correct.
Q In fact, that every step that the FBI took when it had Mr. Maldonado in its custody, he was treated as well as any United States citizen might be treated by U.S. authorities in another country?

THE COURT: All right, but I'm just saying time is of the essence.

MR. NEWTON: I understand. I'll cut to the chase.

THE COURT: Let's move to the chase, cut to the chase.

BY MR. NEWTON:

Q Briefly though, I do want to get into the notion of custody. You're telling me that in your opinion as an FBI agent, the FBI did not have custody of Mr. Maldonado when he was in the safe house?

A We did not have custody. There was only just -- I'm sorry, a Kenyan police officer present.

Q One officer?

A Yes, sir.

Q You don't consider yourself to have had joint custody?

A No, sir.

Q Who paid for the safe house?

A I think -- I think it was the FBI office, the ALET?

Q And how many FBI agents and police officers from the United States were in that safe house when he was interviewed?

A There were two.

Q There were two American officials in a safe house paid for by Americans, one Kenyan police officer. And your testimony under oath today is that he was not in FBI custody