[ORAL ARGUMENT NOT YET SCHEDULED]

14-5194

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
No. 1:09-cv-02178-EGS

BRIEF FOR PLAINTIFF–APPELLANT

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December 15, 2014

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties: The appellant (plaintiff below) is Amir Meshal. The appellees (defendants below) are Chris Higgenbotham, Steve Hersem, John and Jane Does 3–10, John Doe 1, and John Doe 2. The United States is an intervenor–appellee. No briefs of amici curiae were filed in the district court. Appellant anticipates that amici briefs will be filed in this Court on behalf of Former FBI Officials; Professors Steven Vladeck, Jim Pfander, and Carlos Vasquez; and former U.N. Special Rapporteurs on Torture Manfed Nowak, Theo van Boven, and Sir Nigel Rodley.

Ruling Under Review: The ruling under review is the district court's opinion and order of June 13, 2014 (per Emmet G. Sullivan, J.), granting defendants' motion to dismiss. The opinion is not yet officially reported.

Related Cases: This case has not previously been before this or any other court. Counsel for appellant are not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ Jonathan Hafetz
Jonathan Hafetz
Counsel for Plaintiff-Appellant
December 15, 2014

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FTCA	Federal Tort Claims Act
SAC	Second Amended Complaint
TVPA	Torture Victim Protection Act

INTRODUCTION

This case raises a fundamental question under our Constitution: whether an American citizen who was unlawfully detained and tortured by FBI agents during a law enforcement investigation can seek any remedy in the courts of his own country.

The implications of this case are far reaching. Under the sweeping exception to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), pressed by the government and upheld by the lower court, American citizens would have no remedy for the most egregious violations of their constitutional rights by U.S. officials. The opinion below is not limited to any recognized exception to *Bivens*, and errs in providing absolute immunity from suit whenever U.S. law enforcement agents are pursuing a matter involving "national security" or "intelligence gathering" while abroad.

The lower court's ruling extends well beyond any decision of this or any other circuit. If upheld, it would deny a remedy not only to Mr. Meshal, but potentially to any American citizen who lives, works, or travels abroad and whose constitutional rights are violated by U.S. law enforcement agents. Had defendants imprisoned Amir Meshal for four years or for forty years, or had they strangled him in his cell, the result would be the same. Under the district court's opinion, no U.S. citizen would have the opportunity to bring

suit if the case in some way involves national security unless and until Congress enacts a statute providing a remedy. Erecting such an absolute immunity rule misconstrues the circuit precedent on which the district court relied, contradicts Congress's repeated preservation of *Bivens* to remedy law enforcement misconduct, and flouts the Supreme Court's ruling in *Bivens* itself, whose purpose is to provide U.S. citizens with a remedy for violations of core constitutional rights by law enforcement officials in the *absence* of affirmative legislation by Congress.

Here, it is *Bivens* or nothing, and no special factors counsel hesitation. The core allegations of gross FBI misconduct during a law enforcement investigation place this case within the heartland of *Bivens*. The question here is not whether Mr. Meshal should or will ultimately prevail in obtaining relief, but rather whether he or any American citizen can pursue a remedy if that citizen is disappeared, tortured, and detained for months on end by U.S. officials. The district court wrongly concluded that no such remedy exists.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 (federal question) and directly under the U.S. Constitution. This Court has appellate jurisdiction under 28 U.S.C. § 1291 over the final decision of the district court granting Defendants' motions to dismiss.

STATEMENT OF THE ISSUE

The issue on appeal is whether the district court erred in holding that Plaintiff-Appellant Amir Meshal, a U.S. citizen, has no remedy under *Bivens* against the individual FBI agents who violated his rights under the Fourth and Fifth Amendments to the U.S. Constitution through their direct participation in his unlawful detention and torture during a law enforcement investigation outside the United States.

STATEMENT OF THE CASE

Plaintiff-Appellant Amir Meshal brought suit under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note, against four FBI agents for their direct, personal role in his unlawful detention, torture, and rendition from Kenya to Somalia and Ethiopia over a period of more than four months.

On June 13, 2014, the district court granted the government's motion to dismiss the complaint. *Meshal v. Higgenbotham*, __, F. Supp. 2d __, No. 09–2178 (EGS), 2014 WL 2648032 (D.D.C. June 13, 2014), Joint Appendix (JA) 78. The district court found that Mr. Meshal had plausibly alleged violations of his Fourth and Fifth Amendment rights, slip op. at 15, JA 92, and described his treatment at the hands of U.S. officials as "appalling" and

"embarrassing," *id.* at 37, JA 114. Specifically, it found that Mr. Meshal's "detention without a hearing for four months" properly stated a Fourth Amendment violation, *id.* at 13, JA 90, and that the threats of "torture, disappearance, and death" properly stated a Fifth Amendment substantive due process violation, *id.* at 15, JA 92. The court further found that *Bivens* provided the sole available judicial remedy. *Id.* at 17, JA 94. It stated that "[t]o deny [Mr. Meshal] a judicial remedy under *Bivens* raises serious concerns about the separation of powers, the role of the judiciary, and whether *our* courts have the power to protect *our* own citizens from constitutional violations by *our* government when those violations occur abroad." *Id.* at 2, JA 79 (emphases in original).

The district court nevertheless determined that it was constrained by precedent. It said prior decisions had "expressly rejected a *Bivens* remedy for [U.S.] citizens who allege they have been mistreated, and even tortured, by the United States of America in the name of intelligence gathering, national security, or military affairs," *id.*, and that *Bivens* "is powerless to protect him," *id.* at 36, JA 113. Thus, the lower court concluded, only Congress or the President could provide Mr. Meshal with a remedy for the violation of his constitutional rights by federal officials. *Id.* at 37, JA 114.

Mr. Meshal timely appealed.[1]

STATEMENT OF FACTS

Initial Arrest

Amir Meshal, a United States citizen, was born and raised in New Jersey. In November 2006, he traveled to Mogadishu, Somalia, to experience living under a country governed by Islamic law to deepen his understanding of Islam. Second Amended Comp. (SAC) ¶ 1, JA 15. At that time, peace and security had come to Mogadishu after years of instability. *Id.* ¶ 21, JA 22. When fighting unexpectedly erupted between rival governments a few weeks after his arrival, Mr. Meshal fled from Somalia to Kenya along with thousands of other civilians. *Id.* ¶¶ 34-38, JA 26-27.

FBI Interrogation in Kenya

In Kenya, Mr. Meshal was apprehended by Kenyan criminal investigation authorities and transported to Nairobi. *Id.* ¶ 46, JA 29. Kenyan authorities told Mr. Meshal that they needed to find out what the United States wanted to do with him before they could send him back to the United States. *Id.* ¶¶ 50-52, JA 30-31. At the time, U.S. law enforcement agents were present in Kenya conducting criminal counter-terrorism investigations. *Id.* ¶ 29, JA 24. Soon after his arrest by Kenyan authorities,

[1] Mr. Meshal appeals only the district court's dismissal of his *Bivens* claims; he does not appeal the dismissal of his TVPA claims.

defendant FBI agents began to interrogate Mr. Meshal. *Id.* ¶ 58, JA 32-33. For the next four months, defendants detained Mr. Meshal in secret, denied him access to a lawyer, a court, and family members, threatened him with torture and death, and rendered him between three countries without legal process, all in an effort to force him to confess to a crime so that the U.S. government could prosecute him in a U.S. court.

Mr. Meshal's interrogation by defendant FBI agents began on or about February 3, 2007, approximately one week after his apprehension in Kenya. That day, Mr. Meshal was escorted outside the police station in Nairobi for an encounter with three FBI officials: defendant FBI Supervising Special Agent Steve Hersem (who identified himself as "Steve"); defendant FBI Supervising Special Agent Chris Higgenbotham (who identified himself as "Chris"); and defendant Doe 1 (who identified himself as "Tim"). *Id.* ¶¶ 59-63, JA 33-34.[2] Over the next week, defendants Hersem, Higgenbotham, and Doe 1 interrogated Mr. Meshal at least four times. Each session lasted a full day and took place in a suite and building controlled by the FBI. *Id.* ¶¶ 69-70, JA 36-37. After each session, the agents returned Mr. Meshal to the Kenyan police station. *Id.* ¶¶ 82, 90, JA 40-43; slip op. at 5, JA 82.

[2] The true names of defendants Doe 1 and Doe 2 have been provided to plaintiff pursuant to a protective order and filed under seal.

On the first day of interrogation, Doe 1 presented Mr. Meshal with a standard FBI "waiver of rights" form, notifying him that he could refuse to answer any questions without a lawyer present. SAC ¶ 71, JA 37; slip op. at 5, JA 82. But when Mr. Meshal asked for an attorney, Doe 1 said Mr. Meshal was not permitted to make any phone calls. SAC ¶ 71, JA 37; slip op. at 5, JA 82. When Mr. Meshal asked whether he had a choice not to sign the document because he had no way of contacting an attorney, Higgenbotham responded: "If you want to go home, this will help you get there. If you don't cooperate with us, you'll be in the hands of the Kenyans and they don't want you." SAC ¶ 71, JA 37; slip op. at 5, JA 82. Higgenbotham then told Mr. Meshal, falsely, that he was being held in "a lawless country" and "did not have any right to legal representation." SAC ¶ 71, JA 37; slip op. at 5, JA 82. Mr. Meshal was presented with the same standard FBI waiver-of-rights form for signature before each subsequent interrogation in Kenya. SAC ¶ 71, JA 37; slip op. at 5-6, JA 82-83. Mr. Meshal signed the documents because he was made to believe that he had no choice and that signing the documents would expedite his safe return to the United States. SAC ¶ 71, JA 37; slip op. at 5-6, JA 82-83.

During their interrogations of Mr. Meshal, Doe 1, Hersem, and Higgenbotham threatened Mr. Meshal that he would be tortured and made to

disappear if he did not admit being connected to, and receiving training from, al Qaeda. SAC ¶¶ 84, 86-88, JA 40-42. Higgenbotham told Mr. Meshal that the agents "had ways of getting the information they want" and threatened to render him to Israel, where Israelis "would make him disappear." *Id.* ¶ 86, JA 41. Hersem told Mr. Meshal that the Egyptian authorities were very interested in speaking with him and "had ways of making [him] talk." *Id.* ¶ 88, JA 42. Hersem also told Mr. Meshal he could make the same thing happen to Mr. Meshal that happened to the protagonist of "Midnight Express"—a film about a man tortured in prison—if he did not admit to having a connection with al Qaeda. *Id.* Hersem added, "You made it so that even your grandkids are going to be affected by what you did." *Id.* Hersem threatened to send Mr. Meshal back to Somalia if he refused to answer questions. *Id.* At one point, Higgenbotham grabbed Mr. Meshal and forced him to the window of a room. *Id.* ¶ 86, JA 41. Higgenbotham told Mr. Meshal that "Allah is up in the clouds," that "the U.S. is almost as powerful as Allah," and that he and the other agents knew he was hiding something and "had ways of getting the information they want," causing Mr. Meshal to fear for his life. *Id.*

During the same time defendants were interrogating Mr. Meshal, FBI agents were interrogating another U.S. citizen, Daniel Maldonado, whom

Mr. Meshal had met after fleeing the violence in Somalia and who had been seized at about the same time as Mr. Meshal. ¶¶ 65-67, JA 35-36. Defendants told Mr. Meshal that Maldonado "had a lot to say about him" and that his story would have to match Maldonado's if he wanted to go home. *Id.* ¶¶ 65-67, JA 35-36; slip op. at 6, JA 83. When Maldonado admitted to FBI agents that he had received military training in Somalia, he was indicted and brought back to the United States for federal prosecution. SAC ¶¶ 67-68, JA 35-36.

Kenyan officials never interrogated or questioned Mr. Meshal, nor did they provide him with any basis for his detention. SAC ¶¶ 76, 78, JA 38-39; slip op. at 7, JA 84. The Kenyan official who was present at Mr. Meshal's interrogations never asked Mr. Meshal any questions, did not take any notes, and left the interrogation site for several hours while the FBI agents' interrogation continued. SAC ¶ 76, JA 38.

Rendition from Kenya to Somalia and Ethiopia

On February 6, 2007, two FBI agents, Special Agent Charles Stern and Special Agent Robert Reilly, visited Mr. Meshal's home in New Jersey. *Id.* ¶ 102, JA 46. They informed Mr. Meshal's father that his son was being detained in Kenya and that they could arrange a call between him and his son. *Id.*

On February 7, a consular affairs officer from the U.S. Embassy in Nairobi visited Mr. Meshal in jail. *Id.* ¶ 103, JA 46. The consular affairs officer told Mr. Meshal that he was trying to get him home, and that someone would be in touch with his family in New Jersey. *Id.* That same day, agents Stern and Reilly returned to Mr. Meshal's father's house in New Jersey, and told him that no call with his son would be possible. *Id.*

By this time, Kenyan courts had started hearing habeas corpus petitions filed by a local human rights organization on behalf of Mr. Meshal and other individuals who had fled Somalia and who were being held in Kenya without charge. *Id.* ¶ 100, JA 45; slip op. at 7, JA 84. The petitions alleged there was no basis under Kenyan law to continue holding Mr. Meshal and the other detainees, and demanded their immediate release. SAC ¶ 100, JA 45.

In order to prevent Mr. Meshal's release, and to prolong his incommunicado detention to secure evidence for a criminal prosecution, defendants had Mr. Meshal rendered from Kenya to Somalia, and then from Somalia to Ethiopia.

On February 9, Kenyan officials removed Mr. Meshal from the jail, handcuffed him, and placed a black hood over his head. SAC ¶¶ 108-09, JA 48-49. Mr. Meshal was then flown to Somalia, along with twelve other

prisoners, just as defendants had threatened Mr. Meshal would be if he did not confess to a connection to al Qaeda. *Id.* ¶¶ 87, 109-111, JA 41-42, JA 48-49.

The same day that Mr. Meshal was rendered to Somalia, U.S. officials transported Maldonado from Kenya to the United States, where Maldonado had been indicted. *Id.* ¶ 120, JA 50. U.S. officials familiar with both cases stated that Maldonado was returned to the United States because he confessed his involvement with al Qaeda to the FBI agents, but that Mr. Meshal was not brought back to the United States because he did not admit such involvement. *Id.* ¶ 121, JA 51.

Mr. Meshal was detained in Somalia for approximately one week in inhumane conditions, including for two days in an underground room referred to as "the cave." *Id.* ¶¶ 111-12, JA 48-49. On or around February 16, 2007, Mr. Meshal was handed over to Ethiopian officials and flown, blindfolded and shackled, to a secret detention site near Addis Ababa, Ethiopia. *Id.* ¶¶ 117-19, 130-37, JA 50, 054-56; slip op. at 9, JA 86.

FBI Interrogation in Ethiopia

After a week of incommunicado detention, and continuing over the next three months, Mr. Meshal was regularly transported from the detention site near Addis Ababa to a gated villa for interrogation by Doe 1, who had

interrogated him in Kenya, and Doe Defendant 2, an FBI agent who introduced himself as "Dennis." SAC ¶¶ 140-41, 144-45, JA 57-59; slip op. at 8, JA 85. Doe 1 led all of Mr. Meshal's interrogations in Ethiopia except the final interrogation, which was led by Doe 2. SAC ¶¶ 141, 146, 149, JA 57-60.

At the beginning of each interrogation, Doe 1 presented Mr. Meshal with the same standard FBI waiver-of-rights form that defendants had presented Mr. Meshal with in Kenya. *Id.* ¶ 149, JA 60. And each time, Doe 1 made Mr. Meshal believe that he had no choice except to sign the document if he wanted to go home. *Id.* During each interrogation, Doe 1 made Mr. Meshal believe that he and the other FBI agents would send Mr. Meshal home if he was "truthful" and admitted he had terrorism connections, had received weapons training, or had otherwise supported al Qaeda. *Id.* ¶¶ 148-50, JA 60-61; slip op. at 9, JA 86. Doe 1 also interrogated Mr. Meshal about particular people from the United States and people he encountered while fleeing Somalia. SAC ¶ 150, JA 60-61. Doe 1 frequently accused Mr. Meshal of lying when he maintained his innocence. *Id.* Both Doe 1 and Doe 2 refused Mr. Meshal's repeated requests to speak with a lawyer. SAC ¶ 151, JA 61; slip op. at 9, JA 86. When Mr. Meshal

was not being interrogated, he remained handcuffed in his prison cell. SAC ¶ 154, JA 61-62; slip op. at 9, JA 86.

Apart from one brief interrogation upon his arrival in the country, Ethiopian officials never questioned Mr. Meshal. SAC ¶¶ 140-41, JA 57-58; slip op. at 8, JA 85. No formal charges were ever filed against Mr. Meshal in Ethiopia. SAC ¶¶ 155, 160, 162, JA 62-64; slip op. at 9, JA 86.

Although U.S. consular officials in Addis Ababa had known that Mr. Meshal was detained in Ethiopia and that FBI agents were regularly interrogating him, they did not visit him until on or about March 21, 2007, after his detention became public knowledge when McClatchy Newspapers reported that he was being held in a secret location in Ethiopia. SAC ¶ 157, JA 63; slip op. at 9, JA 86. By that time, FBI agents had already been interrogating Mr. Meshal in Ethiopia for more than a month. SAC ¶ 157, JA 63.

Nevertheless, FBI agents continued to interrogate Mr. Meshal in Ethiopia for another two months. On or about May 24, 2007, Mr. Meshal was taken to the U.S. Embassy in Addis Ababa, and then flown to the United States, where he was finally released. *Id.* ¶ 160, JA 63-64.

SUMMARY OF ARGUMENT

The district court correctly determined that Mr. Meshal plausibly alleged violations of his Fourth and Fifth Amendment rights by the defendants. Specifically, the district court found that decades of Supreme Court precedent confirm both that Mr. Meshal did not forfeit the protection of the Constitution by traveling abroad and that U.S law enforcement agents may not subject a U.S. citizen to months of near-incommunicado detention without access to counsel or any kind of hearing before a judicial officer, nor coercively interrogate a captive U.S. citizen and threaten him with disappearance, torture, and death.

The district court, however, erred in two main respects in dismissing Mr. Meshal's *Bivens* claims. *First*, the district court improperly determined that "binding" circuit precedent prevented it from allowing a *Bivens* remedy. Slip op. at 37, JA 114. The Supreme Court has held that *Bivens* must be available when, as here, it provides the sole remedy against federal law enforcement officials who run roughshod over a U.S. citizen's constitutional rights in a criminal investigation. The Court, moreover, has not only refused to immunize federal officials from *Bivens* liability when they act in the name of national security, but has also stated that the rationale underlying *Bivens* applies *more* forcefully in such situations because of the potential for abuse.

See Mitchell v. Forsyth, 472 U.S. 511, 523-24 (1985). In addition to ignoring the Supreme Court's rejection of a "national security" exception to *Bivens*, the district court misread the circuit precedent on which it relied.

This Circuit's decision in *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012), holds only that Defense Department contractors subjected to military detention cannot sue military officials based on the Supreme Court's internal military discipline cases, *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483 U.S. 669 (1987), and that in the distinct context of suits by military detainees against military officials in a war zone, the absence of affirmative legislation creating a cause of action counsels hesitation. But this case, like *Bivens* and unlike *Doe*, challenges misconduct by law enforcement officers against a criminal suspect. Congress has expressly preserved *Bivens* suits against law enforcement officers and rejected Justice Department proposals to eliminate such suits.

Second, the district court erred by failing to recognize that a *Bivens* remedy is required here. Because this case challenges misconduct by law enforcement officials in a criminal investigation, it is not a new kind of federal litigation requiring consideration of "special factors" that might otherwise "counsel[ ] hesitation" against extending *Bivens* to a new type of claim or new category of defendant. *Correctional Servs. Corp. v. Malesko*,

534 U.S. 61, 68 (2001); *Bivens*, 403 U.S. at 396. But even if it were, the district court failed to conduct the required balancing of any factors counseling hesitation against those factors favoring a remedy for the asserted constitutional violations. Here, the following factors weigh decidedly in favor of *Bivens*' availability: (1) plaintiff's U.S. citizenship; (2) Congress's clear indication that *Bivens* relief should be available when a U.S. citizen is wrongly imprisoned and tortured by law enforcement officials; (3) the judiciary's experience adjudicating the types of claims raised in this case and the multitude of tools that are available to address any concerns that might arise; and (4) the danger of immunizing law enforcement officials from the most egregious abuses of a citizen's constitutional rights through the creation of an unprecedented and unbounded "national security" or "foreign relations" exception to *Bivens*. Thus, even assuming this case requires consideration of special factors, the district court erred in not recognizing a *Bivens* remedy.

ARGUMENT

I. Standard of Review

This Court reviews *de novo* a district court's grant of a motion to dismiss for failure to state a claim on which relief may be granted. *See, e.g.*, *Rudder v. Williams*, 666 F.3d 790, 794 (D.C. Cir. 2012).

II. The District Court Properly Concluded that Mr. Meshal Plausibly Alleged Violations of His Rights under the Fourth and Fifth Amendments to the U.S. Constitution.

The Supreme Court long ago made clear that a U.S. citizen's constitutional rights do not evaporate once the citizen leaves our nation's borders: "When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (plurality opinion). As the district court recognized, "[i]t has been 'well settled' for over fifty years that 'the Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed at United States citizens.'" Slip op. at 12, JA 89 (quoting *United States v. Toscanino*, 500 F.2d 267, 280-81 (2d Cir. 1974)). The court thus properly concluded that the Fourth and Fifth Amendments protect U.S. citizens, such as Mr. Meshal, from prolonged extrajudicial detention and coercive interrogation by U.S. law enforcement agents, both at home and abroad. Slip op. at 12-15, JA 89-92.

The Fourth Amendment plainly mandates a prompt hearing before a judicial officer to assess the sufficiency of the evidence supporting detention. *See, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975). The

district court thus correctly concluded that Mr. Meshal had properly stated a Fourth Amendment claim where Defendants caused him to be detained for four months without such a hearing. *See* Slip op. at 13, JA 90 (citing *Gerstein*, 420 U.S. at 125). As the court explained, Mr. Meshal's four-plus months of near-incommunicado detention could not possibly pass constitutional muster when detained criminal suspects "must receive a hearing within 48 hours of seizure" and when even "[n]on-citizens detained under the USA Patriot Act must receive a probable cause hearing within seven days." *Id.* (citing *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); 8 U.S.C. § 1226a(a)(5)).[3]

The court also properly concluded that Mr. Meshal had stated a Fifth Amendment Due Process Clause claim where the government threatened him with torture, disappearance, and death while interrogating him. *Id.* at 14-15, JA 91-92. The Due Process Clause unquestionably forbids law enforcement officials from using any form of torture as a tool to extract confessions, including "mental" torture. *See*, *e.g.*, *Palko v. Connecticut*, 302

[3] The relevant provision of the USA PATRIOT Act allows non-citizens suspected of engaging in terrorist acts to be held for up to seven days without charge upon the Attorney General's certification. 8 U.S.C. § 1226a. This provision has never been challenged in or upheld by a court. But even assuming its lawfulness, Mr. Meshal's detention was more than *seventeen times* as long as the U.S. government can hold a *non-citizen* terrorism suspect based on the Attorney General's certification.

U.S. 319, 326 (1937) (the Due Process Clause must at least "give protection against torture, physical or mental"), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784 (1969); *see also Rochin v. California*, 342 U.S. 165, 172 (1952) (forbidding interrogation methods that were "too close to the rack and the screw to permit of constitutional differentiation"); *Harbury v. Deutch*, 233 F.3d 596, 602 (D.C. Cir. 2000) ("No one doubts that under Supreme Court precedent, interrogation by torture like that alleged by [plaintiff] shocks the conscience."), *rev'd on other grounds sub nom.*, *Christopher v. Harbury*, 536 U.S. 403 (2002). As the district court explained:

> Plaintiff has alleged that FBI agents threatened him with torture, disappearance, and death if he did not immediately confess to his interrogators that he was a terrorist. These threats were made when Mr. Meshal was thousands of miles from home, in a foreign prison where he had no access to any country's legal system, and with no idea when, if ever, he would be allowed to see a lawyer, face charges, or return home. Under these circumstances, accepting the allegations of the Complaint as true, the Court finds he has stated a plausible substantive due process claim.

Slip op. 15, JA 92. The court's conclusion accords with longstanding precedent condemning threats by law enforcement as substantive due process violations. *See, e.g.*, *Beecher v. Alabama*, 389 U.S. 35, 38 (1967) (threat that the defendant "speak his guilt or be killed"); *Burton v. Livingston*, 791 F.2d 97, 100 (8th Cir. 1986) (plaintiff verbally threatened

with "the terror of instant and unexpected death at the whim of [their] . . . custodians"); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (interrogation is "so terrifying in the circumstances . . . that [it] is calculated to induce not merely momentary fear or anxiety, but severe mental suffering").[4]

Federal agents cannot circumvent a citizen's rights under the Fourth and Fifth Amendments by "teaming up" with foreign actors. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1542-43 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985).[5] *See also, e.g., U.S. v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992) (finding that the Fourth Amendment attaches "where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements

[4] Mr. Meshal pleaded additional Fifth Amendment claims that the district court did not address because it concluded that the coercive interrogations gave rise to a Fifth Amendment claim. *See* Slip op. 14 n.3, JA 91. Mr. Meshal's other Fifth Amendment claims concern his prolonged extrajudicial detention and his forcible rendition to two dangerous situations, including a forcible return to the war-torn country that he had recently fled. These claims are plausible for the same reasons the district court upheld the claims it reached.

[5] *Ramirez de Arellano* was reversed on other grounds only because of the interceding enactment of a statute that bore on an entirely different issue in the case. This Court has since cited with approval *Ramirez de Arellano*'s holding and reasoning, including its separation of powers analysis. *See Committee of the United Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 934-35 (D.C. Cir. 1988).

applicable to American officials"); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C. Cir. 1985) ("The exclusionary rule does apply to a foreign search if American officials or officers participated in some significant way. . . ."); *cf. Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 934–35 (D.C. Cir. 1988) (recognizing Fifth Amendment claims raised by U.S. citizens injured in Nicaragua, but ultimately declining to hear the plaintiffs' claims since there was "no allegation that the United States itself has participated in or in any way sought to encourage injuries to Americans in Nicaragua"). The possible collaboration of foreign officials thus does not immunize Defendants for their prolonged detention and coercive interrogation of Mr. Meshal. And, as the district court properly concluded, Mr. Meshal plausibly alleged that Defendants bore responsibility for his detention without a hearing for four months and for his coercive interrogations. *See* Slip op. at 13, JA 90 (noting, *inter alia*, that Defendants repeatedly represented to Mr. Meshal that they alone determined whether, and when, he would go home); *see also id.* at 7-9, JA 84-86 (noting foreign officials took no real part in Defendants' repeated interrogations of Mr. Meshal over a period of four months).[6]

[6] Numerous other factual allegations in the complaint support the district court's conclusion. *See, e.g. id.* ¶ 96, JA 44 (Kenyan police officers informed a local human rights organization that the FBI was in charge of

Mr. Meshal, in short, properly stated violations of his Fourth and Fifth Amendment rights. The Fourth Amendment protects citizens against unreasonable detention by law enforcement agents, and Mr. Meshal's detention for more than four months in Kenya, Somalia, and Ethiopia without ever being charged, granted access to counsel, or presented before a judicial officer, was clearly unreasonable. The Fifth Amendment protects citizens from coercive interrogation techniques by law enforcement agents, and here those agents clearly exceeded constitutionally permissible limits by subjecting Mr. Meshal to more than thirty coercive interrogations in which they threatened him with torture, disappearance, and other serious harm to obtain a confession. The district court thus correctly concluded that Mr. Meshal "has stated a 'plausible claim for relief' under the Fourth and Fifth Amendments." Slip op. 15, JA 92 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

Mr. Meshal's detention); *id.* ¶ 52, JA 30-31 (Kenyan authorities told Mr. Meshal that they were waiting to "find out what the United States wanted to do with him"); *id*. ¶ 79, JA 39 (Defendants Higgenbotham and Hersem arranged for Mr. Meshal to be moved to a prison closer to their Kenyan villa to facilitate their interrogation, and physically transported him there); *id.* ¶ 121, JA 51 (statements by U.S. officials that Defendants did not bring Mr. Meshal back to the United States because, unlike Daniel Maldonado, the other U.S. citizen they were interrogating in Kenya at the time, Mr. Meshal did not confess to a crime).

III. The District Court Erred in Holding that "Special Factors" Nonetheless Preclude a *Bivens* Remedy for Mr. Meshal's Properly Asserted Violations of His Constitutional Rights.

The district court's failure to recognize a *Bivens* remedy for the violation of Mr. Meshal's constitutional rights results from two principal errors. *First*, the district court erred in concluding that precedent precludes a *Bivens* remedy in this case. The district court not only ignored the relevant Supreme Court precedent, but also incorrectly extended this Court's decision in *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012), which barred *Bivens* claims by military contractors subjected to military detention and challenging the military chain of command, to bar a *Bivens* action by a private civilian against civilian law enforcement agents. *Second*, the district court incorrectly assumed that this case, although it involves neither a new type of claim nor a new category of defendant, nonetheless constitutes a new kind of federal litigation requiring consideration of special factors. This case concerns fundamental constitutional violations committed by law enforcement officers in the course of a criminal investigation—the core of *Bivens*. But even if the claims in this case *were* new, the district court erred by failing to conduct the required balancing of any factors counseling hesitation against those factors favoring a remedy for the asserted constitutional violations. Here, the following factors weigh decidedly in

favor of *Bivens*'s availability: (1) plaintiff's U.S. citizenship; (2) Congress's clear indication that *Bivens* relief should be available when a U.S. citizen is wrongly imprisoned and tortured by law enforcement officials; (3) the judiciary's experience adjudicating the types of claims raised here and the multitude of tools that are available to address any concerns that might arise; and (4) the danger of immunizing law enforcement officials for the most egregious abuses of a citizen's constitutional rights through the creation of an unprecedented and unbounded "national security" or "foreign relations" exception to *Bivens*. Thus, even if this case required consideration of special factors, the district court erred in not recognizing a *Bivens* remedy.

A. Precedent Does Not Preclude a *Bivens* Remedy in This Case.

In *Bivens*, the Supreme Court held that individuals alleging a constitutional violation by federal law enforcement officers could sue those officers directly under the Constitution. 403 U.S. at 397 (claim for Fourth Amendment violations); *see also Carlson v. Green*, 446 U.S. 14 (1980) (*Bivens* claim for Eighth Amendment cruel and usual punishment violation); *Davis v. Passman*, 442 U.S. 228 (1979) (*Bivens* claim for Fifth Amendment due process violation).

Bivens serves two purposes. First, as Chief Justice Rehnquist explained, "*Bivens* from its inception has been based . . . on the deterrence

of individual officers who commit unconstitutional acts." *Malesko*, 534 U.S. at 71. This rationale is as relevant to cases that implicate national security as it is to ordinary law enforcement investigations. As the Supreme Court stated in rejecting the argument that national security necessitated dismissal of a *Bivens* suit against the Attorney General for illegal wiretaps directed at suspected terrorists: "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate." *Mitchell*, 472 U.S. at 524 (emphasis in original; quotations marks omitted). Second, *Bivens* "provide[s] a cause of action for a plaintiff who lack[s] any alternative remedy for harms caused by an individual officer's unconstitutional conduct." *Malesko*, 434 U.S. at 70 (emphasis omitted). The Supreme Court recently underscored why the availability of alternative remedies matters: it both deters officials from acting unlawfully and provides compensation to the individual whose constitutional rights have been violated. *Minneci v. Pollard*, 132 S. Ct. 617, 620 (2012).

A *Bivens* remedy must therefore be available unless: (1) an alternative remedy exists that provides a convincing reason for the judicial branch to refrain from providing relief; or (2) a balance of "special factors counseling hesitation" weighs against extending *Bivens* to a new kind of federal litigation. *Id.* at 621-22; *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). The

latter inquiry requires federal courts to "'make the kind of remedial determination that is appropriate for a common-law tribunal.'" *Wilkie*, 551 U.S. at 550 (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)). The mere presence of "special factors" does not automatically bar a cause of action, but rather requires a "weighing [of] reasons for and against the creation of a new cause of action, the way common law judges have always done." *Id.* at 554.

The district court recognized that Mr. Meshal has no alternative remedy. Slip op. at 17, JA 94. It also recognized that "when the constitutional rights of American citizens are at stake, courts have not hesitated to consider such issues on their merits even when the U.S. government is allegedly working with foreign governments to deprive citizens of those rights." *Id.* at 23, JA 100. *See also id.* at 20, JA 97 ("Even when [unconstitutional] conduct is committed overseas, the judiciary has historically concluded it still has a role in applying the protections of the Constitution to U.S. citizens.").

The lower court nevertheless ruled that special factors counseled hesitation and dismissed the complaint. *Id*. at 37, JA 114. Specifically, it determined that this Circuit's decision in *Doe v. Rumsfeld*, coupled with decisions by the Seventh Circuit in *Vance v. Rumsfeld*, 701 F.3d 193 (7th

Cir. 2012) (en banc), and the Fourth Circuit in *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012), preclude a *Bivens* remedy here. In so concluding, the lower court improperly extended those decisions beyond their limited context—suits against military officers that threaten the military command structure during wartime—to create an unprecedented "national security" exception to *Bivens* for U.S. citizens abused by federal law enforcement officials.

The Supreme Court has never recognized any such exception nor suggested that law enforcement investigations of certain types of crimes should be uniquely immunized from *Bivens* liability. To the contrary, the Court has recognized the propriety of a *Bivens* remedy for U.S. citizens even when the unconstitutional conduct directly implicates national security. *Mitchell*, 472 U.S. at 520 (refusing to grant absolute immunity to the U.S. Attorney General in *Bivens* suits for damages "arising out of his allegedly unconstitutional conduct in performing his national security functions"). Indeed, the Court has explained that the rationale underlying *Bivens* liability applies *more*, not less, forcefully in that situation. The label "national security," it cautioned, "may cover a multitude of sins," and the "danger that . . . federal officials will disregard constitutional rights in their zeal to protect

the national security is sufficiently real to counsel against" immunizing them from civil liability. *Id.* at 523.

The Supreme Court has instead identified only a limited number of "special factors" to date: (1) congressional preclusion, whether expressly by creation of an alternative remedy, or implicitly through intentional omission of a damages remedy in an otherwise comprehensive regulatory scheme, *Hui v. Castaneda*, 559 U.S. 799, 812 (2010) (express congressional preclusion of a *Bivens* remedy against Public Health Service employees); *Schweiker v. Chilicky*, 487 U.S. 412, 421-23 (1988) (elaborate administrative scheme providing Social Security disability benefits); *Bush v. Lucas*, 462 U.S. 367 (1983) (congressionally created federal service compensation scheme that provided meaningful redress); (2) intrusion on "'the unique disciplinary structure of the Military Establishment and Congress's activity in the field,'" *United States v. Stanley*, 483 U.S. 669, 683 (1987) (quoting *Chappell v. Wallace*, 462 U.S. 296, 304 (1983)); and (3) "difficulty in defining a workable cause of action," *Wilkie*, 551 U.S. at 555.

None of those factors is present here. First, Congress has not precluded, whether expressly or implicitly, a *Bivens* action for the constitutional violations asserted here. Congress has repeatedly legislated against the backdrop of *Bivens* liability for constitutional violations by

federal law enforcement agents and, each time, it has preserved the availability of *Bivens* suits and rejected calls to eliminate them. *See infra* at 42-48. Congress, in short, has neither created an alternative remedial scheme for suits like one, nor given the judiciary any indication that it should stay its *Bivens* hand.

Second, this case does not intrude on the disciplinary structure of the military establishment or otherwise involve a claim against military officials. Rather, Mr. Meshal has sued individual civilian law enforcement agents for constitutional violations committed during a criminal investigation. This suit thus presents no risk of interfering with the military hierarchy or military operations. Nor does it challenge conduct in a war zone, as the government concedes. *See* Hearing Tr., July 12, 2011, at 5, JA 13. These differences alone distinguish the present case from *Doe* as well as from *Vance* and *Lebron*. *See also infra* at 33-38.

Third, there is no difficulty defining a workable cause of action. The Fourth and Fifth Amendment claims asserted by Mr. Meshal—detention without judicial process and coercive interrogation by law enforcement agents—do not present novel theories of liability, *see Wilkie*, 551 U.S. at 555-62, but rather are the type of claims routinely decided by federal judges, *see, e.g.*, *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (detention

without a prompt probable cause hearing); *Chavez v. Martinez*, 538 U.S. 760 (2003) (coercive interrogation); *Wilkins*, 872 F.2d at 195 (same). Not infrequently, moreover, those claims address law enforcement activity outside the United States. *See, e.g.*, *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008) (U.S. criminal investigation in Saudi Arabia); *United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988) (U.S. seizure of suspected terrorist in international waters); *United States v. Karake*, 443 F. Supp. 2d 8 (D.D.C. 2006) (U.S. criminal investigation in war-torn Rwanda); *United States v. Purvis*, 768 F.3d 1237 (11th Cir. 1985) (U.S. seizure of narcotics suspect in international waters). Indeed, a federal judge would have considered Mr. Meshal's claims on the merits had he been charged with a crime and asserted them in response to his prosecution.[7]

[7] Under the district court's reasoning, the only time a U.S. citizen who is unlawfully detained, tortured, and disappeared by U.S. officials outside his country could obtain a judicial remedy would be if the government prosecutes him. But the whole point of *Bivens* is to afford a remedy precisely to those citizens whose constitutional rights are violated by law enforcement, but who are not prosecuted. *See Bivens*, 403 U.S. at 410("[A]ssuming Bivens' innocence of the crime charged, the 'exclusionary rule' is simply irrelevant. For people in Bivens' shoes, it is damages or nothing.") (Harlan, J., concurring); *Mitchell*, 472 U.S. at 523 n.7 (*Bivens* is required in the national security context because "declaratory or injunctive relief and the use of the exclusionary rule . . . . are useless where a citizen not accused of any crime has been subjected to a completed constitutional violation").

Since the Supreme Court decided *Bivens*, lower courts have regularly applied *Bivens* to remedy constitutional violations by law enforcement officials of U.S. citizens in their custody and control, whether those individuals are criminal suspects or convicted prisoners. *See, e.g.*, *Jones v. Horne*, 634 F.3d 588, 592-95 & n.2 (D.C. Cir. 2011) (Due Process and other violations by prison and law enforcement officials); *Lederman v. United States*, 291 F.3d 36, 39 (D.C. Cir. 2002) (unconstitutional arrest by law enforcement officers); *Sullivan v. Murphy*, 478 F.2d 938, 974 (D.C. Cir. 1973) (unconstitutional detention without probable cause hearing and consequent forfeiture of collateral); *Wilkins*, 872 F.2d at 194-95 (Fifth Amendment Due Process Clause claim against FBI agent who allegedly held a gun to the plaintiff's head during interrogation); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625-26 (5th Cir. 2006) (Fourth Amendment excessive force claim against border patrol agents); *Bagola v. Kindt*, 131 F.3d 632, 646 (7th Cir. 1997) (Eighth Amendment claim against prison officials for use of excessive force or failure to provide humane conditions of confinement); *Magluta v. Samples*, 375 F.3d 1269, 1271-72 (11th Cir. 2004) (Fifth Amendment due process claim by an individual in federal custody).

The Supreme Court has never suggested that a *Bivens* remedy would be unavailable in suits against law enforcement officials who violate the constitutional rights of U.S. citizens in their power. *See Vance*, 701 F.3d at 208 (Hamilton, J., dissenting). To the contrary, the Supreme Court's most recent *Bivens* decision, *Minneci v. Pollard, supra*, reaffirms *Bivens*' core principle: to ensure that U.S. citizens have some remedy when their constitutional rights are violated by federal officials. Although the Court held in *Minneci* that the plaintiff could not sue employees at a privately run federal prison under *Bivens*, it found that the plaintiff had an "adequate alternative damages action[ ]" under state law that could serve *Bivens*' twin purposes of providing "significant deterrence and compensation." *Minneci*, 132 S. Ct. at 620. Thus, even in the distinct setting of a privately operated federal prison, the Court underscored that a federal prisoner must have an adequate remedy in damages when his constitutional rights are violated. [8]

[8] Eight justices joined the Court's opinion in *Minneci*. *Id.* at 619-20. Justice Ginsburg dissented because she believed a *Bivens* remedy should be available even in such a case. *Id.* at 626-27 (Ginsburg, J., dissenting). Of the eight justices in the majority, only two, Justices Scalia and Thomas, wrote separately to state that *Bivens*, and its two follow-on cases, *Davis v. Passman*, and *Carlson v. Green*, should be limited to "the precise circumstances they involved." *Id.* at 626 (Scalia, J., joined by Thomas, J., concurring). *Minneci* thus underscores that *Bivens* remains an important protection for individuals whose constitutional rights are violated by federal officials. *See Vance*, 701 F.3d at 208 (Wood, J., concurring) ("Had the Court wished to disapprove *Bivens* actions altogether, it would not have

The district court not only ignored the relevant Supreme Court case law, but also misconstrued the recent circuit decisions on which it relied. Those cases—*Doe*, *Vance*, and *Lebron*—recognize, at most, a limited exception to *Bivens* for suits by U.S. citizens against military officials during wartime. *Doe* and *Vance* are even narrower: like *Stanley* and *Chappell* they involve suits by individuals operating within the military chain of command against superior military officers. *Doe*'s references to "national security" and "intelligence," 683 F.3d at 395, must be understood within and confined to the unique military context in which that case was decided: a suit by a military contractor against military superiors for conduct occurring in a war zone.

In *Doe* and *Vance*, the plaintiffs were security contractors working for the U.S. military in an active war zone who brought suit against military superiors, up to and including the Secretary of Defense. *See Doe*, 683 U.S. at 392; *Vance*, 701 F.3d at 195-96. The *Doe* court determined that plaintiff's

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taken the trouble in *Minneci* to review the history of *Bivens* and decide on which side of the line the proposed claim fell."); *see also Wilkie*, 551 U.S. at 576 (Ginsburg, J., concurring in part, dissenting in part) ("Some Members of this Court consider *Bivens* a dated precedent. . . . . But the Court has so far adhered to *Bivens*' core holding: Absent congressional command or special factors counseling hesitation, victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." (quotations and citations omitted)).

functional status as a U.S. servicemember brought his suit within the Supreme Court's twin "internal military affairs" *Bivens* cases, *Chappell* and *Stanley*. *Doe*, 683 F.3d at 394.[9] It saw no distinction between the plaintiff before it—a translator for a defense contractor operating in Iraq—and the servicemembers in *Chappell* and *Stanley*, thus making his case a straightforward application of Supreme Court precedent. *Id.* ("Granted, [the plaintiff] is a contractor and not an actual member of the military, but we see no way in which this affects the special factors analysis."). On that basis alone, *Doe* must be distinguished from this case.

Although the Seventh Circuit's divided decision in *Vance* did not rest on the plaintiffs' *de facto* military status, the court underscored that the plaintiffs "were security contractors in a war zone, performing much the same role as soldiers." *Vance*, 701 F.3d at 199. And the court did rest its

[9] In *Chappell*, the Court dismissed a suit for racial discrimination brought by enlisted personnel against their superior officers, 462 U.S. at 304; in *Stanley*, the Court dismissed an action by a serviceman who claimed he was secretly administered LSD as part of an Army experiment, 483 U.S. at 683-84. In both cases, the special factor the Court identified was the risk that a *Bivens* remedy would intrude on the military's congressionally enacted system of internal military discipline. *Chappell*, 462 U.S. at 304 ("[T]he unique disciplinary structure of the military establishment and Congress's activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers."); *Stanley*, 483 U.S. at 683-84 (applying *Chappell* to servicemembers outside situations where an officer-subordinate relationship exists, but where a *Bivens* suit could adversely affect internal military discipline).

ruling on the Supreme Court's "principal point [in *Chappell* and *Stanley*] that civilian courts should not interfere with the military chain of command." *Id.* Mr. Meshal, however, is not a servicemember or a military contractor or a government-connected person of any kind. He is simply a private U.S. citizen, and his claims arise only from the actions of civilian law enforcement officers. His suit does not raise any concerns about judicial circumvention of a congressionally created system of internal military discipline or judicial interference with decisions by military officials. The *Vance* court, moreover, underscored that, as in *Chappell* and *Stanley*, Congress had created an alternative remedial scheme for claims against the military, with which a *Bivens* remedy would interfere. *Id.* at 200-01; *id.* at 201 (congressionally created compensation schemes available to military detainees indicate Congress's view of "how best to address the fact that the military can injure persons by improper conduct"). Mr. Meshal's suit does not raise any such concerns about judicial interference with a congressionally created military compensation scheme.

These decisions must be distinguished for other reasons as well. *Doe*, *Vance*, and *Lebron* all challenged military decisionmaking and implicated the military command structure during wartime. The *Doe* court repeatedly emphasized that the case involved claims against military officers in a

theater of active hostilities. *Doe*, 683 F.3d at 395 (concerns about "deplet[ing] *military* resources" and disrupting the armed forces in waging war (emphasis added)); *id.* at 395-96 (adjudication would "require a court to delve into the *military's* policies regarding the designation of detainees as 'security internees' or 'enemy combatants'" (emphasis added)); *id.* at 396 ("allegations . . . implicate the *military* chain of command" (emphasis added)); *id.* ("Litigation of Doe's case would require testimony from top *military* officials as well as forces on the ground, which would detract focus, resources, and personnel from the [military] mission in Iraq." (emphasis added)).

Vance likewise concerned military conduct in a war zone, and the court stressed the impact such suits would have on military operations and on the military command structure. *See Vance*, 701 F.3d at 199 (rejecting a damages remedy against "*military* personnel" who acted in a "combat zone" (emphasis added)); *id.* (cautioning against interfering with the "*military* chain of command" (emphasis added)); *id.* at 202 (warning about "intrud[ing] inappropriately into the *military* command structure" (emphasis added)). *Lebron* similarly rested on the particular concerns about judicial interference in military affairs during wartime. *See Lebron*, 670 F.3d at 549-50 ("[T]he 'special facto[r]' that 'counsel[s] hesitation' is . . . the fact that

congressionally uninvited intrusion into *military* affairs by the judiciary is inappropriate." (quoting *Stanley*, 483 U.S. at 683 (emphasis added))); *see also id.* at 550 ("[plaintiff's] enemy combatant classification and *military* detention raise fundamental questions incident to the conduct of armed conflict" (emphasis added)).

This Circuit's ruling in *Doe* relied specifically on *Chappell* and *Stanley*'s "internal military discipline" exception to *Bivens* and therefore does not provide controlling authority here. *Doe*, like *Vance* and *Lebron*, also turned on how suits against military personnel during wartime uniquely implicate the military chain of command. Further, but importantly, while the *Doe* court found that Congress had not created a cause of action for military detainees, this congressional silence contrasts sharply with Congress's preservation of *Bivens* claims against law enforcement agents and rejection of executive branch proposals to eliminate those claims. *See infra* at 42-48.

In short, none of these cases—and least of all *Doe*—recognizes a freestanding "national security" or "foreign relations" exception to *Bivens*. They should not be extended to create such an exception to bar relief for a U.S. citizen unlawfully detained and tortured by four FBI agents during a

criminal law enforcement investigation simply because the FBI misconduct occurred outside the United States.

B. Even If This Case Were a New Kind of Federal Litigation Requiring Consideration of Special Factors, Those Factors Do Not Warrant Dismissal.

The Supreme Court has instructed that whether to grant a *Bivens* remedy requires a court to "pay[ ] particular heed . . . to any special factors counseling hesitation before authorizing a new kind of federal litigation." *Wilkie*, 551 U.S. at 550. But the mere presence in some form of "special factors" is not a trump card. Ultimately, those factors must be weighed in the balance, as the court exercises its judgment in determining whether there should be a remedy for violations of the Constitution. *Id.* at 554 (court must "weigh[ ] reasons for and against the creation of a new cause of action, the way common law judges have always done.").

As threshold matter, this case is not "a new kind of federal litigation." *Id.* at 550 (quotation marks omitted). Nor are federal law enforcement agents a "new category of defendants." *Malesko*, 534 U.S. at 68. While the FBI agents' conduct may have occurred on foreign soil, it is substantially the same conduct at issue in *Bivens*: violations of a citizen's constitutional rights by law enforcement agents determined to obtain evidence of a crime at any cost. *Bivens*, 403 U.S. at 389-90. Indeed, the conduct here is more

outrageous than in *Bivens*, as Mr. Meshal was unlawfully imprisoned for four months and threatened with torture and death. This case thus falls squarely within the heartland of *Bivens*.

But even if this were a new kind of litigation requiring consideration of "special factors," the balance weighs clearly in favor of allowing for a remedy. The following factors all support the availability of *Bivens* relief: (1) plaintiff's U.S. citizenship; (2) Congress's clear indication that *Bivens* relief should be available where a U.S. citizen is wrongly imprisoned and tortured by law enforcement officials, regardless of where the misconduct occurs; (3) the judiciary's deep reservoir of experience in adjudicating the types of claims raised here; and (4) the dangers of immunizing executive officials from the most egregious abuses of a U.S. citizen's constitutional rights through the creation of an unprecedented "national security" exception to *Bivens* that has no discernable limits.

1. Plaintiff's U.S. Citizenship

American citizens have always had a unique claim on the courts of this country to vindicate violations of their constitutional rights by officials of their own government, whether those violations occur at home or abroad. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (Even "a state of war is not a blank check for the President when it comes to the rights of the

Nation's citizens."); *Reid*, 354 U.S. at 5-6. As Justice Jackson explained, "Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection." *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950). Courts in this Circuit have accordingly recognized the special claim that U.S. citizens have on U.S. courts to remedy violations of their constitutional rights, even when those violations occur on foreign soil. *See, e.g.*, *Ramirez de Arellano*, 745 F.2d at 1530 ("'[A United States officer's] distance from home and the duties in which he is engaged, cannot enlarge his power over the property of a citizen, nor give to him, in that respect, any authority which he would not, under similar circumstances, possess at home.'" (quoting *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134 (1852)); *id.* at 1543-44 ("[U]ntil today it has never been doubted that the Judiciary does operate under a 'special charter' [the U.S. Constitution] to help preserve the fundamental rights of this nation's citizens . . . . The Constitution draws certain lines beyond which neither the Executive, the Legislature, nor the Judiciary may pass, and it is emphatically the Judiciary's duty to declare, in a justiciable controversy, where those lines are."); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 40 (D.D.C. 2004) (rejecting

the government's assertion that the executive's national security and foreign affairs powers deprive the judiciary of its authority to remedy violations of a citizen's constitutional rights).

Importantly, *Doe* reaffirmed the continued relevance of citizenship in *Bivens* actions. *Doe*, 683 F.3d at 396. The *Doe* court specifically relied on the plaintiff's citizenship to distinguish special factors decisions involving foreign nationals. *Id.* Those decisions all described the concern about foreign nationals using U.S. courts to litigate national-security and foreign-relations matters against U.S. officials. *See Ali v. Rumsfeld*, 649 F.3d 762, 774 (D.C. Cir. 2011); *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009).[10] The *Doe* court found that the plaintiff's citizenship "remove[d] concerns we had in those cases about the effects that allowing a *Bivens* action would have on foreign affairs." *Doe*, 683 F.3d at 396. While the *Doe* court ultimately concluded that plaintiff's citizenship was insufficient to tip the balance in favor of a *Bivens* remedy given other special factors present in

[10] This court's decision in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), was predicated on the same concern. *Id.* at 209 (refusing to allow a *Bivens* remedy to Nicaraguan citizens against U.S. officials for claims concerning activities that took place in Nicaragua because of "the danger of foreign citizens' using the courts in situations to obstruct the foreign policy of our government"). The Second Circuit's divided decision in *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc), emphasized the same concern in denying *Bivens* relief there to a foreign national. *Id.* at 575-76 (citing *Sanchez-Espinoza*).

that case, it made clear that citizenship remains an important consideration in the special factors analysis.[11]

2. Congressional Action Supports a *Bivens* Remedy

The district court properly found that Mr. Meshal has no other available remedy. Slip op. at 17, JA 94. But it erred in concluding that only Congress could provide him or other similarly situated U.S. citizens with a remedy. *Id.* at 37, JA 114. The entire point of *Bivens* is to remedy constitutional violations except where Congress has chosen an alternate remedial scheme. To require that Congress do so turns *Bivens* on its head.

The relevant question, therefore, is whether Congress has provided a reason for this Court, in exercising its judgment as a common law tribunal, to hesitate and stay its *Bivens* hand. *See Bush*, 462 U.S. at 380. Congress has provided no such reason. It has neither legislated an alternative remedial

[11] In addition to a citizen's longstanding claim to a remedy in the courts of his country, two other considerations support *Bivens*'s availability here. First, claims by U.S. citizens for Fourth and Fifth Amendment violations such as those alleged in this case are likely to remain relatively few in number, thus requiring only a limited expenditure of judicial resources. *Cf. Wilkie*, 551 U.S. at 561 (considering the amount of potential litigation in determining whether to allow a *Bivens* remedy). Second, if U.S. officials harm citizens of other nations, those individuals can at least turn to their home governments to stand up for their rights. *Vance*, 701 F.3d at 221 (Hamilton, J., dissenting). But for U.S. citizens alleging torture and other unconstitutional conduct by their own government, no other government can provide a remedy. *Id.*

scheme nor given any indication that U.S. law enforcement officials should be exempted from civil liability when they violate a U.S. citizen's constitutional rights by forcibly disappearing him for four months and threatening him with torture and death. *Cf. Spagnola v. Mathis*, 859 F.2d 223, 229 (D.C. Cir. 1988) (court should stay its *Bivens* hand where Congress has legislated a comprehensive remedial scheme and "not inadvertently" omitted a damages remedy for certain claimants); *Klay v. Panetta*, 758 F.3d 369, 376 (D.C. Cir. 2014) ("If Congress has legislated pervasively on a particular topic but has not authorized the sort of suit that a plaintiff seeks to bring under *Bivens*, respect for the separation of powers demands that courts hesitate to imply a remedy."); *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) (staying *Bivens* hand where "Congress [had] created a comprehensive [remedial] scheme that did not inadvertently exclude a remedy for the [plaintiffs'] claims").

Bivens has historically provided a remedy against law enforcement officials who, in their effort to obtain evidence to support suspicions of criminality, run roughshod over a citizen's constitutional rights. Congress has never once questioned the ability of U.S. citizens to bring suit against law enforcement officials for the Fourth and Fifth Amendment violations asserted here, but has instead consistently recognized *Bivens* as the

appropriate remedy for constitutional torts by federal law enforcement officers. *Cf. Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1945) (citing "legislative acquiescence" over time as "remov[ing] any doubt that a private cause of action exists").

In 1974, *after* the Supreme Court had decided *Bivens*, Congress amended the Federal Tort Claims Act (FTCA) to create a cause of action against the United States for intentional torts committed by federal law enforcement officers. *See Carlson*, 446 U.S. at 19. Congress made "crystal clear" that FTCA remedies were intended to supplement, not displace, *Bivens* actions. *Id.* Congress, moreover, rejected statutory language, proposed by the Justice Department, that would have eliminated *Bivens* in favor of suits against the government for constitutional violations. *See* James E. Pfander & David Baltmanis, "Rethinking *Bivens*: Legitimacy and Constitutional Adjudication," 98 Geo. L.J. 117, 132-33 (2009); S. Rep. No. 93-588 (1973), 1974 U.S.C.C.A.N. 2789, 2791 (explaining the new provision as "a counterpart to the *Bivens* case and its progeny").

In 1988, Congress adopted the Westfall Act to protect government officials from state common law tort liability. Pub. L. No. 100-694, 102 Stat. 4563 (1988). The Westfall Act preempts non-federal remedies against federal employees acting within the scope of their employment, except those

"brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). While Congress made the FTCA the exclusive remedy for state law tort claims, it once again rejected a proposal to eliminate *Bivens*, *see* Pfander & Baltmanis, *supra*, at 135 & n.100, and instead broadly preserved the availability of *Bivens* actions for "violation[s] of the Constitution" by federal officials, 28 U.S.C. § 2679(b)(2)(A). In addition to the Act's text, *see id.*, its accompanying legislative history made clear that Congress meant to preserve *Bivens* claims, *see* H. Rep. No. 100-700, at 6 (1988) ("Since the Supreme Court's decision in *Bivens* the courts have identified this type of tort as a more serious intrusion of the rights of an individual that merits special attention. Consequently, [the Act] would not affect the ability of victims of constitutional torts to seek personal redress from federal employees who allegedly violate their constitutional rights.").

Notably, in its recent statements to the Committee against Torture, which oversees compliance with the U.N. Convention against Torture, the U.S. State Department assured the United Nations not only that the categorical prohibition on torture applies to U.S. officials at all times and in all places,[12] but also that *Bivens* is one of the "extensive remedies and

[12] Mary E. McCleod, Acting U.S. Legal Advisor, U.S. Dep't of State, Opening Statement before the U.N. Committee against Torture, Nov. 12-13,

avenues for seeking redress" under U.S. law for torture and related abuses.[13] The U.S., moreover, has previously relied on the availability of *Bivens* claims in cases of torture by U.S. officials to show that the U.S. is complying with its obligations under the Convention.[14] Surely, if *Bivens* were not, in fact, available where, as here, it is the *only* remedy for torture of U.S. citizens by U.S. officials, the State Department would have informed the Committee that no remedies were available under U.S. law.

Congress, as Justice Scalia emphasized, "does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2008). Had Congress wished to extinguish a U.S. citizen's longstanding right to *Bivens* relief for torture and other egregious conduct by law enforcement officials, it would have said so. *Cf. Hui*, 559 U.S. at 813 (no

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2014, *available at* https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/

[13] *See* U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Third to Fifth Periodic Report of the United States ¶ 147, Aug. 12, 2013, *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/USA/3-5&Lang=en (incorporating by reference remedies listed in U.S. Dep't of State, *Common Core Document of the United States of America: Submitted with the Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights and concerning the International Covenant on Civil and Political Rights* ¶¶ 156, 158, Dec. 30, 2011, *available at* http://www.state.gov/j/drl/rls/179780.htm).

[14] United States Written Response to Questions Asked by the United Nations Committee Against Torture ¶ 5, Apr. 28, 2006 (Question 5), *available at* http://www.state.gov/j/drl/rls/68554.htm.

Bivens remedy in suits by federal detainees against Public Health Service employees because Congress had "plainly preclude[d]" a *Bivens* remedy in those circumstances). In the forty-three years since the Supreme Court decided *Bivens*, Congress has given no reason for a court to stay its *Bivens* hand in a suit by a U.S. citizen against individual FBI agents for the Fourth and Fifth Amendment violations asserted here.

The *Doe* court, to be sure, observed that Congress did not create a cause of action for military detainees to sue federal military officials in federal court. *Doe*, 683 F.3d at 396-97. But, as noted above, *Doe* concerned a *Bivens* action by a military contractor against his military superiors for actions taken under military authority in a war zone. *Doe's* backdrop was the congressionally chosen military disciplinary structure and Congress's specific legislation detailing the rights of military detainees. It holds only that the failure of Congress to create a cause of action weighed against a *Bivens* remedy under the distinct circumstances presented there. Suits to remedy constitutional violations by federal law enforcement officials have never, since *Bivens*, required affirmative congressional legislation. And Congress's express preservation of *Bivens* under the Westfall Act underscores its understanding that a *Bivens* remedy remains available to

remedy such violations. Congressional action accordingly counsels in favor of *Bivens* here.

3. Judicial Competence and Expertise

In arguing against a *Bivens* remedy, the government has cited as special factors the purported inability of federal judges to adjudicate claims targeting conduct by U.S. officials in foreign territory without interfering with the government's relations with other sovereigns or to address sensitive evidentiary issues that might arise in litigation without prejudicing national security. Slip op. at 18-19, JA 95-96. The argument fails for two reasons. First, the Supreme Court has identified "special factors" relating to the *legislative* prerogative as those "counseling hesitation" under *Bivens*. *See Bush*, 462 U.S. at 380 ("special factors" inquiry centers on "the question of who should decide whether such a remedy should be provided," the Judiciary or the Legislature). As described above, Congress has provided no cause for this Court to stay its *Bivens* hand here, and the Executive may not act in Congress's stead to exempt its own actions from judicial scrutiny.

Second, the government's argument rests on a false premise. Courts have proven time and again that they are fully capable of managing the very concerns cited by the government. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 796 (2008) (emphasizing judges' "expertise and competence" to

address sensitive national security matters while vindicating fundamental constitutional rights); *United States v. U.S. Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 320 (1972) (rejecting the suggestion that national-security matters are "too subtle and complex for judicial evaluation"); *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978) (per curiam) (in overriding a presidential veto of the 1974 Freedom of Information Act Amendments, Congress "stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security"); *Zweibon v. Mitchell*, 516 F.2d 594, 641-42 (D.C. Cir. 1975) (en banc) ("[W]e do not believe federal judges will be insensitive to or uncomprehending of the issues involved in foreign security cases. . . . " (quotation marks omitted)). Further, to the extent that the executive's concerns are relevant at all, courts possess ample means to address them without barring categorically a cause of action before such concerns are raised and presented in concrete form. The availability of proven doctrines and tools tailored to protecting sensitive executive information and judgments strongly militates against recognizing "national security" or "foreign relations" as freestanding and decisive special factors barring a

broad swath of claims, including the most egregious claims of law enforcement misconduct**.**

The district court properly rejected the argument that the specter of interference with foreign policy raised by the government counseled hesitation. Slip op. at 23, JA 100. ("[W]hen the constitutional rights of American citizens are at stake, courts have not hesitated to consider such issues on their merits even when the U.S. government is allegedly working with foreign governments to deprive citizens of those rights."). As the district court recognized, federal judges regularly adjudicate Fourth and Fifth Amendment claims brought by U.S. citizens for constitutional violations by U.S. officials in foreign territory, including in situations where those officials act in coordination with their foreign counterparts. *Id.* at 22-24, JA 99-101; *see also, e.g.*, *United States v. Abu Ali*, 528 F.3d at 226-30 (investigating the "working arrangement" and "improper collaboration" between Saudi and U.S. law enforcement to determine whether U.S. officials violated the defendant's constitutional rights during interrogations); *United States v. Yousef*, 327 F.3d 56, 145 (2d Cir. 2003) (for suppression purposes, courts must inquire into statements elicited in overseas interrogation by foreign police to determine whether U.S. agents actively participated in the questioning, or used the foreign police for the interrogation to circumvent

constitutional requirements); *Mount*, 757 F.2d at 1318 (for suppression purposes, courts must examine whether U.S. agents participated in the overseas search); *Toscanino*, 500 F.2d at 281 (requiring an evidentiary inquiry to determine whether the defendant was forcibly abducted by foreign officials at the behest of U.S. officials); *Karake*, 443 F. Supp. 2d at 14, 93 (conducting an evidentiary hearing and suppressing statements by defendants during a joint criminal investigation by federal and foreign agents); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 155 (D.D.C. 1976) (plaintiffs entitled to discovery of facts that would show that the German government wiretapped American citizens at the direction of the United States); Wadie E. Said, "Coercing Voluntariness," 85 *Ind. L.J.* 1, 11-12 (2010) (courts "routinely" apply the joint venture doctrine in terrorism and other criminal prosecutions to address constitutional challenges to conduct by U.S. law enforcement acting in conjunction with foreign agents in foreign territory).

In *Ramirez de Arellano*, this Circuit held that a U.S. citizen could bring suit against U.S. officials when those officials seized his property in Honduras in violation of the Fifth Amendment. 745 F.2d at 1542-43. In rejecting the government's claim that the court lacked competence to adjudicate the constitutional claims because the conduct occurred on foreign

territory, the court explained that "[t]eaming up with foreign agents cannot exculpate officials of the United States from liability to [U.S.] citizens for the United States officials' unlawful acts." *Id*. *Abu Ali v. Ashcroft* is similarly instructive. There, Judge Bates ruled that federal courts must allow a remedy to a U.S. citizen detained at the behest of U.S. law enforcement officials in foreign territory in violation of the U.S. Constitution. *Abu Ali v. Ashcroft*, 350 F. Supp. 2d at 30-31. Judge Bates explained that "there is simply no authority or precedent . . . for [the government's] suggestion that the executive's prerogative over foreign affairs can overwhelm to the point of extinction the basic constitutional rights of citizens of the [U.S.] to freedom from unlawful detention by the executive." *Id.* at 61-62. Although *Abu Ali* did not involve a criminal prosecution, Judge Bates looked to criminal cases in concluding that the court could capably address any evidentiary or foreign relations concerns that might arise. *Id.* at 62-63 (determining U.S. responsibility based on the involvement of U.S. officials is "precisely the inquiry that federal courts conduct in any criminal case where a defendant allege[s] that evidence the United States intended to use against him was obtained by foreign governments at the behest of the United States in violation of his constitutional rights"). Judge Bates, who formerly served as Chief Judge of the Foreign Intelligence Surveillance Court,

underscored that even in a suit challenging the ongoing detention of a suspect on foreign soil, federal courts can conduct the litigation with "the deference due to the executive in the management of foreign relations." *Id.* at 64.[15]

The government will, no doubt, protest that these were not *Bivens* actions. But that misses the point. Whether to allow a *Bivens* remedy is ultimately a subject of judgment. *Wilkie*, 551 U.S. at 550. The judiciary's demonstrated experience adjudicating Fourth and Fifth Amendment claims against law enforcement officials in similar situations underscores why that judgment should be exercised in favor of a remedy here.[16] In the face of this

[15] As Judge Bates observed, the risk of judicial interference with foreign relations is properly addressed under the "act of state" doctrine, which "'precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within it own territory.'" *Id.* at 57 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964)). The government cannot rely on that doctrine here because Mr. Meshal challenges only the unconstitutional conduct of U.S. officials and does not challenge the public acts of any foreign government or official. *See Ramirez de Arellano*, 745 F. 2d. at 1542; *Abu Ali*, 350 F. Supp. 2d at 60-61. The government instead seeks to circumvent the limits of the act of state doctrine to immunize the conduct of U.S. officials through the guise of "special factors."

[16] In other circumstances, where *Bivens* is extended to a new type of claim and new category of defendant, and where the judiciary lacks any such past experience adjudicating that type of claim, it might weigh against recognizing a *Bivens* remedy. *See Wilson*, 535 F.3d at 710-11 (applying *Wilkie* and exercising judgment against recognizing a *Bivens* remedy in a suit involving CIA operations and covert operatives).

longstanding practice, the government's special factors arguments ring hollow.[17]

Further, but importantly, courts have ample, time-tested tools at their disposal to address each and every concern the government raises. And it is through these tools, *not Bivens* "special factors," that such concerns are properly addressed.

Specifically, the state secrets privilege, not *Bivens* "special factors," is the doctrine by which a district court considers allegations that a deposition or particular piece of evidence might reveal information damaging to national security. *See United States v. Reynolds*, 345 U.S. 1 (1953). But that privilege must be asserted by the government, not by an individual litigant, and its invocation must be supported by an affidavit from the head of the relevant government department. *Id.* at 7-8. The government did not intervene to assert the privilege in this case, and no cabinet-level official has put his or her name and reputation behind an affidavit swearing that a

[17] Tellingly, the government has consistently and unequivocally described the ability of federal courts to manage terrorism cases, even though they may involve U.S. law enforcement activity in foreign territory. *See* U.S. Dep't of Justice, *Remarks of Attorney General Eric Holder at Northwestern University School of Law*, Mar. 5, 2012, *available at* http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law ("Those who claim that our federal courts are incapable of handling terrorism cases are not registering a dissenting opinion—they are simply wrong.").

particular sort of information was secret and that its disclosure would undermine national security.[18]

Another tool, the qualified immunity doctrine, is designed to avoid chilling law enforcement agents in the exercise of their legitimate functions by protecting from discovery all federal agents not plausibly alleged to have violated a clearly established constitutional right. *See Pearson v. Callahan*, 555 U.S. 223, 231–32 (2009) ("[W]e have made clear that the 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that 'insubstantial claims' against government officials [will] be resolved prior to discovery.'" (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, n.2 (1987)). As the Supreme Court has emphasized, qualified immunity provides sufficient protection even for high-level executive-branch officials and even in cases involving national security. *Mitchell*, 472 U.S. at 513–14; *see also id.* at 524 ("We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly

[18] Notably, the Attorney General recently enacted guidelines to ensure that "the state secrets privilege is invoked only when necessary and in the narrowest way possible." *See* Dep't of Justice, *Attorney General Establishes New State Secrets Policies and Procedures*, Sept. 23, 2009, *available at* http://www.justice.gov/opa/pr/attorney-general-establishes-new-state-secrets-policies-and-procedures. The guidelines state that the privilege may be invoked "only to the extent necessary to protect against the risk of significant harm to national security" and may not be invoked to conceal government wrongdoing or avoid embarrassment to government agencies or officials. *Id.*

established law."). By contrast, refusing to recognize any cause of action effectively provides law enforcement officials with absolute immunity, creating an impermissible end run around the Supreme Court's decision in *Mitchell*.

Courts possess a variety of other tools that enable them to adjudicate matters that may involve sensitive information, including protective orders and specialized discovery procedures. The Supreme Court has emphasized that such tools are effective even when courts are weighing constitutional claims against the "extraordinary needs of the CIA"; their availability here illustrates why a suit against law enforcement officers can be ably managed by the district court. *See Webster v. Doe*, 486 U.S. 592, 604 (1988) ("[T]he District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission."). This Court has itself developed extensive experience with protective orders arising from the Guantanamo Bay detainee litigation. *See, e.g.*, *Parhat v. Gates*, 532 F.3d 834, 851 (D.C. Cir. 2008). And it regularly protects secret information implicated in other civil suits as well. *See, e.g.*, *U.S. Info. Agency v. Krc*, 989 F.2d 1211, 1220 (D.C. Cir.

1993) (relying in part on secret information relating to national security and foreign affairs provided to the court under seal in the context of a Foreign Service discharge suit); *National Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 202 (D.C. Cir. 2001) (evaluating a claim involving classified information while avoiding disclosure of the classified information to the public and parties in a suit involving an order designating organizations as "foreign terrorist organizations").

There is, in short, no basis for foreclosing a U.S. citizen's *Bivens* action on the assumption that courts lack the tools or competence to address any national security or foreign relations concerns that might arise. The question of how to manage litigation that potentially implicates sensitive information is premature at this stage, where the only question is whether a cause of action exists, and not whether the action will ultimately be successful or how discovery should proceed. The district court erred by conflating concerns about the exposure of sensitive information with the question of whether to recognize a cause of action, thereby barring the courthouse doors to Mr. Meshal and to future American citizens seeking to remedy egregious conduct by federal law enforcement officials.

4. The Dangers of a "National Security" Exception to *Bivens*

If upheld, the district court's ruling would create an unprecedented

categorical exception to *Bivens* and establish exactly the type of absolute-immunity rule the Supreme Court has explicitly rejected in the context of national security. *See Mitchell*, 472 U.S. at 523; *see also Butz v. Economou*, 438 U.S. 478, 501 (1978) ("[T]he cause of action recognized in *Bivens* . . .would . . . be drained of meaning if federal officials were entitled to absolute immunity for their constitutional transgressions." (quotation marks omitted)). Moreover, unlike an exception for conduct by military contractors or servicemembers in a war zone, a "national security" or "foreign relations" exception to *Bivens* would have no discernable bounds. It could sweep in a broad range of law enforcement misconduct, depriving U.S. citizens of a remedy in any criminal investigation conducted outside the United States. *Cf.* The Federal Bureau of Investigation, *Quick Facts* (describing national security and protection against foreign intelligence operations as FBI priorities), *available at* http://www.fbi.gov/about-us/quick-facts (last visited Dec. 12, 2014). Such investigations by necessity involve foreign officials whose approval the FBI must obtain when operating in foreign territory, and thus, by necessity, will be subject to the same "special factors" arguments the government advances here.[19] Federal

[19] SAC ¶ 30, JA 25 (FBI officers "have no law enforcement authority in foreign countries" and, accordingly, must conduct criminal investigations "in accordance with local laws and policies and procedures established by

officials should not be able to immunize themselves from liability for constitutional violations by claiming that their investigations abroad are aimed at "national security" or involve "foreign relations" rather than "law enforcement."

Indeed, the U.S. government's indictment of Daniel Maldonado, the other U.S. citizen FBI agents were interrogating in Kenya at the same time they were interrogating Mr. Meshal, underscores that the FBI's "national security" investigations are often aimed at criminal prosecutions, including of U.S. citizens. *See* SAC ¶¶ 65-67, 120-21, JA 35-36, 50-51 The Supreme Court has never suggested that law enforcement investigations of certain types of crimes should be uniquely exempted from constitutional requirements, nor that the longstanding availability of a *Bivens* remedy turns

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the host countries." (quoting Officer of the Inspector General, U.S. Dep't of Justice, Audit Report 04-18, FBI Legal Attaché Program 8 (2004))). In that regard, FBI policies conform to longstanding international law norms of sovereignty and territorial integrity that prohibit law enforcement officers of one state from exercising their functions in the territory of another state without the territorial state's consent. *See Restatement (Third) of the Foreign Relations Law of the United States* § 432(2) (1987) ("A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state."). The U.S. has long adhered to this rule. *See FBI Authority to Seize Suspects Abroad*: Hearing Before the House Subcomm. on Civil & Const. Rights of the Comm. on the Judiciary, 101st Cong., 1st Sess. 31-33 (1989) (prepared statement of Abraham D. Sofaer, Legal Adviser, U.S. Dep't of State), *available at* http://babel.hathitrust.org/cgi/pt?id=pst.000017580472;view=1up;seq=3.

on the nature of the crime investigated or whether some or all of the investigation takes place abroad. Considered judgment counsels against such categorical exceptions, which would eviscerate the judiciary's ability to remedy the most egregious abuses of a U.S. citizen's rights by officials of his government. For this reason, as well as for the reasons described above, this lawsuit should be allowed to proceed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,762 words (as counted by Microsoft Word Version 14), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Jonathan Hafetz
Jonathan Hafetz

Dated: December 15, 2014

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing BRIEF FOR APPELLANTS and the JOINT APPENDIX in this appeal upon counsel for defendants-appellees via this Court's electronic filing system, this 15th day of December, 2014.

/s/ Jonathan Hafetz
Jonathan Hafetz

ADDENDUM

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trative settlements and from 20 to 25 percent for fees in cases after suit is filed and removed the requirement of agency or court allowance of the amount of attorneys fees.

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89–506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89–506, set out as a note under section 2672 of this title.

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(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.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

(June 25, 1948, ch. 646, 62 Stat. 984; Pub. L. 87–258, §1, Sept. 21, 1961, 75 Stat. 539; Pub. L. 89–506, §5(a), July 18, 1966, 80 Stat. 307; Pub. L. 100–694, §§5, 6, Nov. 18, 1988, 102 Stat. 4564.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §945 (Aug. 2, 1946, ch. 753, §423, 60 Stat. 846).

Changes were made in phraseology.

SENATE REVISION AMENDMENT

The catchline and text of this section were changed and the section was renumbered "2678" by Senate amendment. See 80th Congress Senate Report No. 1559.

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (d)(3), are set out in the Appendix to this title.

AMENDMENTS

1988—Subsec. (b). Pub. L. 100–694, §5, amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: "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, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim."

Subsec. (d). Pub. L. 100–694, §6, amended subsec. (d) generally. Prior to amendment, subsec. (d) read as follows: "Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court."

1966—Subsec. (b). Pub. L. 89–506 inserted reference to section 2672 of this title and substituted "remedy" for "remedy by suit".

1961—Pub. L. 87–258 designated existing provisions as subsec. (a) and added subsecs. (b) to (e).

EFFECTIVE DATE OF 1988 AMENDMENT

Section 8 of Pub. L. 100–694 provided that:

"(a) GENERAL RULE.—This Act and the amendments made by this Act [enacting section 831c–2 of Title 16, Conservation, amending this section and sections 2671 and 2674 of this title, and enacting provisions set out as notes under this section and section 2671 of this title] shall take effect on the date of the enactment of this Act [Nov. 18, 1988].

"(b) APPLICABILITY TO PROCEEDINGS.—The amendments made by this Act [amending this section and sections 2671 and 2674 of this title] shall apply to all claims, civil actions, and proceedings pending on, or filed on or after, the date of the enactment of this Act.

"(c) PENDING STATE PROCEEDINGS.—With respect to any civil action or proceeding pending in a State court to which the amendments made by this Act apply, and as to which the period for removal under section 2679(d) of title 28, United States Code (as amended by section 6 of this Act), has expired, the Attorney General shall have 60 days after the date of the enactment of this Act during which to seek removal under such section 2679(d).

"(d) CLAIMS ACCRUING BEFORE ENACTMENT.—With respect to any civil action or proceeding to which the amendments made by this Act apply in which the claim accrued before the date of the enactment of this Act, the period during which the claim shall be deemed to be timely presented under section 2679(d)(5) of title 28, United States Code (as amended by section 6 of this Act) shall be that period within which the claim could have been timely filed under applicable State law, but in no event shall such period exceed two years from the date of the enactment of this Act."

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89–506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89–506, set out as a note under section 2672 of this title.

EFFECTIVE DATE OF 1961 AMENDMENT

Section 2 of Pub. L. 87–258 provided that: "The amendments made by this Act [amending this section] shall be deemed to be in effect six months after the enactment hereof [Sept. 21, 1961] but any rights or liabilities then existing shall not be affected."

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law..[1]

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

[1] So in original.