No. _____

IN THE

Supreme Court of the United States

AMIR MESHAL,

Petitioner,

—v.—

CHRIS HIGGENBOTHAM, FBI SUPERVISING SPECIAL AGENT, IN HIS INDIVIDUAL CAPACITY, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Hina Shamsi
Dror Ladin
Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Jonathan Hafetz
Counsel of Record
169 Hicks Street
Brooklyn, NY 11201
(917) 355-6896
hafetzj@yahoo.com

Arthur B. Spitzer
AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL
4301 Connecticut Avenue, NW, Suite 434
Washington, D.C. 20008

QUESTION PRESENTED

Whether a U.S. citizen may bring a *Bivens* claim in the absence of any other remedy when federal law enforcement officers unlawfully detain and grossly mistreat him during a criminal counterterrorism investigation abroad.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Amir Meshal respectfully requests that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the court of appeals (App. 3a-67a) is reported at 804 F.3d 417. The district court opinion (App. 68a-100a) is reported at 47 F. Supp. 3d 115.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2016. On April 18, 2016, Chief Justice Roberts extended the time to file a petition for a writ of certiorari to June 1, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition involves the Fourth and Fifth Amendments to the U.S. Constitution. In relevant part, the Fourth Amendment provides that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation." In relevant part, the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

This case raises the important question whether a U.S. citizen has any judicial recourse for violations of his Fourth and Fifth Amendment rights by federal law enforcement agents during a criminal counterterrorism investigation abroad. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The lower court's decision, dismissing Petitioner's *Bivens* claims, is in tension with the decision of the U.S. Court of Appeals for the Second Circuit in *Turkmen v. Hasty*, 789 F.3d 218 (2d Cir. 2015), *reh'g en banc denied*, 807 F.3d 197 (2d Cir. 2015), *pet'ns for certiorari filed*, May 9, 2016 (Nos. 15-1358 and 15-1359) and May 6, 2016 (No. 15-1363). In that case, the Second Circuit held that "national security" considerations did not warrant dismissal of *Bivens* claims against federal officials for Fourth and Fifth Amendment violations committed during a counterterrorism investigation. *Id.* at 233-37.

1. Petitioner's Detention and Interrogation.

Petitioner Amir Meshal, an American citizen born and raised in New Jersey, traveled to Mogadishu, Somalia, in November 2006 to deepen his understanding of Islam. App. 5a. At the time, peace and security had come to Mogadishu after years of instability. App. 5a. When fighting unexpectedly erupted after his arrival, Mr. Meshal fled to Kenya with thousands of other civilians. App. 69a-70a.

Kenya had closed its border at that time, and upon reaching the country, Mr. Meshal was apprehended by Kenyan authorities. App. 5a. Soon

thereafter, Respondent FBI agents, who were in Kenya conducting criminal counterterrorism investigations, began to interrogate Mr. Meshal. Second Amended Complaint, *Meshal v. Higgenbotham*, 1:09-cv-02178-EGS, ¶¶ 29, 58 (D.D.C. 2009) (Dkt. No. 51) (D.D.C. 2009) ("Compl."). Over the next four months, FBI agents secretly detained Mr. Meshal in three countries without probable cause, denied him access to counsel and the courts, and coercively interrogated him, including by threatening him with disappearance and death. App. 6a-7a, 34a. The FBI agents' purpose was to force Mr. Meshal to confess to wrongdoing he had not committed and to associations he did not have, in order to obtain evidence to prosecute him for a crime in a U.S. court. App. 7a, 34a.

Following Mr. Meshal's initial apprehension in Kenya, Respondents began interrogating Mr. Meshal daily. App. 6a, 71a-72a. They forced Mr. Meshal to sign a standard waiver of rights form used in criminal investigations, telling him, falsely, that he was in a lawless country and had to sign the form if he wanted to go home. App. 14a-15a, 71a-72a. They threatened him with torture and disappearance if he did not admit to terrorist connections and made him fear for his life. App. 6a-7a, 71a-73a.

Respondents then orchestrated Mr. Meshal's rendition to Somalia and Ethiopia to prolong his detention and coercive interrogation. App. 7a, 73a-74a. Another U.S. citizen the FBI agents were interrogating in Kenya at the same time was promptly returned to the U.S. for prosecution after confessing to a crime. App. 15a, 72a. U.S. officials familiar with both cases stated that the FBI agents

continued to detain Mr. Meshal because he would not confess. Compl. ¶ 121.

In Ethiopia, Respondents secretly imprisoned Mr. Meshal for more than three months and interrogated him more than thirty times. App. 7a, 74a-75a; Compl. ¶¶ 3, 140-54. Respondents presented Mr. Meshal with the same standard waiver of rights form and coerced him into signing it. Compl. ¶ 149. Mr. Meshal remained under Respondents' control throughout his detention. App. 6a; Compl. ¶¶ 69-70, 52, 87, 96, 148-49, 156, 170D.

On or around May 24, 2007, Mr. Meshal was returned to the United States and released. App. 7a, 75a. He was never charged with any offense. App. 7a.

2. Proceedings Below

Mr. Meshal commenced this action in 2009, asserting jurisdiction under 28 U.S.C. § 1331. In 2014, the district court granted Respondents' motion to dismiss. App. 8a, 100a. The district court was "outraged" by Mr. Meshal's "appalling" and "embarrassing" allegations of mistreatment by U.S. officials, App. 100a, and found that Mr. Meshal stated plausible claims for relief under the Fourth and Fifth Amendments, App. 77a. It nevertheless said that binding circuit precedent precluded his *Bivens* claims. App. 81a.

A divided panel of the D.C. Circuit affirmed. In the majority's view, Petitioner's action extended *Bivens* to a new context, which it defined as a terrorism investigation conducted overseas by federal law enforcement agents. App. 5a, 17a. The majority acknowledged that its ruling left Mr. Meshal with no

alternative remedy for the Fourth and Fifth Amendment violations he suffered. App. 19a. But it identified two special factors counseling hesitation: national security and conduct occurring outside the borders of the United States. App. 5a, 21a.[1] The majority cited cases involving "the military, national security, or intelligence" in which other lower courts had denied a *Bivens* remedy, App. 20a, to support its conclusion that courts are reluctant to intervene in matters touching on national security and foreign policy, absent congressional authorization. App. 20a-22a. In addition, the majority expressed concern that "the spectre of litigation and the potential discovery of sensitive information" about the degree to which Respondents orchestrated Petitioner's detention in foreign countries could undermine the willingness of foreign governments to cooperate with the United States. App. 23a. Without deciding whether either national security or conduct abroad alone would preclude a *Bivens* remedy, the majority said both factors together did. App. 20a. The majority expressed sympathy for Petitioner's plight, but left it to Congress or this Court to determine the scope of any judicial remedy for individuals, like Mr. Meshal, who are subjected to constitutional violations committed by U.S. law enforcement officers during a terrorism investigation abroad. App. 27a.

Judge Kavanaugh concurred. App. 28a-33a. He stated that since *Bivens*, this Court has been reluctant to extend the implied *Bivens* action to new contexts, and that because Congress had not created

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[1] The majority alternatively described this second factor as foreign policy. App. 5a, 20a-21a.

a cause of action for Petitioner's alleged constitutional violations, the suit should be dismissed. App. 29a. Judge Kavanaugh further concluded that federal courts should not recognize a *Bivens* remedy for any conduct by U.S. officials abroad. App. 31a-32a. Judge Kavanaugh said that a *Bivens* remedy was also improper in this case because it involved a national security investigation. App. 31a. He noted that "[i]f [he] were a member of Congress, [he] might vote to enact a new tort cause of action to cover a case like Meshal's," but that "as judges we do not get to make that decision." App. 33a.

Judge Pillard dissented. App. 34a-67a. First, she said that "congressional action supports a constitutional damages claim where, as here, it would not intrude on the unique disciplinary structure of the military and where there is no comprehensive regulation or alternative remedy in place." App. 35a. Second, she maintained that FBI agents' "mere recitation of foreign policy and national security interests does not foreclose a constitutional damages remedy" when those agents "arbitrarily detain a United States citizen overseas and threaten him with disappearance and death during months of detention without charges." App. 35a. Judicial scrutiny, Judge Pillard emphasized, is especially important under this Court's precedents when government agents broadly assert that constitutional rights "must yield to national security and foreign policy imperatives." App. 36a. Because of the "fundamental character of our separation of powers," she maintained, courts "have demanded that governmental assertions of national security interest be authoritative and specific." App. 37a. And indeed,

Judge Pillard observed, federal courts "frequently decide cases raising national security issues and are well equipped to handle them." App. 64a. It would therefore contravene this Court's decisions, she concluded, to deny a U.S. citizen any remedy for egregious violations of his Fourth and Fifth Amendment rights by federal agents where, as here, the purported national security and foreign policy considerations asserted by those agents remain "entirely unsupported," "conjectural," and without "authoritative explanation." App. 63a-64a.

A petition for rehearing en banc was denied on February 2, 2016.

REASONS TO GRANT THE PETITION

In a divided opinion, the D.C. Circuit held that an American citizen has no cause of action under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against the individual law enforcement agents directly responsible for his prolonged extrajudicial detention and abusive interrogation because the misconduct occurred abroad and because the agents assert broadly and without substantiation that litigation would harm national security and foreign policy.

The ruling below is in tension with the Second Circuit's decision in *Turkmen v. Hasty*, 789 F.3d 218 (2d. Cir. 2015), *reh'g en banc denied*, 808 F.3d 197 (2d Cir. 2015), *pet'ns for certiorari filed*, May 9, 2016 (Nos. 15-1358 and 15-1359), and May 6, 2016 (No. 15-1363). In *Turkmen*, the Second Circuit held that national security did not warrant dismissal of a *Bivens* suit for the abusive treatment of noncitizen Arab and Muslim detainees by federal officials. *Id.* at

234-37. Not even actions taken by federal officials in the immediate aftermath of the 9/11 attacks, the Second Circuit held, altered the traditional availability of *Bivens* to remedy core Fourth and Fifth Amendment violations. *Id.*

The ruling below additionally presents a question of exceptional importance warranting review by this Court. The ruling does not merely deny Petitioner any remedy for what the court below acknowledged are "troubling" allegations of misconduct by federal agents. App. 4a. It also provides absolute immunity from suit even to the lowest level federal law enforcement agents whenever they invoke—broadly and without authoritative explanation—"national security" and "foreign affairs" to excuse their violation of a U.S. citizen's constitutional rights while abroad.

Certiorari should be granted: (1) to resolve the question in the lower courts over whether a federal agent's assertion of national security considerations justifies dismissal of a *Bivens* actions for Fourth and Fifth Amendment violations; (2) because the complete and categorical denial of a remedy to U.S. citizens for unconstitutional conduct by federal agents abroad raises a question of exceptional importance; and (3) because the lower court's ruling departs from this Court's precedents in fundamental respects.

Petitioner respectfully submits that this case presents a better vehicle than *Turkmen* to resolve the question whether national security is a special factor that supports dismissal of a *Bivens* action. First, like *Bivens*, but unlike *Turkmen*, this case involves a U.S. citizen and, therefore, resolution of this question will

not be colored by any considerations surrounding the claims of deportable noncitizens to the protections of the federal courts. Second, also like *Bivens*, but unlike *Turkmen*, this case involves Fourth and Fifth Amendment violations committed during a criminal investigation. And third, again like *Bivens*, but unlike *Turkmen*, this case exclusively seeks a remedy against the individual federal agents who committed the alleged constitutional violations, and not against senior executive or supervisory officials in connection with policy decisions.

If this Court grants certiorari in *Turkmen*, it should grant certiorari in this case as well so that any decision on the scope of *Bivens* can be informed by the different legal and factual scenarios presented in the two records. At the very least, Petitioner respectfully requests, in the alternative, that the Court hold this case pending the disposition of *Turkmen*.

I. THE CIRCUITS ARE DIVIDED ABOUT WHETHER AND HOW NATIONAL SECURITY CONSIDERATIONS AFFECT THE AVAILABILITY OF *BIVENS*.

In *Bivens*, this Court held that a U.S. citizen may seek damages for Fourth Amendment violations committed by law enforcement agents during a criminal investigation. *Bivens*, 403 U.S. at 398. This Court subsequently extended *Bivens* to Fifth Amendment Due Process Clause violations, *Davis v. Passman*, 442 U.S. 228 (1979), and Eighth Amendment violations, *Carlson v. Green*, 446 U.S. 14 (1980).

In line with this Court's precedents, the Second Circuit in *Turkmen* ruled that noncitizen Arab and Muslim men detained in the immediate aftermath of the 9/11 attacks could maintain a *Bivens* action against federal officials for their abusive treatment and conditions while in custody. 789 F.3d at 264-65. The court rejected the contention—pressed vigorously by the dissent, *id.* at 278-80 (Raggi, J. dissenting)—that there should be no *Bivens* action because defendants acted in response to the threat of terrorism. *Id.* at 233-35. "Without doubt," the court stated, "9/11 presented unrivaled challenges and severe exigencies—but that does not change the 'context' of Plaintiffs' claims." *Id.* at 234.

The Second Circuit held that the right not to be subjected to abusive treatment by federal officials in violation of the Fifth Amendment "stands firmly within a familiar *Bivens* context." *Id.* at 235. It further held that plaintiffs' Fourth Amendment claims for unreasonable and punitive searches likewise fell squarely within a familiar *Bivens* context. *Id.* at 236-37 ("[T]he Fourth Amendment is at the core of the *Bivens* jurisprudence."). The Second Circuit thus concluded that even where "national security concerns motivated the Defendants to take action," the *Bivens* remedy must remain available to those who "felt the brunt" of that action. *Id.* at 264.

The D.C. Circuit majority reached a significantly different conclusion, relying in large part on national security considerations in dismissing Petitioner's *Bivens* suit for Fourth and Fifth Amendment violations committed by federal law enforcement agents during a criminal

counterterrorism investigation. App. 11a-12a. While the majority below also relied on the fact that the constitutional violations occurred abroad, App. 17a-18a, national security considerations were essential to its ruling. App. 20a.

The Solicitor General recognizes this division, stating in his petition for certiorari in *Turkmen* that the Second Circuit's ruling is "at odds" with the D.C. Circuit's ruling in *Meshal*. *Ashcroft v. Turkmen*, No. 15-1359, Petition for a Writ of Certiorari 19-20 (filed May 9, 2016) (quoting judges dissenting from denial of rehearing en banc) ("*Ashcroft* Cert. Pet'n"); *see also Hasty v. Turkmen*, No. 15-1363, Petition for a Writ of Certiorari 22 (filed May 6, 2016) (stating that the Second Circuit's ruling in *Turkmen* "conflicts" with the D.C. Circuit's ruling in *Meshal*).

The Solicitor General seeks, however, to describe *Turkmen* as an "outlier," *Ashcroft* Cert. Pet'n 13, citing decisions from the Fourth, Seventh, and D.C. circuits dismissing *Bivens* suits against federal officials based, purportedly, on national security considerations, *id.* at 13, 18-20. But those other circuit decisions present the distinct question of *Bivens*' application to suits against military officials by military contractors and/or for alleged actions taken pursuant to wartime authority that directly concern the conduct of war. *See Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc) (military detention of a military contractor in an active war zone); *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012) (same); *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012) (military detention of a presidentially designated enemy combatant pursuant to the law of war); *see infra* at 25-26 (discussing *Vance*, *Doe*, and

Lebron). Those decisions do not present the distinct, and exceptionally important, question that divides the Second and D.C. Circuits: whether national security considerations—separate from wartime action by the military—support dismissing *Bivens* suits against federal law enforcement officials for abuses committed during a federal investigation. On that question, the Second Circuit's decision in *Turkmen* is not an "outlier," but rather is in conflict with the D.C. Circuit's decision in *Meshal*.[2]

The ruling below, moreover, highlights a broader confusion among lower courts about the role of national security considerations in *Bivens* cases. This confusion not only risks the total denial of a remedy for U.S. citizens whose Fourth and Fifth Amendment rights are violated by their own government's officials, but also produces arbitrary and inconsistent results. In some instances, lower courts have expressly rejected national security as a basis for dismissing *Bivens* suits. *Turkmen*, 789 F.3d at 264-65. In others, lower courts have permitted *Bivens* claims arising from counterterrorism investigations to proceed without addressing whether

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[2] The other category of decisions the Solicitor General relies on in describing *Turkmen* as an outlier is immigration *Bivens* cases. *Ashcroft* Cert. Pet'n 18-19 (arguing that immigration, like national security, is an area "independently recognized as one[ ] into which courts should generally be reluctant to intrude on their own initiative"). The presence in *Turkmen* of that additional consideration further underscores the exceptional importance of the question presented here: whether a federal law enforcement agent's invocation of national security can extinguish a *citizen*'s right to recover for constitutional violations.

national security bars such litigation. *Al-Kidd v. Gonzales*, No. 1:05-cv-093, 2012 WL 4470776 (D. Idaho, Sept. 12, 2012) (awarding summary judgment to plaintiff against several individual defendants for violating plaintiff's Fourth Amendment rights based on his unlawful arrest in a counterterrorism investigation).[3] And in still other cases, such as this one, a federal official's mere assertion of national security considerations, without authoritative explanation, has been deemed sufficient to preclude all possibility of further litigation. Indeed, courts within the *same circuit* remain confused over the status of national security as a bar to *Bivens* relief. *Compare Turkmen*, 789 F.3d at 264-65 (federal officials' assertion of national security considerations does not preclude *Bivens* relief), *with Arar v. Ashcroft* 585 F.3d 559 (2d Cir. 2009) (en banc) (federal

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[3] In *Al-Kidd v. Ashcroft*, 563 U.S. 731, 131 S. Ct. 2074 (2011), this Court had previously ordered the dismissal of the plaintiff's Fourth Amendment claims against former Attorney General John Ashcroft based on his alleged creation of a policy of pretextually detaining material witnesses. The Court, however, rejected plaintiff's claims on the merits, finding that Ashcroft's alleged conduct did not violate the Fourth Amendment, *id.* at 2080-83, and for the additional reason that Ashcroft was entitled to qualified immunity, *id.* at 2085. It never suggested that *Bivens* relief was categorically unavailable to an American citizen based on the potential presence of national security considerations in a Fourth Amendment suit arising from a counterterrorism investigation. The Court, moreover, never questioned the plaintiff's right to seek *Bivens* relief against the individual officers directly responsible for the asserted constitutional violations, which the plaintiff subsequently did. *See* Richard A. Serrano, "Muslim American caught up in post-9/11 sweep gets an apology," *L.A. Times*, Feb. 15, 2015, (describing al-Kidd's *Bivens* suit against individual FBI agents).

officials' assertion of national security considerations supports barring *Bivens* relief for their alleged complicity in torture and other abusive treatment). Such widely divergent results on whether a federal agent's assertion of national security considerations precludes a *Bivens* remedy for constitutional violations—a proposition this Court has implicitly rejected, *see infra* at 24-25——underscores the continuing uncertainty among lower courts. Certiorari is warranted to resolve that uncertainty and to clarify whether individuals may seek a remedy for gross constitutional misconduct by federal law enforcement officials.

II. WHETHER *BIVENS* SHOULD BE CONSTRUED TO LEAVE A U.S. CITIZEN SUBJECTED TO GROSS MISCONDUCT BY FEDERAL LAW ENFORCEMENT AGENTS WITHOUT ANY REMEDY IS A QUESTION OF EXCEPTIONAL IMPORTANCE.

More than four decades ago, *Bivens* established a right to sue directly under the Constitution for Fourth Amendment violations committed by federal law enforcement officers. *Bivens*, 403 U.S. at 396-97. The decision below eliminates that core protection for citizens who are abused by law enforcement agents purportedly investigating a national security matter abroad. Because Petitioner was never criminally prosecuted, the unconstitutional actions of the agents in this case will never be subject to *any* judicial review if a *Bivens* claim is foreclosed under the reasoning adopted by the D.C. Circuit. By erecting a categorical bar to *Bivens*, the decision below effectively creates exactly

the type of absolute-immunity rule this Court has rejected. *See Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985) (refusing absolute immunity to the U.S. attorney general even where his constitutional misconduct occurred in the performance of his national security functions); *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)).

The creation of a broad new *Bivens* exception has significant ramifications for Americans who live, work, or travel abroad. National security and protection against foreign intelligence operations are FBI priorities. *Cf.* The Federal Bureau of Investigation, *Quick Facts*, *available at* http://www.fbi.gov/about-us/quick-facts (last visited May 25, 2016). All such investigations conducted in foreign countries involve some degree of collaboration with foreign officials and thus, under the D.C. Circuit's reasoning, would be subject to the same sweeping and indiscriminate "special factors" arguments the lower court relied on here.[4]

As Judge Pillard cautioned, "national security is a malleable concept" and lacks any limiting principle. App. 59a. "'Despite its appearance

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[4] Compl. ¶ 30 (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 the host countries." (quoting Office of the Inspector General, U.S. Dep't of Justice, Audit Report 04-18, FBI Legal Attaché Program 8 (2004))).

throughout history,'" she explained, "national security" is "'rarely defined, and when Congress and the executive branch define it, they do so broadly.'" App. 59a (quoting Laura K. Donohue, "The Limits of National Security," 48 Am. Crim. L. Rev. 1573, 1579-84 (2011)). This Court has recognized that the term is inherently nebulous and can endanger important constitutional protections. *See Mitchell*, 472 U.S. at 523 ("the label of 'national security' may cover a multitude of sins" and therefore requires restraints—including the threat of liability for federal officials); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (holding that the government had failed to show that the publication of the Pentagon Papers would irreparably harm U.S. national security).

The majority's ruling threatens to immunize a wide range of law enforcement misconduct. The ruling prohibits American citizens abroad from pursuing any remedy for Fourth and Fifth Amendment violations by rogue federal agents based on the unsupported and conjectural claims about a suit's impact by the same agents who committed the violations. This logic would extend even to the most egregious law enforcement misconduct, including murder, because impunity would extend to every act committed by federal law enforcement agents against U.S. citizens abroad so long as the agents assert that it occurred in the context of a national security investigation.

The ruling does more than create a legal black hole for gross misconduct by federal officials. It flouts the elemental principle of our constitutional system: that "[t]he very essence of civil liberty" consists in the

right of citizens to "claim the protection of the laws" and that "[o]ne of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Certiorari is warranted to address the exceptionally important question of whether an American citizen may be denied all remedies merely because the individual federal agents who violated his constitutional rights acted outside the United States and assert that the abuses they perpetrated were in the name of national security.

III. THE RULING BELOW FUNDAMENTALLY MISUNDERSTANDS THIS COURT'S *BIVENS* JURISPRUDENCE.

The ruling below departs from this Court's precedents in the following significant respects: (1) by concluding that this case—a suit by a private U.S. citizen against individual federal law enforcement agents for Fourth and Fifth Amendment violations—extends *Bivens* to a new context; (2) by leaving Petitioner with no remedy for these constitutional violations, contrary to Congress's repeated determination that such a remedy should be available; (3) by concluding that national security and extraterritoriality constitute special factors that categorically warrant dismissal of a U.S. citizen's *Bivens* suit; and (4) by dismissing the suit based on the unsupported and conjectural assertions of the very federal agents accused of violating a citizen's constitutional rights. Certiorari is warranted to correct these serious errors.

A. This Case Does Not Extend *Bivens* To A New Context.

The lower court's conclusion that this case extends *Bivens* to a new context fundamentally misunderstands this Court's settled understanding of that term. This case tracks *Bivens* in its essential respects. It involves the same category of plaintiff (private U.S. citizen), defendant (individual law enforcement agents) and claim (constitutional violations committed to obtain evidence of a crime). This suit, moreover, does not broadly challenge executive-branch policy or target high-level officials remote from the infliction of the constitutional violations, but exclusively identifies the individual agents who directly carried out those violations. *See Turkmen*, 789 F.3d at 265 (Raggi, J., dissenting) ("claims challeng[ing] . . . errant conduct by a rogue official" are "the typical *Bivens* scenario"). Further, as in *Bivens*, foreclosing suit in this case would leave an innocent American citizen without a remedy. "[N]o less today than when the Supreme Court decided *Bivens*, 'the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment.'" App. 36a (Pillard, J., dissenting) (quoting *Bivens*, 403 U.S. at 407 (Harlan, J., concurring)).

The majority below nonetheless held that "a terrorism investigation conducted overseas by federal law enforcement officers" is a new context. App. 17a. But, as this Court's jurisprudence makes clear, the context for *Bivens* purposes turns on the category of the plaintiff, the defendant, and the claim, not the label given to the investigation or the location of the

constitutional violation. *See*, *e.g.*, *United States v. Stanley*, 483 U.S. 669 (1987) (context defined as suit by military servicemember against military officials); *Chappell v. Wallace*, 462 U.S. 296 (1983) (same); *Bush v. Lucas*, 462 U.S. 367 (1983) (new context was claim over demotion in violation of the First Amendment); *FDIC v. Meyer*, 510 U.S. 471 (1994) (new context was suit against federal agency, rather than individual defendant); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (new context was due process claim against Social Security Administration over disability benefits); *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) (new context was suit against private prison corporation, rather than federal employee).

In its most recent discussion of *Bivens*, *Minneci v. Pollard*, 132 S. Ct. 617 (2012), the Court affirmed *Bivens*' central purpose: to remedy unconstitutional conduct by federal agents. In refusing to extend *Bivens* to a prisoner's suit against private prison employees, the Court emphasized that defendants' employment status made the "critical difference." *Id.* at 623. The plaintiff in *Minneci*, moreover, had an "adequate alternative damages action[ ]" under state law that could serve *Bivens*' twin purposes of providing "significant deterrence and compensation." *Id.* at 620. Only two Justices endorsed the view of "new context" the D.C. Circuit majority adopted here, which would limit *Bivens* "to the precise circumstances [it] involved." *Id.* at 626 (Scalia, J., joined by Thomas, J., concurring).

Torture and prolonged detention by FBI agents seeking to coerce a criminal confession falls within *Bivens*' heartland whether the misconduct

occurs in Kansas or Kenya. The lower court's conclusion that this case presents a new context raises a question of exceptional importance, conflicts with this Court's precedents, and was wrongly decided.

B. The Ruling Below Leaves Petitioner With No Alternative Remedy And Contradicts Congressional Action.

In previous cases where this Court held *Bivens* is unavailable, the plaintiff had an alternative remedy either under state tort law, *see Minneci*, 132 S. Ct. at 623, 626 (state tort remedy for Eighth Amendment claims against private prison employees); *Wilkie v. Robbins*, 551 U.S. 537, 551 (2007) (state tort remedy for unconstitutional interference with property rights); *Malesko*, 534 U.S. at 73-74 (state tort remedy for Eighth Amendment claims against private prison corporation), or under an alternative remedial scheme created by Congress, *see Schweiker*, 487 U.S. at 424-27 (Social Security Act); *Bush*, 462 U.S. at 380-81, 388 (comprehensive federal civil service regulation).[5] The opinion below

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[5] The sole exception is suits by military servicemembers against the military, which are uniquely subject to a separate and comprehensive internal system of justice established by Congress pursuant to its plenary authority over the military. *See Stanley*, 483 U.S. at 683-84 (suits by military servicemembers against military officials for injuries arising out of or in the course of activity incident to military service); *Chappell*, 462 U.S. at 304 (suits by military servicemembers against their superior officers). This Court's twin military *Bivens* rulings rested specifically on the "special status of the military," *Chappell*, 462 U.S. at 303-04, with its independent system of justice for military personnel established by Congress pursuant to explicit congressional authorization and its "unique

recognized that Mr. Meshal has no alternative remedy. App. 19a. But it nevertheless foreclosed a remedy despite the long history of congressional approval of *Bivens* suits by U.S. citizens for constitutional violations by individual federal agents. The ruling below both misconstrues relevant congressional action and effectively turns *Bivens* on its head by making *Bivens* suits dependent on Congress's creation of a cause of action.

Congress has deliberately and repeatedly preserved *Bivens* for constitutional violations by federal agents against U.S. citizens. In 1974, when Congress amended the Federal Tort Claims Act (FTCA), it deliberately preserved *Bivens* suits by rejecting proposed legislation that would have substituted the government for individual officers in suits alleging violations of the U.S. Constitution. *See Carlson*, 446 U.S. at 19-20 & n.5 (finding it "crystal clear" that Congress intended to maintain *Bivens* actions against individual officials for constitutional violations). In 1988, Congress went one step further and expressly preserved the right of individuals to sue federal officers for "a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A) (preserving *Bivens* in enacting the Westfall Act to preempt non-federal remedies against federal employees acting within the scope of their employment).

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disciplinary structure," *Stanley*, 483 U.S. at 681-84; *Chappell*, 462 U.S. at 303-04. Those *Bivens* suits are entirely distinct from one, such as this, by a private citizen against FBI agents for constitutional violations inflicted during a criminal investigation.

Each time, moreover, Congress deliberately rejected Justice Department proposals to eliminate *Bivens*. *See* James F. Pfander & David Baltmanis, "Rethinking *Bivens*: Legitimacy and Constitutional Adjudication," 98 Geo. L.J. 117, 132-35 & n.100 (2009). Instead, "[b]y accepting *Bivens* and making it the exclusive mode for vindicating constitutional rights, Congress . . . joined the Court in recognizing the importance of the *Bivens* remedy in our scheme of government accountability law." *Id.* at 136.

The majority below speculated that Congress may merely have "acquiesc[ed]" to *Bivens*, believing it was constitutionally compelled. App. 25a-26a. That speculation is unfounded. As Judge Pillard noted, this Court "had already repeatedly reiterated its own understanding that the judicially recognized remedy could be displaced by a congressional substitute." App. 44a (citing *Bush*, 462 U.S. at 378-79; *Carlson*, 446 U.S. at 18-20; *Davis*, 442 U.S. at 245-47; *Bivens*, 403 U.S. at 397). "In the face of that invitation to legislate," and "[d]espite addressing many other related types of claims, Congress has enacted no alternative that would displace a claim like Meshal's." App. 43a-44a.[6] The majority's suggestion that Congress should have "place[d]

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[6] Congress again signaled its approval of *Bivens* claims like Mr. Meshal's when it enacted a limited, good-faith immunity provision protecting U.S. agents from damages liability in suits brought by noncitizen detainees in the Detainee Treatment Act of 2005. *See* 42 U.S.C. § 2000dd-1(a). Congress's enactment of this limited immunity provision applicable only to noncitizens demonstrates its continued understanding that U.S. agents would face liability in U.S. courts when they mistreat U.S. citizens. App. 47a-48a n.2 (Pillard, J., dissenting).

Bivens causes of action in a separate statutory provision," App. 26a n.9, directly contradicts *Bivens* itself, which held 28 U.S.C. § 1331 "sufficient to empower a federal court to grant a traditional remedy at law" for constitutional violations. *Bivens*, 403 U.S. at 405 (Harlan, J., concurring).

The decision below, moreover, produces "an inexplicable result: civil remedies are available to most victims of torture *except* a United States citizen tortured by United States agents abroad." App. 50a (Pillard, J., dissenting) (emphasis in original) (noting that remedies are available to U.S. citizens tortured by U.S. officials inside the United States, to U.S. citizens tortured by foreign officials outside the United States, and to foreign citizens tortured inside and outside the U.S.). Congress "does not . . . hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2008). It did not "selectively den[y] to Americans abused abroad by United States agents the remedies it has extended to all others," but rather understood that U.S. citizens already had a remedy under *Bivens*. App. 50a-51a.

In fact, as Judge Pillard notes, the executive branch publicly insists that all victims of arbitrary detention and torture, both of which Mr. Meshal alleges, have a remedy under U.S. law. App. 48a-50a. The executive branch makes these assurances to demonstrate U.S. compliance with its obligations under the Convention against Torture and the International Covenant on Civil and Political Rights, both of which require the United States to provide remedies, including compensation. App. 48a-50a. And the remedy the executive branch cites is *Bivens* litigation in federal court. App. 48a-50a.

Denying a U.S. citizen any remedy for unlawful detention and gross mistreatment by individual federal agents, particularly when Congress has repeatedly indicated such a remedy continues to be available, contradicts this Court's settled jurisprudence and warrants review.

C. National Security And Extraterritoriality Do Not Constitute Special Factors That Preclude A *Bivens* Remedy For U.S. Citizens.

Assuming this case presents a new context under *Bivens*, a court must then consider whether "special factors counsel [ ] hesitation." *Wilkie*, 551 U.S. at 550. The D.C. Circuit majority held that the "special factors" test is met by the mere invocation of "national security" and "foreign affairs" by a law enforcement agent whose conduct abroad has been challenged as unconstitutional. This Court's cases do not support that conclusion.

1. This Court has never recognized national security as a special factor. To the contrary, it has stressed that the rationale for *Bivens* applies *more* forcefully in cases implicating national security because of "the danger . . . that . . . federal officials will disregard constitutional rights in their zeal" to protect the country. *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985). In *Mitchell*, this Court accordingly rejected the argument that national security necessitated dismissal of a *Bivens* suit against the U.S. 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." *Id.* at 524 (emphasis in original;

quotations marks omitted); *see also id.* at 520 (refusing to grant absolute immunity to the Attorney General in *Bivens* suits "arising out of his allegedly unconstitutional conduct in performing his national security functions"). *Bivens*, the Court explained, must therefore be available in cases implicating national security for the same reason it is available in law enforcement cases generally: 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." *Id.* at 523 n.7; *see also Turkmen*, 789 F.3d at 264 ("It might well be that national security concerns motivated the Defendants to take action, but that is of little solace to those who felt the brunt of that decision."). In either case, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

The majority below relied principally on two distinct categories of lower court cases: suits against the military for wartime activity and suits by foreign nationals. Neither supports a freestanding "national security" special factor in Bivens suits by American citizens

The military *Bivens* cases do not support broadly treating national security as a *Bivens* special factor for abuses by federal law enforcement agents during a criminal investigation. Two of those cases, *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012), and *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc), were actions by U.S. military contractors—the functional equivalent of U.S. servicemembers—against military superiors. *Doe*, 683 F.3d at 391-92, 394 (contractors are the functional equivalent of U.S.

servicemembers and are thus subject to the exclusive system of military justice and discipline); *Vance*, 701 F.3d at 199 (plaintiffs "were security contractors in a war zone, performing much the same role as soldiers"). For that reason alone, those cases fall within this Court's established—but carefully bounded—exception to *Bivens* for actions impacting internal military affairs. *See Chappell*, 462 U.S. 304 (recognizing the "unique disciplinary structure of the military establishment" as a special factor); *Stanley*, 483 U.S. at 683 (applying *Chappell* to servicemembers outside situations where an officer-subordinate relationship exists, but where a *Bivens* suit could affect internal military discipline).

Additionally, *Doe* and *Vance* involved claims against military officers, up to and including the Secretary of Defense, that challenged military decisions in a war zone and that implicated the military command structure. *Doe*, 683 F.3d at 395-96; *Vance*, 701 F.3d at 199, 202. The third military *Bivens* case relied on by the majority below, *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012), involved the military detention of a presidentially designated enemy combatant during wartime pursuant to congressionally approved wartime legal authority. *Id.* at 544-45, 549. These cases, even if correctly decided, do not support the majority's blanket treatment of national security as a *Bivens* special factor, including *Bivens* suits by private U.S. citizens against individual federal law enforcement agents investigating alleged criminal activity.[7]

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[7] Judge Kavanaugh noted that "[t]he U.S. was conducting an investigation to determine *whether* Meshal was an enemy

The reliance by the majority below on cases involving *Bivens* suits by foreign nationals, App. 11a-13a, is equally misplaced. This Court has repeatedly recognized the unique and powerful claim that U.S. citizens have on the courts of this country for their protection. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) ("[A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963) ("Citizenship is a most precious right."); *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950) ("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.").

The majority's ruling eviscerates the important distinction between citizens and foreign nationals regarding the activity of U.S. agents abroad that runs through this Court's jurisprudence. Further, it ignores that the finding of "special factors" in those decisions rested on the concern—inapplicable here—that foreign nationals could use U.S. courts to obstruct U.S. foreign policy. *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. 2011); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985); *Arar v. Ashcroft*, 585 F.3d 559, 575-76 (2d Cir.

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combatant." App. 32a (emphasis in original). But the adoption by the majority below of an unbounded national security-extraterritoriality exception to *Bivens* denies citizens a remedy even where, as here, federal officials do not rely on executive war powers and act outside a war zone. The majority's preclusion of *Bivens* suits would thus apply equally to U.S. citizens in Spain and Syria.

2009) (en banc) (citing *Sanchez-Espinoza*). Thus, the cases cited by the majority not only fail to support its preclusion of *Bivens* suits by American citizens, but also contravene this Court's historic protection of citizens abroad from abuses by officials of their own government.

The court below additionally relied on *Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008), for its sweeping treatment of national security as a *Bivens* special factor. But *Wilson* concerned a distinct and narrow question: whether a former CIA employee could sue over the disclosure of her covert status. *Id.* at 701-03. There, Congress had legislated a comprehensive remedial scheme that intentionally excluded a remedy for that specific claim. *Id.* at 706-07. *Wilson*'s statement that "the litigation . . . would inevitably require judicial intrusion into matters of national security and sensitive intelligence information" was rooted in the unique concerns surrounding "CIA operations and covert operatives." *Id.* at 710; *cf. Tenet v. Doe*, 544 U.S. 1 (2005) (barring suits to enforce espionage contracts). *Wilson* did not purport to immunize all federal agents who invoke national security to excuse abusing suspects in their custody. Even in *Wilson*, moreover, there was an alternative remedy under the Privacy Act. *Wilson*, 535 F.3d at 709. Mr. Meshal has none.

2. The majority's other special factor—extraterritoriality—fares no better. It conflicts with the long established principle that American citizens remain under the Constitution's protections when they leave the country and can rely on federal courts to enforce those protections. *See, e.g.*, *Reid v. Covert*, 354 U.S. 1, 6 (1957) (plurality opinion) (the

provisions of the Bill of Rights designed "to protect [the] life and liberty" of a citizen "should not be stripped away just because he happens to be in another land"); *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974) ("That the Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens is well settled."). As this Court explained, "[t]his is not a novel concept," but one "as old as government." *Reid*, 354 U.S. at 6.

U.S. officials, moreover, cannot evade those protections merely by acting in coordination with foreign governments. In *Munaf v. Geren*, 553 U.S. 674 (2008), this Court unanimously held that federal courts could examine the lawfulness of a U.S. citizen's detention by U.S. forces even where those forces were acting as part of a multi-national coalition abroad. *Id.* at 686-88. While the Court denied relief on the petitioners' claims regarding their *future* treatment by *foreign authorities* following their extradition, it reaffirmed that U.S. citizens may seek the protection of federal courts to challenge their unlawful detention and mistreatment *by U.S. officials*. *Id.* at 697-700. And in the Guantanamo Bay habeas cases, where many of the detainees were captured by foreign governments and handed over to the United States, federal courts routinely review the facts and circumstances of the detainees' capture and detention pursuant to this Court's precedents. *See, e.g.*, *Rasul v. Bush*, 542 U.S. 466, 470-72 & n.4, 483-84 (2004); *Awad v. Obama*, 608 F.3d 1, 4 (D.C. Cir. 2010); *Anam v. Obama*, 696 F. Supp. 2d 1, 5-7 (D.D.C. 2010). Mr. Meshal challenges only his unlawful detention and

mistreatment by U.S. officials. Under this Court's decisions, he is entitled to the Judiciary's protection.

Lower courts have similarly held that federal agents cannot avoid accountability for their own unconstitutional conduct merely by "teaming up" with foreign agents. *See 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); *see also Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 40 (D.D.C. 2004) (U.S. participation with foreign agents in a counterterrorism investigation does not prevent judges from enforcing a U.S. citizen's constitutional rights). While these decisions involved claims for equitable relief, not damages, they never suggested that the judicial duty to vindicate a citizen's rights depends on the form of relief sought. Damages actions, moreover, traditionally "have been viewed as *less* intrusive than injunctive relief because they do not require the court to engage in operational decision-making." *Vance*, 701 F.3d at 229 (Williams, J., dissenting) (emphasis in original).

The creation of "conduct abroad" as a *Bivens* special factor by the majority below also misconstrues this Court's decisions on the presumption against the extraterritorial application of federal statutes. *See, e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). As the dissent observed, "that presumption has no relevance to Meshal's *Bivens* claims to enforce constitutional provisions that all agree apply abroad, especially given that the very genesis of *Bivens* lies in the acknowledged inactivity of Congress." App. 54a. This Court, moreover, has emphasized that this statutory presumption may be overcome where

claims "touch and concern" the United States. *Kiobel*, 133 S. Ct. at 1669. Mr. Meshal, a U.S. citizen, is suing federal officials for violating the U.S. Constitution. Even if decisions such as *Kiobel* were relevant to the *Bivens* analysis, they would support a *Bivens* remedy because this case "touches and concerns" the U.S. with sufficient force to displace any presumption against extraterritorial application. *See id; see also Al-Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516, 530-31 (4th Cir. 2014) (suit by foreign nationals against U.S. corporation for torture in Iraq rebuts the presumption against the Alien Tort Statute's extraterritorial application). The suggestion that *Kiobel*—a suit alleging violations of international law by foreign nationals against other foreign nationals—precludes a suit alleging violations of the U.S. Constitution by a U.S. citizen against U.S. agents merely because those violations occurred abroad warrants review by this Court.

D. The Decision Below Improperly Erects A Categorical Bar To *Bivens* Suits By U.S. Citizens Based On The Unsubstantiated Assertions Of The Federal Agents Sued For Unconstitutional Conduct.

In dismissing Mr. Meshal's *Bivens* claims, the lower court departed from this Court's jurisprudence in another fundamental respect. The Court has instructed that the mere presence of "special factors" does not automatically bar a cause of action, but rather requires that courts exercise their judgment and "weigh[ ] reasons for and against" one. *Wilkie*, 551 U.S. at 554. The majority below eviscerated this requirement by erecting a categorical bar to suit by an American citizen based on "generalized

assertions"—unsupported by any certification or declaration of any authoritative diplomatic or national security officer—that any litigation would pose unacceptable risks. App. 35a-36a (Pillard, J., dissenting). The majority's ruling thus unnecessarily shuts American citizens out of court. It contradicts this Court's repeated insistence about the Judiciary's important role in enforcing constitutional protections when government officials broadly assert claims about national security and foreign policy. The exercise of judicial judgment dictates a *Bivens* remedy where, as here, failing to recognize one would leave an American citizen without any remedy for gross constitutional violations by federal law enforcement agents, and where the purported national security and foreign policy considerations remain "entirely unsupported and conjectural" and without any "concrete, plausible, and authoritative explanation." App. 63a-64a (Pillard, J, dissenting).

This Court, moreover, has consistently held that lower courts can handle precisely the type of evidentiary issues about which Respondents self-servingly speculate. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 796 (2008) (emphasizing judges' "expertise and competence" to address sensitive national security matters while adjudicating fundamental constitutional rights); *Webster v. Doe*, 486 U.S. 592, 604 (1988) (emphasizing judges' ability to control the discovery process to balance a plaintiff's need for access to proof with the government's need to protect confidential and sensitive information); *United States v. U.S. District 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"). Judges have developed various tools to handle national security concerns during litigation, including protective orders, the submission of documents under seal, and the state-secrets privilege. App. 64a-66a (Pillard, J, dissenting).[8] And this Court has instructed judges to use these tools to allow for the adjudication of colorable constitutional claims. *Webster*, 486 U.S. at 604. As Judge Pillard observed, Respondents have provided no basis for concluding that these more targeted tools, which do not necessitate wholesale dismissal of a citizen's suit to enforce fundamental constitutional protections, would be inadequate here. App. 66a.

The ruling below thus not only undermines *Bivens*' core purpose to remedy unconstitutional conduct by federal agents. It also flouts the Court's rulings that blanket assertions of national security or extraterritoriality are insufficient to oust the Judiciary from exercising its role in enforcing the Constitution. *See Boumediene*, 553 U.S. at 766 (rejecting the categorical preclusion of suits where the unconstitutional conduct occurs abroad and

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[8] For example, the U.S. can invoke the state-secrets privilege to block information from discovery or use if its disclosure might reasonably jeopardize national security. App. 37a, 63a (Pillard, J., dissenting) (citing *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953)). The privilege, however, must be formally invoked by a high government official, and must be reviewed by the court. *Reynolds*, 345 U.S. at 7-8. The lower court's ruling on special factors eviscerates these constraints. *Cf. In re Sealed Case*, 494 F.3d 139, 143-44 (D.C. Cir. 2007) (assuming that *Bivens* is available to remedy Fourth Amendment violation committed overseas by U.S. State Department official against a U.S. citizen, but permitting the government's invocation of the state-secrets privilege).

involves national security); *Hamdi*, 542 U.S. at 536-37 ("[I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by the Government, simply because the Executive opposes making available such a challenge."). The Court should grant certiorari to prevent absolutely immunizing federal agents who egregiously violate a citizen's constitutional rights based on those same agents' generalized, conjectural, and unsupported assertions about matters that this Court has said are squarely within the competence and duty of federal judges to adjudicate.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted to review the judgment below.

Respectfully submitted,

Jonathan Hafetz
Counsel of Record
169 Hicks Street
Brooklyn, NY 11201
(917) 355-6896
hafetzj@yahoo.com

Hina Shamsi
Dror Ladin
Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Arthur B. Spitzer
AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL
4301 Connecticut Avenue, NW, Suite 434
Washington, D.C. 20008

Dated: May 31, 2016

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5194 **September Term, 2015**
1:09-cv-02178-EGS
Filed On: February 2, 2016

Amir Meshal,

Appellant

v.

Chris Higgenbotham, FBI Supervising Special Agent, in his individual capacity, et al.,

Appellees

Before: Garland, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett*, Pillard, and Wilkins, Circuit Judges

ORDER

Upon consideration of appellant's corrected petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Ken R. Meadows
Deputy Clerk

*Circuit Judge Millett did not participate in this matter.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5194 **September Term, 2015**
1:09-cv-02178-EGS
Filed On: February 2, 2016

Amir Meshal,

Appellant

v.

Chris Higgenbotham, FBI Supervising Special Agent, in his individual capacity, et al.,

Appellees

Before: Brown, Kavanaugh, and Pillard, Circuit Judges

ORDER

Upon consideration of appellant's corrected petition for panel rehearing filed on December 7, 2015, and the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Ken R. Meadows
Deputy Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 1, 2015 Decided October 23, 2015

No. 14-5194

AMIR MESHAL,
APPELLANT

v.

CHRIS HIGGENBOTHAM, FBI SUPERVISING SPECIAL AGENT, IN HIS INDIVIDUAL CAPACITY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:09-cv-02178)

Jonathan Hafetz argued the cause for appellant. With him on the briefs were *Arthur B. Spitzer* and *Hina Shamsi*.

William J. Aceves was on the brief for *amici curiae* U.N. Special Rapporteurs on Torture in support of appellant.

Jessica Ring Amunson was on the brief for *amici curiae* Law Professors James E. Pfander, Carlos M. Vázquez, and Stephen I. Vladeck in support of appellant.

James J. Benjamin, Jr. and *Christopher M. Egleson* were on the brief for *amicus curiae* Donald Borelli in support of appellant.

Agnieszka M. Fryszman was on the brief as *amicus curiae* The Constitution Project in support of appellant.

Henry C. Whitaker, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were *Ronald C. Machen Jr.*, U.S. Attorney at the time the brief was filed, and *Matthew M. Collette* and *Mary H. Mason*, Attorneys.

Before: BROWN, KAVANAUGH and PILLARD, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* BROWN.

Concurring opinion filed by *Circuit Judge* KAVANAUGH.

Dissenting opinion filed by *Circuit Judge* PILLARD.

BROWN, *Circuit Judge*: Amir Meshal filed this *Bivens* action, *see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), against several agents of the Federal Bureau of Investigation ("FBI"), claiming they violated his Fourth and Fifth Amendment rights when they detained, interrogated, and tortured him over the course of four months in three African countries. Meshal insists a *Bivens* remedy in these circumstances is necessary and unexceptional. The government condemns the pro-*Bivens* rationale applied extraterritorially as unprecedented. The district court found the allegations of federal agents abusing an American citizen abroad quite troubling. So do we. Still, the district court dismissed Meshal's suit, finding a *Bivens* action unavailable.

Faced with a shifting paradigm in which counterterrorism and criminal investigation merge, we rely on a familiar framework in an unconventional context. No court has countenanced a *Bivens* action in a case involving the national security and foreign policy context. And, while *Bivens* remedies for ill-executed criminal investigations are common, extraterritorial application is virtually unknown. We hold that in this particular new setting—where the agents' actions took place during a terrorism investigation *and* those actions occurred overseas—special factors counsel hesitation in recognizing a *Bivens* action for money damages.

I

Meshal, a United States citizen and New Jersey resident, traveled to Mogadishu, Somalia in 2006 to "broaden his understanding of Islam after the country's volatile political situation had largely stabilized."[1] J.A. 15. While he was visiting the country, violence erupted, forcing Meshal to flee to Kenya along with other civilians.

In January 2007, Meshal was apprehended by Kenyan authorities, in a joint U.S.-Kenyan-Ethiopian operation, and transported to Nairobi. A member of Kenya's Criminal Investigation Department ("CID") told Meshal that authorities needed to determine "what the United States wanted

[1] When reviewing whether the district court properly granted a motion to dismiss, we assume the truth of all well-pleaded factual allegations in the complaint. *Doe v. Rumsfeld*, 683 F.3d 390, 391 (D.C. Cir. 2012) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009)).

to do with him" before sending him "back to the United States." J.A. 31.

Sometime between January 27 and February 3, 2007, U.S. officials learned about Meshal's detention in Kenya and thus began a lengthy, multi-jurisdictional interrogation in which Defendants Chris Higgenbotham, Steve Hersem, John Doe 1, and John Doe 2 (collectively "Defendants") had significant roles. Meshal claims Defendants followed the procedures detailing how the FBI should "conduct investigations abroad, participate with foreign officials in investigations abroad, or otherwise conduct activities outside the United States with the written [acquiescence or approval] of the Director of Central Intelligence and the Attorney General or their designees." J.A. 32 (citing THE ATTORNEY GENERAL'S GUIDELINES FOR FBI NATIONAL SECURITY INVESTIGATIONS AND FOREIGN INTELLIGENCE COLLECTION 17 (Oct. 31, 2003) (declassified Aug. 2, 2007)).

For the next four months, Meshal claims Defendants detained him in secret, denied him access to counsel and the courts, and threatened him with torture and death. He says he was threatened with extradition to Israel where the Israelis would "make [Meshal] disappear," J.A. 41; and with rendition to Egypt, where they "had ways of making him talk," J.A. 42. Defendant Hersem also intimated that Meshal would suffer the same fate as the protagonist in the movie *Midnight Express*[2]—a movie where a foreign prisoner is brutally beaten and confined in horrid conditions in a Turkish prison for

[2] *See* MIDNIGHT EXPRESS (Columbia Pictures 1978).

refusing to cooperate. Hersem said, "You made it so that even your grandkids are going to be affected by what you did," but promised that if Meshal confessed his connection to al Qaeda, he would be returned to the United States to face civilian courts instead of being returned to Somalia. J.A. 41. Meshal believes the agents hoped to extract a confession to terrorist activity as a prelude to prosecution. The alleged threats had an effect; Meshal's cellmate observed that Meshal was "extremely distressed and crying" after returning to his cell from one of the interrogations. J.A. 41.

Meshal also alleges he was transferred between three African countries without legal process: from Kenya to Somalia, where he was detained in handcuffs in an underground room, with no windows or toilets, a place referred to as "the cave," J.A. 48–49; then flown blindfolded to Addis Ababa, Ethiopia, where he was detained in a military barracks. Over the next three months, Ethiopian officials regularly transported Meshal and other prisoners to a villa for interrogation where Does 1 and 2 repeatedly refused Meshal's requests to speak to a lawyer. When he was not being interrogated, Meshal was handcuffed in his prison cell, and spent several days in solitary confinement.

Eventually, the FBI released Meshal, and he returned to the United States. During the four months he was detained abroad, he lost approximately eighty pounds. He was never charged with a crime.

Meshal filed a *Bivens* action specifically alleging detention without a hearing for four months violated his Fourth Amendment rights and that the

threats of torture and disappearance violated his due process rights. In deciding Defendants' motion to dismiss, the district court found Meshal had properly stated Fourth and Fifth Amendment claims.[3] Yet the court dismissed the case, concluding a *Bivens* action was unavailable to Meshal because both this court, and several other circuits, had "expressly rejected a *Bivens* remedy for [U.S.] citizens who allege they have been mistreated, and even tortured, by [American officials] in the name of intelligence gathering, national security, or military affairs." *Meshal v. Higgenbotham*, 47 F. Supp. 3d 115, 116–17 (D.D.C. 2014).

II

A

Federal tort causes of action are ordinarily created by Congress, not by the courts. Congress has created numerous tort causes of action allowing plaintiffs to recover for tortious acts by federal officers. *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.*; Torture Victim Protection Act, 28 U.S.C. § 1350 Note. But Congress has not created a tort cause of action that applies to this case. The Federal Tort Claims Act, for example, explicitly exempts claims against federal officers for acts

[3] Meshal pled additional Fifth Amendment claims that the district court did not address. Those claims related to his "prolonged extrajudicial detention and his forcible rendition to two dangerous situations." Br. of Appellant at 20 n.4, Meshal v. Higgenbotham, No. 14-5194 (D.C. Cir. Dec. 15, 2014). We need not discuss these additional claims, which were raised only in a footnote in Meshal's initial brief. *See Hutchins v. District of Columbia*, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999).

occurring in a foreign country. *See* 28 U.S.C. § 2680(k). The Torture Victim Protection Act provides a cause of action only against foreign officials, not U.S. officials. *See* 28 U.S.C. § 1350 Note, § 2(a). Having no statutory cause of action, Meshal has sued directly under the Constitution, relying on the Supreme Court's decision in *Bivens*.

In 1971, the Supreme Court recognized an implied private action, directly under the Constitution, for damages against federal officials alleged to have violated a citizen's Fourth Amendment rights. *Bivens*, 403 U.S. 388. The case began when Webster Bivens sued Bureau of Narcotics Agents in federal court, alleging facts the Court "fairly read" as claiming Bivens' "arrest was made without probable cause." *Id*. at 389. Because the alleged constitutional violation had already occurred, Justice Harlan noted that, "[f]or people in Bivens' shoes, it [was] damages or nothing." *Id*. at 410 (Harlan, J., concurring in judgment).

The Court recognized a federal damages remedy apart from the availability of state common law remedies. *See id*. at 394–95. Noting Congress had not specifically provided a remedy for violations of constitutional rights and that "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation," *id*. at 396–97, the Court nevertheless relied on the rule that "where legal rights have been invaded . . . federal courts may use any available remedy to make good the wrong done." *Id*. at 396. Importantly, although no federal statute provided *Bivens* a right to sue for the invasion of his Fourth Amendment rights, the Court

recognized a cause of action because it found "no special factors [counselled] hesitation in the absence of affirmative action by Congress." *Id.*

Since *Bivens*, the Supreme Court has proceeded cautiously in implying additional federal causes of action for money damages. In the decade immediately following the ruling, the Court extended *Bivens*' reach to claims involving employment discrimination in violation of the Due Process Clause, *Davis v. Passman*, 442 U.S. 228, 243–45 (1979), and cruel and unusual punishment by prison officials in violation of the Eighth Amendment, *Carlson v. Green*, 446 U.S. 14, 19–23 (1980). But over time, the Court gradually retreated from *Bivens*, rejecting any "automatic entitlement" to the remedy, and noting that "any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee . . . ." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

The best way to implement a particular constitutional guarantee, the Court decided, was to let Congress determine whether it warranted a cause of action. *See id.* at 562. Finding either that Congress had provided an alternative remedy or that special factors counseled hesitation, the Court declined to recognize a *Bivens* action for: 1) a federal employee's claim that his federal employer demoted him in violation of the First Amendment, *Bush v. Lucas*, 462 U.S. 367, 368–69 (1983); 2) a claim by military personnel that military superiors violated various constitutional provisions, *Chappell v. Wallace*, 462 U.S. 296, 298–300 (1983); 3) a claim by Social Security disability benefits recipients that benefits

had been denied in violation of the Fifth Amendment, *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988); 4) a former bank employee's suit against a federal agency, claiming he lost his job due to agency action violating due process, *FDIC v. Meyer*, 510 U.S. 471, 484–86 (1994); 5) a prisoner's Eighth Amendment-based suit against a private corporation managing a federal prison, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 73–74 (2001); 6) landowners' claims that government officials unconstitutionally interfered with their property rights, *Wilkie*, 551 U.S. 554–61; and 7) a prisoner's Eighth Amendment claim against private prison employees, *Minneci v. Pollard*, 132 S. Ct. 617, 623–26 (2012).

We, too, have tread carefully before recognizing *Bivens* causes of action when plaintiffs have invoked them in new contexts, especially in cases within the national security arena. In *Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008), we declined to recognize a *Bivens* action for a Central Intelligence Agency operative and her husband to recover damages for injuries they allegedly suffered when her covert status was disclosed. We held that the Privacy Act's comprehensive remedial scheme was a "special factor" counseling hesitation before creating a *Bivens* remedy. *Id.* at 706–07. We also noted that, "if we were to create a *Bivens* remedy, the litigation . . . would inevitably require judicial intrusion into matters of national security and sensitive intelligence information." *Id.* at 710. In *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011), we were asked to recognize a *Bivens* action by noncitizen plaintiffs suing the former Secretary of Defense and three high-ranking Army officers for formulating and implementing policies that allegedly caused the

torture and degrading treatment of plaintiffs. We disavowed the availability of *Bivens* because special factors, such as the "danger of obstructing U.S. national security policy," counseled hesitation. *Id.* at 773 (quoting *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009)). In *Doe*, we refused to create a *Bivens* action for a contractor, a U.S. citizen, who claimed the U.S. military wrongfully detained him in Iraq. We noted that recognizing a *Bivens* cause of action "is not something to be undertaken lightly," and we again found national security was a special factor counseling serious hesitation. 683 F.3d at 394.

Other circuits have also refrained from recognizing *Bivens* causes of action in the national security context. The Second Circuit, sitting en banc, concluded a dual citizen of Canada and Syria could not bring a *Bivens* action for a claim that the United States transferred him to Syria in order to subject him to torture and interrogation. *See Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009). The Fourth Circuit refused to recognize a *Bivens* action for plaintiff Jose Padilla, who sued former high-level policy-makers in the Department of Defense based on his status as an enemy combatant. *See Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012). And the Seventh Circuit, sitting en banc, rejected the availability of *Bivens* for American citizen plaintiffs claiming they had been subjected to interrogation and mistreatment while in military detention. *See Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012). In each of these decisions, courts recognized that cases involving national security and the military counseled hesitation in recognizing a *Bivens* cause of action where Congress has not done so. *See id.* at

199–200; *Lebron*, 670 F.3d at 548–49; *Arar*, 585 F.3d at 575–76.

B

Meshal asks us to paddle upstream against this deep current of authority. He contends his suit involves only core *Bivens* claims—Fourth and Fifth Amendment claims made against particular law enforcement officers for actions taken during a criminal investigation—so there is nothing new here. Conversely, the government contends this case implicates a new *Bivens* context for two reasons: (i) Meshal's claims involve alleged conduct undertaken as part of the FBI's counterterrorism responsibilities involving a national security investigation of terrorist activity: and (ii) the alleged acts of the federal officers occurred abroad.

We begin with some caveats. As we understand it, the Supreme Court has taken a case-by-case approach in determining whether to recognize a *Bivens* cause of action. *See Wilkie*, 551 U.S. at 550, 554; Anya Bernstein, *Congressional Will and the Role of the Executive in* Bivens *Actions: What Is Special About Special Factors?*, 45 IND. L. REV. 719, 720 (2012). We therefore need not decide, categorically, whether a *Bivens* action can lie against federal law enforcement officials conducting non-terrorism criminal investigations against American citizens abroad. Nor do we decide whether a *Bivens* action is available for plaintiffs claiming wrongdoing committed by federal law enforcement officers during

a terrorism investigation occurring within the United States. Our holding is context specific.[4]

Because of the procedural posture, we must reject the government's characterization that this case involved only a national security investigation, as distinct from an investigation that was both a national security and criminal investigation. In reviewing the grant of a motion to dismiss, we assume the truth of all well-pleaded factual allegations and construe reasonable inferences from those allegations in the plaintiff's favor. *See Doe*, 683 F.3d at 391. The complaint alleges that Defendants Hersem and Higgenbotham were members of the FBI "jump team" or "fly team," the terms for those agents sent to Africa in 2007 "to conduct law enforcement investigations." J.A. 33. On the first day of Meshal's interrogation in Kenya and Ethiopia, Doe 1 presented Meshal with a document and asked him to sign it, "telling [Meshal] the document notified him that he could refuse to answer any questions without a lawyer present." J.A. 37, 60. The presence of *Miranda*-like waiver forms usually signifies a criminal prosecution.[5] Meshal's experience was not

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[4] Nor do we question whether constitutional protections generally apply to American citizens outside the United States when dealing with their government. *See Reid v. Covert*, 354 U.S. 1, 6–10 (1957) (applying Fifth and Sixth Amendment rights to U.S. citizens facing military trial for murder overseas); *Al Bahlul v. United States*, 767 F.3d 1, 65 n.3 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part) ("As a general matter, the U.S. Constitution applies to U.S. citizens worldwide[.]").

[5] *See* FeiFei Jiang, *Dancing the Two-Step Abroad: Finding A Place for Clean Team Evidence in Article III Courts*, 47 COLUM. J.L. & SOC. PROBS. 453, 453 (2014) ("Federal agents often employ a two-step interview process for suspects in

unique. Kenyan authorities also arrested Daniel Maldonado, and FBI agents interrogated him in Kenya around the same time they held and interrogated Meshal. After Maldonado confessed, he pled guilty in federal district court to involvement in terrorist activities. J.A. 35–36; see Partial Tr. Prelim./Detention Hr'g, United States v. Maldonado, No. 4:07-mj-00125-1, 34–35 (S.D. Tex. 2007) (Dkt. No. 17). Drawing the inferences from the complaint in Meshal's favor, the agents' actions suggest a criminal investigation for terrorism, not purely intelligence-gathering. Even so, a criminal investigation into potential terrorism implicates some of the same special factor concerns as national security policy.

C

This case requires us to examine whether allowing a *Bivens* action to proceed would extend the remedy to a new context. *See Iqbal*, 556 U.S. at 675; *Malesko*, 534 U.S. at 68; *Wilkie*, 551 U.S. at 575 (Ginsburg, J., concurring in part and dissenting in part); *see also Arar*, 585 F.3d at 572 ("'Context' is not defined in the case law."). The Supreme Court has never defined what constitutes a new "context" for *Bivens* purposes, but in reviewing the case law, some patterns emerge. First, the Court considers a *Bivens* claim "new" when a plaintiff invokes a constitutional amendment outside the three amendments previously approved. *Compare Bivens*, 403 U.S. 388

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extraterritorial terrorism investigations. Agents conduct the first interview without *Miranda* warnings for the purpose of intelligence-gathering. Separate 'clean team' agents then give the suspect *Miranda* warnings prior to the second stage of the interview, which they conduct for law enforcement purposes.").

(recognizing remedy for Fourth Amendment claims), *with Bush*, 462 U.S. 367 (refusing to recognize a *Bivens* remedy for a First Amendment violation). But even if the plaintiff alleges the same type of constitutional violation, it does not automatically invoke the same context for *Bivens* purposes. *Compare Passman*, 442 U.S. 228 (recognizing a *Bivens* remedy where plaintiff alleges employment discrimination under the Fifth Amendment's Due Process Clause), *with Schweiker*, 487 U.S. 412 (rejecting the availability of a *Bivens* remedy for social security claimants alleging a violation of due process under the Fifth Amendment). In addition, the Court considers a *Bivens* claim "new" when it involves a new category of defendants. *See Minneci*, 132 S. Ct. 617 (private prison employee); *Malesko*, 534 U.S. 61 (private prison corporation); *Meyer*, 510 U.S. 471 (federal agency); *Chappell*, 462 U.S. 296 (military defendants).

Meshal is correct that the claims here do not involve a different constitutional amendment or a new category of defendants. *See Engel v. Buchan*, 710 F.3d 698, 708 (7th Cir. 2013) (noting the case involved an FBI agent "accused of violating the constitutional rights of a person targeted for a criminal investigation and prosecution," and noting those facts "parallel[ ] *Bivens* itself"). And Meshal correctly notes that *Bivens* remedies typically are available when based on actions taken by law enforcement officers during criminal proceedings. *See Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987) (acknowledging "the classic *Bivens*-style tort, in which a federal law enforcement officer uses excessive force, contrary to the Constitution or agency guidelines"). Yet viewed "[a]t a sufficiently

high level of generality, any claim can be analogized to some other claim for which a *Bivens* action is afforded, just as at a sufficiently high level of particularity, every case has points of distinction." *Arar*, 585 F.3d at 572. Like the Second Circuit in *Arar*, we construe "context" as it is commonly used in law: "to reflect a potentially recurring scenario that has similar legal and factual components." *Id*.

The context of this case is a potential damages remedy for alleged actions occurring in a terrorism investigation conducted overseas by federal law enforcement officers. Not only does Meshal's claim involve new circumstances—a criminal terrorism investigation conducted abroad—it also involves different legal components—the extraterritorial application of constitutional protections. Such a different context requires us to think anew. To our knowledge, no court has previously extended *Bivens* to cases involving either the extraterritorial application of constitutional protections[6] or in the

[6] We considered a *Bivens* claim involving actions occurring overseas in *In re Sealed Case*, 494 F.3d 139 (D.C. Cir. 2007). There, a Drug Enforcement Agency officer stationed in Burma alleged a State Department official violated his Fourth Amendment rights when the official sent a classified cable transcribing a telephone call plaintiff had made to a subordinate. *Id*. at 141. In response, the government invoked the state secrets doctrine, which, when the district court applied the doctrine, essentially barred plaintiff's *Bivens* claim. On appeal, we noted the government had not challenged the application of the Fourth Amendment to actions occurring overseas, and we assumed, without analysis, *Bivens* applied. *Id*. at 143 ("The district court ruled that it was settled, indisputable law that the Fourth Amendment protects American citizens abroad, . . . and the United States does not challenge that ruling on appeal."). Consequently, *In re Sealed Case* did not establish

national security domain,[7] let alone a case implicating both—another signal that this context is a novel one.

Meshal downplays the extraterritorial aspect of this case. But the extraterritorial aspect of the case is critical. After all, the presumption against extraterritoriality is a settled principle that the Supreme Court applies even in considering statutory remedies. *See, e.g., Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013); *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010). If Congress had enacted a general tort cause of action applicable to Fourth Amendment violations committed by federal officers (a statutory *Bivens*, so to speak), that cause of action would not apply to torts committed by federal officers abroad absent sufficient indication that Congress meant the statute to apply extraterritorially. *See Morrison*, 130 S. Ct. at 2877. Whether the reason for reticence is concern

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that *Bivens* is available for all claims involving incidents occurring abroad.

[7] Neither *Mitchell v. Forsyth*, 472 U.S. 511 (1985), nor *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011), help Meshal's cause. Although both cases involved *Bivens* claims in the national security context, in neither case did the Court explicitly consider whether to imply a *Bivens* cause of action. The Court instead, as has become its practice in some *Bivens* cases, seemed to assume without deciding that the claims were actionable under *Bivens*. *See, e.g., Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014) (assuming without deciding *Bivens* applied to a First Amendment viewpoint discrimination claim); *Reichle v. Howards*, 132 S. Ct. 2088, 2093 n.4 (2012) (same for First Amendment retaliatory arrest claim); *Iqbal*, 556 U.S. at 675 (same for First Amendment free exercise claim). Moreover, neither case involved extraterritoriality.

for our sovereignty or respect for other states, extraterritoriality dictates constraint in the absence of clear congressional action.

D

Once we identify a new context, the decision whether to recognize a *Bivens* remedy requires us to first consider whether an alternative remedial scheme is available and next determine whether special factors counsel hesitation in creating a *Bivens* remedy. *See Wilkie*, 551 U.S. at 550.

Meshal has no alternative remedy; the government does not claim otherwise. *See Meshal*, 47 F. Supp. 3d at 122 ("The parties agree that Mr. Meshal has no alternative remedy for his constitutional claims."). Meshal, backed by a number of law professors appearing as amici curiae, argues that, when the choice is between damages or nothing, a *Bivens* cause of action must lie. The Supreme Court, however, has repeatedly held that "even in the absence of an alternative" remedy, courts should not afford *Bivens* remedies if "any special factors counsel[ ] hesitation." *Wilkie*, 551 U.S. at 550; *see also Schweiker*, 487 U.S. at 421–22. *Cf. Wilson*, 535 F.3d at 708–09. Put differently, even if the choice is between *Bivens* or nothing, if special factors counsel hesitation, the answer may be nothing. *See* Andrew Kent, *Are Damages Different?:* Bivens *and National Security*, 87 S. CAL. L. REV. 1123, 1151 (2014) ("Kent") (noting "the Court's *Bivens* doctrine has long tolerated denying *Bivens* even when there is no other effective remedy").

The "special factors" counseling hesitation in recognizing a common law damages action "relate not

to the merits of the particular remedy, but to the question of who should decide whether such a remedy should be provided." *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (Scalia, J.). Where an issue "involves a host of considerations that must be weighed and appraised," its resolution "is more appropriately for those who write the laws, rather than for those who interpret them." *Bush*, 462 U.S. at 380.

Two special factors are present in this case. We do not here decide whether either factor alone would preclude a *Bivens* remedy, but both factors together do so. First, special factors counseling hesitation have foreclosed *Bivens* remedies in cases "involving the military, national security, or intelligence." *Doe*, 683 F.3d at 394. Second, the Supreme Court has never "created or even favorably mentioned a non-statutory right of action for damages on account of conduct that occurred outside the borders of the United States." *Vance*, 701 F.3d at 198–99.

Adding to the general reticence of courts in cases involving national security and foreign policy, the government offers a laundry list of sensitive issues they say would be implicated by a *Bivens* remedy. Further litigation, the government claims, would involve judicial inquiry into "national security threats in the Horn of Africa region," the "substance and sources of intelligence," and whether procedures relating to counterterrorism investigations abroad "were correctly applied." Br. for the Appellees at 25–26, Meshal v. Higgenbotham, No. 14-5194 (D.C. Cir. Feb. 13, 2015). The government also alleges *Bivens* litigation would require discovery "from both foreign

counterterrorism officials, and U.S. intelligence officials up and down the chain of command, as well as evidence concerning the conditions at alleged detention locations in Ethiopia, Somalia, and Kenya." *Id*. at 26.

Unlike other cases where a plaintiff challenges U.S. policy, the plaintiff here challenges only the individual actions of federal law enforcement officers. At oral argument, the government had few concrete answers concerning what sensitive information might be revealed if the litigation continued. Oral Arg. Recording 28:00–28:22; 29:52–29:59; 36:47–37:10. Why would an inquiry into whether the Defendants threatened Meshal with torture or death require discovery from U.S. intelligence officials up and down the chain of command? Why would an inquiry into Meshal's allegedly unlawful detention without a judicial hearing reveal the substance or source of intelligence gathered in the Horn of Africa? What would make it necessary for the government to identify other national security threats? Neither party knows exactly what discovery will entail because no similar *Bivens* claim has survived the motion to dismiss stage. Still, to some extent, the unknown itself is reason for caution in areas involving national security and foreign policy—where courts have traditionally been loath to create a *Bivens* remedy.

At the end of the day, we find the absence of any *Bivens* remedy in similar circumstances highly probative. Matters touching on national security and foreign policy fall within an area of executive action where courts hesitate to intrude absent congressional authorization. *See Dep't of Navy v. Egan*, 484 U.S.

518, 530 (1988). Thus, if there is to be a judicial inquiry—in the absence of congressional authorization—in a case involving both the national security and foreign policy arenas, "it will raise concerns for the separation of powers in trenching on matters committed to the other branches." *Christopher v. Harbury*, 536 U.S. 403, 417 (2002). The weight of authority against expanding *Bivens*,[8] combined with our recognition that tort remedies in cases involving matters of national security and foreign policy are generally left to the political branches, counsels serious hesitation before recognizing a common law remedy in these circumstances.

There are also practical factors counseling hesitation. One of the questions raised by Meshal's suit is the extent to which Defendants orchestrated his detention in foreign countries. The Judiciary is generally not suited to "second-guess" executive officials operating in "foreign justice systems." *Munaf v. Geren*, 553 U.S. 674, 702 (2008). And judicial intrusion into those decisions could have diplomatic consequences. *See* Br. for the Appellees at 26 (allowing *Bivens* here would expose "the substance of diplomatic and confidential communications between

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[8] Even one of Meshal's amici suggests that our prior decisions saying no to *Bivens* in cases involving national security prevents the panel from creating a *Bivens* action here. *See* Steve Vladeck, Meshal: *The Last, Best Hope for National Security* Bivens *Claims?*, JUST SECURITY (June. 17, 2014, 4:09 PM), http://justsecurity.org-/11784/meshal ("Of course, that these three circuit-level decisions (especially the D.C. Circuit's decision in *Doe*) compel the result in the district court in *Meshal* says nothing about whether the en banc D.C. Circuit or Supreme Court would necessarily agree.").

the United States and foreign governments" regarding joint terrorism investigations). Moreover, allowing *Bivens* suits involving both national security and foreign policy areas will "subject the government to litigation and potential law declaration it will be unable to moot by conceding individual relief, and force courts to make difficult determinations about whether and how constitutional rights should apply abroad and outside the ordinary peacetime contexts for which they were developed." Kent, at 1173. Even if the expansion of *Bivens* would not impose "the sovereign will of the United States onto conduct by foreign officials in a foreign land," Dissent at 18, the actual repercussions are impossible to parse. We cannot forecast how the spectre of litigation and the potential discovery of sensitive information might affect the enthusiasm of foreign states to cooperate in joint actions or the government's ability to keep foreign policy commitments or protect intelligence. Just as the special needs of the military requires courts to leave the creation of damage remedies against military officers to Congress, so the special needs of foreign affairs combined with national security "must stay our hand in the creation of damage remedies." *Sanchez-Espinoza*, 770 F.2d at 208–09.

III

A

Meshal claims his U.S. citizenship outweighs the national security and foreign policy sensitivities implicated by permitting a *Bivens* claim. We are not unsympathetic. American citizenship has inherent value. *See Tuaua v. United States*, No. 13-5272, slip

op. at 14 (D.C. Cir. June 5, 2015) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)). Even so, the "source of hesitation" in the *Bivens* special factor analysis "is the nature of the suit and the consequences flowing from it, not just the identity of the plaintiff." *Lebron*, 670 F.3d at 554; *see also Vance*, 701 F.3d at 203. At no point has the Supreme Court intimated that citizenship trumps other special factors counseling hesitation in creating a *Bivens* remedy.

B

Meshal, and several law professors as amici, claim two congressional actions amounted to statutory ratification of *Bivens*. They further claim courts have consistently misinterpreted these legislative actions, and, consequently, have taken an unduly narrow view of *Bivens*.

In 1973, Congress rejected a Department of Justice proposal to substitute the federal government as the defendant in all intentional tort suits against federal officers, including those raising constitutional claims, as part of the Federal Tort Claims Act. *See* James E. Pfander & David Baltmanis, *Rethinking* Bivens: *Legitimacy and Constitutional Adjudication*, 98 GEO. L. J. 117, 131 & n.79 (2009) ("Pfander & Baltmanis"); *see also* S. REP. NO. 93–588, at 3 (1973). In 1988 Congress again rejected a DOJ proposal to funnel all liability into claims brought against the government rather than individual federal officers. *See* Pfander & Baltmanis, at 135 n.100; Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 566–70 (2013) ("Vázquez & Vladeck"). Congress instead passed the Westfall Act,

providing that the FTCA would be the exclusive remedy for federal officials sued for "scope-of-employment" torts. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (codified at 28 U.S.C. § 2679(b)). In addition to creating detailed procedures for converting state torts claims against individual officers into FTCA claims against the United States, the Westfall Act provided an exception to the exclusive-remedy provision, stating it would not "extend or apply to a civil action . . . which is brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). Thus, Congress expressly granted an exemption from the FTCA for *Bivens* suits. *See Hui v. Castaneda*, 559 U.S. 799, 807 (2010) ("Notably, Congress also provided an exception for constitutional violations."); H.R. Rep. 100-700, at 6, 1988 U.S.C.C.A.N. 5945, 5950 ("Since the Supreme Court's decision in [*Bivens*], the courts have identified [a constitutional] tort as a more serious intrusion of the rights of an individual that merits special attention. Consequently, [the Westfall Act] would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights.").

But whether Congress, in rejecting Justice Department proposals and providing a FTCA exemption, meant to ratify *Bivens* is open to doubt. Congress may have viewed *Bivens* and federal tort claims as "parallel, complementary causes of action," *Carlson*, 446 U.S. at 20, and intended, through the Westfall Act, to "solidify the *Bivens* remedy," Pfander & Baltmanis, at 121–22. Or Congress could have thought "*Bivens* was a constitutionally required

decision," *Carlson*, 446 at 33 n.2 (Rehnquist, J., dissenting), thus believing it could not legislate away *Bivens* remedies. We normally presume Congress legislates consistently with constitutional commands, *see United States v. X–Citement Video, Inc.*, 513 U.S. 64, 73 (1994), so mere congressional acquiescence to *Bivens* may not be the same as congressional ratification. And even if Congress did somehow ratify *Bivens*,[9] we would be left with yet another question: Did Congress intend to ratify *Bivens*' scope as it was in 1988 or more broadly? *See* Vázquez & Vladeck, at 579. If Congress intended to ratify *Bivens* only as it existed in 1988 then this would be an easy case.

There are no definitive answers to these competing visions of congressional action. We are not foreclosing either interpretation, but in a case where the thumb is heavy on the scale against recognizing a *Bivens* remedy, uncertain interpretations of what Congress did in 1973 and 1988 cannot overcome the weight of authority against expanding *Bivens*. In any event, if the courts, as amici argue, have radically misunderstood the nature and scope of *Bivens* remedies, a course correction must come from the Supreme Court, which has repeatedly rejected calls for a broad application of *Bivens*. *See supra*, at Part IIC. Because we follow its lead, we will ship our oars

[9] If Congress really desired a ratification of *Bivens*, its actions were not a model of clarity. Congress did not place *Bivens* causes of action in a separate statutory provision as it did for federal questions and constitutional violations committed by state actors. *See* 28 U.S.C. § 1331; 42 U.S.C. § 1983. Instead, it merely created an exception to FTCA immunity for constitutional violations. *See* 28 U.S.C. § 2679(b)(2)(A).

until that Court decides the scope of the remedy *it* created.

If people like Meshal are to have recourse to damages for alleged constitutional violations committed during a terrorism investigation occurring abroad, either Congress or the Supreme Court must specify the scope of the remedy.

IV

Because Meshal has not stated a valid cause of action, the judgment of dismissal is

Affirmed.

KAVANAUGH, *Circuit Judge*, concurring: The United States is at war against al Qaeda and other radical Islamic terrorist organizations. Shortly after al Qaeda's attacks on the United States on September 11, 2001, Congress authorized this war. President Bush and President Obama have aggressively commanded the U.S. war effort.

The terrorists' stated goals are, among other things, to destroy the State of Israel, to drive the United States from its posts in the Middle East, to replace more moderate Islamic leadership in nations such as Saudi Arabia, and to usher in radical Islamic control throughout the Greater Middle East. In pursuing their objectives, the terrorists have repeatedly attacked U.S. persons and property, both in foreign countries and in the U.S homeland.

The war continues. No end is in sight.

In waging this war, the United States has wielded a wide array of federal assets, including the military, the CIA, the FBI, and other U.S. intelligence and law enforcement agencies. The traditional walls dividing military, intelligence, and law enforcement operations have given way to a more integrated war effort. As President Bush and President Obama have explained, the United States employs military, intelligence, and law enforcement personnel in an often unified effort to detect, surveil, capture, kill, detain, interrogate, and prosecute the enemy.

In this case, U.S. law enforcement officers detained and interrogated Meshal in a foreign country. They suspected that Meshal might be an al Qaeda terrorist. Meshal alleges that he was

mistakenly detained and then abused. He has brought a tort suit against the individual officers under *Bivens*, and he seeks damages presumably in the hundreds of thousands of dollars from those officers in their individual capacities.

The *Bivens* doctrine allows parties to maintain certain constitutional tort suits against federal officers in their individual capacities, even in the absence of an express congressionally created cause of action. The classic *Bivens* case entails a suit alleging an unreasonable search or seizure by a federal officer in violation of the Fourth Amendment. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Since *Bivens*, however, the Supreme Court has been reluctant to extend the implied *Bivens* cause of action to new contexts. The Court has emphasized that it is ordinarily Congress's role, not the Judiciary's, to create and define the scope of federal tort remedies. As the Court has explained, *Bivens* carved out only a narrow exception to that bedrock separation of powers principle.

Here, Meshal proceeded under *Bivens* because Congress has not created a cause of action for his alleged injury. As the Court today spells out, Congress has enacted a number of related tort causes of action. For example, the Federal Tort Claims Act provides a cause of action for torts committed by federal officials. But that law exempts torts committed in a foreign country. So it does not help Meshal. The Torture Victim Protection Act provides a cause of action for torture committed by foreign officials. But the statute exempts U.S. officials, a point that President George H.W. Bush stressed

when signing the legislation in 1992. *See* 28 U.S.C. §§ 2671 *et seq*.; *id.* § 1350 Note; *see also* Statement on Signing the Torture Victim Protection Act of 1991, 1 Pub. Papers 437-38 (Mar. 12, 1992). So that law likewise does not help Meshal. The bottom line is that neither of those statutes, nor any other, creates a cause of action against U.S. officials for torts committed abroad in these circumstances. *See* 28 U.S.C. § 2680(k); *id.* § 1350 Note, § 2(a).

Lacking any statutory cause of action, Meshal has sued under *Bivens*. The Department of Justice, speaking ultimately as the representative of President Obama, has vigorously argued that the implied *Bivens* cause of action cannot be stretched to cover Meshal's case. According to the Department of Justice, *Bivens* does not apply here because the alleged conduct occurred during a national security investigation in a foreign country, a setting different in multiple important respects from the heartland *Bivens* case. Faithfully following existing Supreme Court precedent, Judge Emmet Sullivan agreed with the Department of Justice and dismissed Meshal's suit. The Court today affirms, and I fully join its thorough and well-reasoned opinion.

I add this concurrence to underscore a few points in response to the dissent.

The fundamental divide between the majority opinion and the dissent arises over a seemingly simple question: Who Decides? In particular, who decides whether to recognize a cause of action against U.S. officials for torts they allegedly committed abroad in connection with the war against al Qaeda and other radical Islamic terrorist

organizations? In my view, the answer is Congress, not the Judiciary.

In confining the coverage of statutes such as the Federal Tort Claims Act and the Torture Victim Protection Act, Congress has deliberately decided not to fashion a cause of action for tort cases like Meshal's. Given the absence of an express cause of action, the dissent seizes upon *Bivens*. How does the dissent deal with the Supreme Court's oft-repeated caution against extending *Bivens* to new contexts? The dissent argues that this case does not present a new context.

On that point, I respectfully but strongly disagree with the dissent. Most importantly, the alleged conduct in this case occurred *abroad*. So far as the parties have been able to uncover, never before has a federal court recognized a *Bivens* action for conduct by U.S. officials abroad. *Never*. In statutory cases, we employ a presumption against extraterritoriality. There is no persuasive reason to adopt a laxer extraterritoriality rule in *Bivens* cases. It would be grossly anomalous, in my view, to apply *Bivens* extraterritorially when we would not apply an identical statutory cause of action for constitutional torts extraterritorially. *Cf. Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013); *Morrison v. National Australia Bank Limited*, 561 U.S. 247, 255 (2010).

This case is far from the *Bivens* heartland for another reason as well. It involves a *national security* investigation during a congressionally authorized war, not a simple arrest for securities fraud, drug trafficking, or the like. Other courts of appeals have refused to recognize *Bivens* actions for alleged

conduct that occurred during national security investigations, even for conduct that occurred in U.S. territory. *See Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009); *see also Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012). We should do the same in this case, especially because the conduct here occurred in a foreign country. The dissent responds that the Government has not demonstrated that this case is national-security-related. But U.S. officials were attempting to seize and interrogate suspected al Qaeda terrorists in a foreign country during wartime. If this case is not national-security-related, it is hard to see what is. The dissent counters that the U.S. had not designated Meshal as an enemy combatant. But that misses the key point: The U.S. was conducting an investigation to determine *whether* Meshal was an enemy combatant. In this war, the U.S. seeks to proactively confront terrorist threats before they fully materialize. Close calls may arise in labeling an investigation as national-security-related. Not here.

The confluence of those two factors – extraterritoriality and national security – renders this an especially inappropriate case for a court to supplant Congress and the President by erecting new limits on the U.S. war effort. Make no mistake. If we were to recognize a *Bivens* action in this case, U.S. officials undoubtedly would be more hesitant in investigating and interrogating suspected al Qaeda members abroad. Of course, some might argue that would be a good thing. Maybe so, maybe not. Either way, it is not our decision to make. Congress and the President possess the authority to restrict the actions of U.S. officials during wartime, including by approving new tort causes of action. And in this war,

they have done so by enacting new statutes such as the Detainee Treatment Act and the Military Commissions Act. But they have not created a tort cause of action for this kind of case. In my view, we would disrespect Congress and the President, and disregard our proper role as judges, if we were to recognize a *Bivens* cause of action here.

* * *

In justiciable cases, courts should not hesitate to enforce constitutional and statutory constraints on wartime activities. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) (Kavanaugh, J.). But courts should not – under the guise of *Bivens* – *unilaterally* recognize new limits that restrict U.S. officers' wartime activities. As Justice Jackson stated in his canonical concurrence in *Youngstown*, courts "should indulge the widest latitude of interpretation to sustain" the President's command of "the instruments of national force, at least when turned against the outside world for the security of our society." 343 U.S. at 645 (Jackson, J., concurring). If I were a Member of Congress, I might vote to enact a new tort cause of action to cover a case like Meshal's. But as judges, we do not get to make that decision. For those reasons, I respectfully disagree with the dissent and fully join the Court's opinion.

PILLARD, *Circuit Judge*, dissenting:

As the majority observes, the allegations in this case are deeply troubling. *See* Maj. Op. at 2. For purposes of this decision, we must assume the truth of the facts Meshal alleges. The defendant FBI officers arbitrarily detained Meshal in secret in three different countries for four months without charges, denied him access to counsel and the courts, coercively interrogated him, and threatened him with disappearance and death. *Id.* at 3-5. They did so to "coerce him to confess to wrongdoing in which he had not engaged and to associations he did not have." J.A. 16 (Complaint ¶ 3). Neither the United States nor any other government ever charged Meshal with a crime. Maj. Op. at 4-5. Our concurring colleague asserts that "U.S. officials were indisputably attempting to seize and interrogate suspected al Qaeda terrorists in a foreign country during wartime," Conc. Op. at 4, but there is zero basis here on which we could conclude that these defendants had grounds for treating this plaintiff as a suspected al Qaeda terrorist, or that they acted pursuant to the President's war powers. To the contrary, the government never designated Meshal an enemy combatant, and it eventually released him and returned him to the United States. Maj. Op. at 5. Neither defendants nor this panel doubts that Meshal properly stated Fourth and Fifth Amendment claims. *See* J.A. 14; Maj. Op. at 5-6. The only issue is whether, if the allegations were true, they would have consequences.

Had Meshal suffered these injuries in the United States, there is no dispute that he could have sought redress under *Bivens*. If Meshal's tormentors

had been foreign officials, he could have sought a remedy under the Torture Victim Protection Act. Yet the majority holds that because of unspecified national security and foreign policy concerns, a United States citizen who was arbitrarily detained, tortured, and threatened with disappearance by United States law enforcement agents in Africa must be denied any remedy whatsoever.

I would reverse the judgment dismissing Meshal's case and remand for further proceedings for the following two reasons:

First, congressional action supports a constitutional damages claim where, as here, it would not intrude on the unique disciplinary structure of the military and where there is no comprehensive regulation or alternative remedy in place; and

Second, where FBI agents arbitrarily detain a United States citizen overseas and threaten him with disappearance and death during months of detention without charges, those agents' mere recitation of foreign policy and national security interests does not foreclose a constitutional damages remedy.

I am unpersuaded that adjudicating Meshal's constitutional damages claim would necessarily pose unacceptable risks to the national security and foreign policy of the United States. The government has submitted no certification or declaration of any authoritative diplomatic or national security officer to substantiate defendants' sweeping national security and diplomatic relations claims. Defendants instead rely on generalized assertions that any litigation of Meshal's *Bivens* claim would involve

unacceptable risks. Such assertions do not, in my view, constitute the kind of "special factors" that justify eliminating the *Bivens* remedy in a case like this one.

Courts have no power to make national security policy or conduct foreign affairs and, in fulfilling our own constitutional duty, the Article III courts must not imperil the foreign relations or national security of the United States. But no less today than when the Supreme Court decided *Bivens*, "the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring in judgment). Government is most tempted to disregard individual rights during times of exigency. Judicial scrutiny becomes particularly important when executive officials assert that individual rights must yield to national security and foreign policy imperatives. Presented with cases involving assertions of paramount national interests in apparent tension with individual liberty, the federal courts have proved competent to adjudicate. Removing all consequence for violation of the Constitution treats it as a merely precatory document. *See Davis v. Passman*, 442 U.S. 228, 242 (1979). We should not do so without more justification than was presented here.

Our responsibility in cases pitting claims of individual constitutional liberties against national security is to discern how the judiciary can meet its responsibility without either second-guessing the sound judgments of the political branches, or rubber-

stamping every invocation of the capacious and malleable concept of "national security" at the expense of the liberty of the people. The fundamental character of our separation of powers prevents us from simply ceding to executive prerogatives: "[I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536-37 (2004).

To meet that responsibility, courts have demanded that governmental assertions of national security interests be authoritative and specific. We have used special procedures and mechanisms to consider those interests and accord them appropriate respect without abdicating our constitutional duties to adjudicate claims of violation of individual constitutional rights. Measures such as courts' inspection of evidence under seal or even *in camera*, coding to anonymize valuable and sensitive information, security clearances of counsel and court personnel, and other special accommodations have helped to preserve courts' ability to adjudicate in the face of countervailing executive imperatives. Courts developed the state secrets privilege to safeguard against damaging litigation disclosures of national security information. That doctrine's requirements are designed to ensure that it not be lightly invoked, and to tailor its impact on countervailing rights. Defendants here contend that they need not submit to any such controls. Rather, they would have us categorically turn away claims that ostensibly touch on national security and foreign policy. No precedent

of the Supreme Court, this court, or any other United States court requires that result.

The United States government itself elsewhere cites the availability of *Bivens* claims as fulfilling our treaty obligations to provide remedies for arbitrary detention and torture wherever it may occur, in peace or conflict. *See infra* pp. 14-15. Yet defendants would deny that promise, leaving Meshal with no remedy whatsoever—whether under state or federal law, constitutional, administrative, or otherwise. Their position is that an American citizen who ventures beyond our borders has no legal remedy against arbitrary and prolonged detention and mistreatment at the hands of FBI agents—so long as those agents were sent overseas to protect United States interests.

Because I cannot conclude that either the Supreme Court or our court has ever read the Constitution and laws of the United States to support that result, and I am not persuaded that defendants have provided us with grounds to do so here, I respectfully dissent.

I.

Meshal's case is unlike those in which the Supreme Court or this court has declined to recognize a *Bivens* remedy. Here, as the majority acknowledges, Meshal is suing the typical *Bivens* defendant. Maj. Op. at 13. When FBI agents violate a suspect's Fourth and Fifth Amendment rights by detaining him without charges and threatening him with torture, disappearance, and death, a *Bivens* remedy is ordinarily available. *See id.*

Defendants are not among the types of nongovernmental or organizational actors beyond the reach of *Bivens*: they are not a private corporation, *cf. Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 73-74 (2000), its employees, *cf. Minneci v. Pollard*, 132 S. Ct. 617, 623-26 (2012), or a federal governmental agency, *cf. FDIC v. Meyer*, 510 U.S. 471, 484-86 (1994). *See* Maj. Op. at 8, 13.

These claims, if allowed to proceed under *Bivens*, would not sidestep any comprehensive scheme or alternative remedy addressing the conduct at issue. Maj. Op. at 8; *cf. Wilkie v. Robbins*, 551 U.S. 537, 553-62 (2007); *Schweiker v. Chilicky*, 487 U.S. 412, 414, 424-29 (1988); *Bush v. Lucas*, 462 U.S. 367, 388 (1983); *Wilson v. Libby*, 535 F.3d 697, 706-08 (D.C. Cir. 2008).

Meshal's claims also do not implicate the unique demands of military discipline. He is not a service member or military contractor, his claims did not arise in the theater of war, nor are the defendant's asserted security interests those of the military, its chain of command, or alternate disciplinary structure. *Cf. United States v. Stanley*, 483 U.S. 669, 683-84 (1987)*; Chappell v. Wallace*, 462 U.S. 296, 303-06 (1983); *Doe v. Rumsfeld*, 683 F.3d 390, 394-96 (D.C. Cir. 2012); *Lebron v. Rumsfeld*, 679 F.3d 540, 549-51, 553 (4th Cir. 2012)*; Vance v. Rumsfeld*, 701 F.3d 193, 199-203 (7th Cir. 2012) (en banc).

The foreign affairs implications that arise when an alien sues United States officials are absent here. Meshal is an American citizen, born and raised in New Jersey, to whom the constitutional protections asserted here apply both at home and

when he goes overseas as a civilian tourist. *Reid v. Covert*, 354 U.S. 1, 5-10 (1957) (plurality) (rejecting "the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights"); Maj. Op. at 11 n.4; Oral Arg. Tr. at 19 (defendants' counsel acknowledging constitutional rights of United States citizens abroad). Conflict within Somalia displaced Meshal and other civilians, but Meshal does not allege he was arrested or detained in any zone in which the United States was engaged in war or military hostilities. J.A. 13.

Precedent does not permit us categorically to rule out any civil remedy for these alleged wrongs. In my view, defendants' national security and foreign policy "special factors" are overstated and under-explained. I do not read the Supreme Court's cases to hold that "the thumb is heavy on the scale against recognizing a *Bivens* remedy" in a situation such as this one. Maj Op. at 22. To the contrary, the Supreme Court's holding in *Bivens* that damages are an appropriate remedy for a Fourth Amendment violation remains the law of the land. And no one disputes that a Fifth Amendment claim for arbitrary detention and coercive interrogation under threats of disappearance and death would be cognizable under *Bivens* if it occurred in the United States. *See Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989) (Posner, J.) (recognizing *Bivens* Fifth Amendment due process claim in "a case in which a person who had been arrested but not charged or convicted was brutalized while in custody"), *cert. denied*, 493 U.S. 1026 (1990); *see also Hernandez v. United States*, 757 F.3d 249, 271, 277 (5th Cir. 2014) (recognizing *Bivens* Fifth Amendment claim extraterritorially for "conscience-shocking conduct").

Defendants assert that any judicial consideration of Meshal's claims would interfere with foreign policy and national security, but they have failed to make the case. In the district court, defendants' counsel said "I don't know how the foreign government is alleged to have been involved in this particular operation." J.A. 14. At oral argument in our court, as the majority notes, counsel for defendants "had few concrete answers concerning what sensitive information might be revealed if the litigation continued." Maj. Op. at 17.

The only authority defendants cite for any threat to national security is the district court's recapitulation of defendants' own contentions in their lower-court briefs that litigation of Meshal's claims "implicate national security threats in the Horn of Africa region" and "substance and sources of intelligence." *See* Appellee Br. 11, 13, 24-27, 36-37; Br. in Supp. of Mot. to Dismiss at 13-14. They assert that adjudication would require the public release of sensitive national security information, but they provide no basis for us to evaluate that assertion. Defendants also have done nothing to explain why the more targeted tools available to courts to protect such information, such as confidential or *in camera* processes or the state secrets privilege, would be inadequate here.

II.

I explain my conclusion by following the "familiar sequence" the Supreme Court employs to consider whether any "alternative, existing processes," or "special factors" justify denying Meshal's *Bivens* claim. *Wilkie*, 551 U.S. at 550.

A.

Precedent directs us to consider first "whether any alternative, existing process for protecting the [constitutionally recognized] interest amounts to a convincing reason for the Judicial Branch to refrain" from superimposing a *Bivens* remedy on that process. *Minneci*, 132 S. Ct. at 621 (quoting *Wilkie*, 551 U.S. at 550) (brackets in original). Nobody contends that there is any "alternative, existing process" for protecting Meshal's constitutional rights. *See* Maj. Op. at 15-16; Conc. Op. at 2-3. The parties and the court agree that, in these circumstances, it is *Bivens* or nothing. *See Davis* 442 U.S. at 246. Unlike plaintiffs in the cases in which the Supreme Court has held that *Bivens* is unavailable, Meshal has no alternative state tort remedy, *cf. Minneci*, 132 S. Ct. at 623, 626 (state tort remedy for alleged Eighth Amendment claims against private prison employees); *Wilkie*, 551 U.S. at 551 (state tort remedy for alleged unconstitutional interference with property rights); *Malesko*, 534 U.S. at 73-74 (state tort remedy for alleged Eighth Amendment claims against private prison corporation), and Congress has not provided any other remedy or comprehensive scheme to displace *Bivens* here, *cf., e.g.*, *Schweiker*, 487 U.S. at 424-27 (Social Security Act); *Bush*, 462 U.S. at 380-81, 388 (comprehensive federal civil service regulation); *Wilson*, 535 F.3d at 705-08 (Privacy Act); *Chappell*, 462 U.S. at 304 (recognizing "unique disciplinary structure of the military establishment" as "special factor").

The majority acknowledges that Congress at various times has acted in ways that appear to have ratified *Bivens*, but ultimately concludes that

congressional acquiescence is "open to doubt," and so treats the congressional activity in the area as a draw. Maj. Op. at 20-22. The basis of the majority's doubt is unpersuasive: my colleagues wonder whether Congress has preserved *Bivens* for almost half a century only because it thought it had to. *Id.* at 21-22. But the Supreme Court from *Bivens* onward has emphasized that Congress may displace the constitutional common-law remedy. In the face of that invitation to legislate, Congress has consistently preserved a place for judicially recognized *Bivens* claims.

In particular, as the majority acknowledges, even as Congress periodically amended the Federal Tort Claims Act (FTCA), which provides an exclusive federal statutory remedy against the government for state common-law torts by United States officials, Congress purposely left intact the judicially fashioned *Bivens* remedy for constitutional torts by those same officials. Congress in the 1974 amendments to the FTCA "made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Carlson v. Green*, 446 U.S. 14, 19-20 (1980) (citing 28 U.S.C. § 2680(h)). And again, in 1988 when the Westfall Act amended the FTCA to immunize federal officials from personal liability for common law torts committed within the scope of their employment and substitute the United States as the sole defendant to those claims, Congress specified that such substitution-and-immunity does not apply to claims "brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). Congress designed the Westfall Act so as "not to affect the ability of victims of constitutional torts to seek personal redress from

Federal employees who allegedly violate their Constitutional rights"—a type of violation that is "a more serious intrusion on the rights of an individual that merits special attention." H.R. Rep. No. 100-700, at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949-50. Congress has preserved constitutional damages claims even where they are parallel to and thus sometimes overlap with FTCA claims that provide a limited federal statutory vehicle for enforcing the substantive protections of state tort law; there is no basis to read that longstanding acceptance of *Bivens* as signaling congressional intent to eliminate constitutional damages claims when no overlapping or substitute claim exists.

The majority recognizes all of that, Maj. Op. at 20-21, but wonders whether Congress may have preserved *Bivens* only out of concern that the remedy is constitutionally compelled, *id.* at 21-22. There is no basis for any such conclusion. The concurrence finds compelling that Congress has not codified any alternative remedy for Meshal's harms. Conc. Op. at 3. But congressional restraint cuts the other way. As noted above, when Congress was making the relevant amendments to the FTCA, the Supreme Court had already repeatedly reiterated its own understanding that the judicially recognized remedy could be displaced by a congressional substitute. *See, e.g.*, *Bush*, 462 U.S. at 378-79; *Carlson*, 446 U.S. at 18-20; *Davis*, 442 U.S. at 245-47; *Bivens*, 403 U.S. at 397. Despite addressing many other related types of claims, Congress has enacted no alternative that would displace a claim like Meshal's. Against that backdrop, Congress's acquiescence cannot be read as misguided submission to, let alone rejection of, *Bivens* in these circumstances.

Defendants point out that the FTCA explicitly affords no tort remedy for injuries "arising in a foreign country." 28 U.S.C. § 2680(k). They contend the exception shows Congress's intention to deny a constitutional tort remedy to individuals injured abroad by United States agents. But the reason Congress excluded extraterritorial claims from the FTCA was not to deny all damages liability for tort-like harms inflicted by United States agents overseas. That exclusion is specific to the FTCA, under which liability is determined "in accordance with the [tort] law of the place where the act or omission occurred," 28 U.S.C. § 1346(b)(1), *i.e.* by the common law of the various states. Congress "was unwilling to subject the United States to liabilities depending upon the laws of a foreign power." *United States v. Spelar*, 338 U.S. 217, 221 (1949). The exemption shows only that the FTCA aimed to incorporate the tort law of Texas or Illinois but not of Kenya or Ethiopia. The concerns animating the FTCA's extraterritorial carve-out are inapplicable where the United States Constitution, not any foreign country's law, supplies the rule of decision.

The majority also asserts that "if Congress really desired a ratification of *Bivens*," it would have "place[d] *Bivens* causes of actions in a separate statutory provision," such as 28 U.S.C. § 1331 or 42 U.S.C. § 1983. Maj. Op. at 22 n.9. But Congress did not need to do that. Section 1331 provides general federal question jurisdiction. It is the very provision upon which Webster Bivens's claim proceeded. *Bivens*, 403 U.S. at 398 (Harlan, J., concurring in judgment). As Justice Harlan noted, Section 1331 "is sufficient to empower a federal court to grant a traditional remedy at law" for a Fourth Amendment

violation. *Id.* at 405.[1] Demanding a showing that Congress created an analogue to Section 1983 for claims against federal officials also goes too far; had Congress done so, there would be no need for *Bivens*. *See Lebron*, 670 F.3d at 548 (acknowledging that "[w]e do not require congressional action before recognizing a *Bivens* claim, as that would be contrary to *Bivens* itself"). And once the Court decided *Bivens*, there was no need for a Section 1983-like statutory vehicle. Defendants point to other statutes providing remedies to detainees abused at the hands of government officials to argue that Congress could have created a cause of action for plaintiffs in Meshal's position, but chose not to do so. They contend that congressional action "in this field" that creates no damages remedy for Meshal is a "special factor[] that counsel[s] hesitation." Appellee Br. 39. The majority correctly places no reliance on that argument. The additional congressional action defendants identify is wholly consistent with Congress's acquiescence to *Bivens* for claims like Meshal's.

The Military Claims Act and Foreign Claims Act provide an administrative compensation system for individuals harmed by military officials or

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[1] Damages are the traditional remedy at law, *Bivens*, 403 U.S. at 395, and are less intrusive and thus more readily reconciled with national security prerogatives than an injunction disrupting ongoing official activities. *Cf. Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 921-22 (D.C. Cir. 1996) (injunctive relief "was never regarded as relief of first resort" because, "in tort actions, the standard formulation of the common law . . . is that equitable relief, such as an injunction, will be granted only when plaintiff's legal remedies are inadequate").

contractors at home or abroad. *See* 10 U.S.C. § 2733 (Military Claims Act); *id.* § 2734 (Foreign Claims Act). Defendants do not contend that any such claims process is available to a civilian harmed by nonmilitary United States agents overseas, so it is unclear how those statutes could imply any congressional disinclination toward Meshal's *Bivens* claim. Indeed, the fact that Congress provided a remedy to persons in special-factors military cases excluded from *Bivens*' reach suggests congressional solicitude for persons who would otherwise lack compensation. *See Vance*, 701 F.3d at 200-01 (enumerating statutes governing the treatment of military detainees to conclude that "[u]nlike Webster Bivens, they are not without recourse"); *Doe*, 683 F.3d at 396-97.

The same can be said of defendants' invocation of the Torture Victim Protection Act, which authorizes United States residents to sue foreign officials for abusive treatment under color of foreign law. 28 U.S.C. § 1350 Note. Defendants and the concurrence, Conc. Op. at 3-4, assert that the Torture Victim Protection Act's damages remedy for United States residents harmed by foreign officials implies that Congress considered and eschewed a parallel remedy for the same harms inflicted by United States agents. But that statute may well reflect Congress's awareness that, against United States agents, a remedy already exists under *Bivens*.[2]

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[2] In the Detainee Treatment Act of 2005, Congress enacted a limited, good-faith immunity provision shielding United States agents from damages liability in lawsuits brought by alien detainees. *See* 42 U.S.C. § 2000dd-1(a). Such immunity further hints that Congress contemplated that United States agents

Neither defendants nor my concurring colleague offer any reason why we should infer that Congress's creation of a new remedy against foreign officials communicates its disapproval of the sole available remedy for torture of a United States citizen at the hands of United States nonmilitary agents. Their position appears to be that if Kenyan or Ethiopian officials had worked alongside United States agents to torture Meshal, Congress would have wanted him to have a remedy in United States courts against the foreign agents under the Torture Victim Protection Act, but to have no chance of any parallel relief against the Americans inflicting the same torture. That inference is counterintuitive, to say the least.

The executive branch in fact publicly insists that victims of arbitrary detention or torture, both of which Meshal alleges, *do* have a remedy under our law. The remedy the government touts is *Bivens* litigation in federal court. The Convention Against Torture and other treaties prohibit the United States from engaging in torture, forced disappearances, and arbitrary detentions.[3] As the State Department

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would face some kind of liability in United States courts when they mistreat their own citizens. *See Vance*, 701 F.3d at 219-20 (Hamilton, J., dissenting).

[3] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(1), Dec. 10, 1984, S. Treaty Doc. 100-20 (1988), 1465 U.N.T.S. 85 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."); Comm. against Torture, General Comment No. 2 on Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2, at ¶ 16 (Jan. 24, 2008) (construing "any territory" language in Convention Against Torture to include "other areas over which a State exercises factual or effective control");

acknowledged in 2014, the United States is bound by the terms of the Convention Against Torture for actions committed either domestically or abroad, whether during a time of conflict or peace.[4] Both the Convention Against Torture and the International Covenant on Civil and Political Rights (ICCPR) obligate the United States to provide remedies, including "compensation," for violations of their respective guarantees.[5] In 2006, the State Department assured the United Nations Committee Against Torture that victims of torture can sue United States officials for damages under the Constitution and cited *Bivens* to support that point. *See* United States Written Responses to Questions Asked by the United Nations Committee Against

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International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, S. Exec. Doc. C, D, E, F, 95-2 (1978), 999 U.N.T.S. 171 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 3, 32, 147, Aug. 12, 1949, 75 U.N.T.S. 287 (prohibiting cruel and inhuman treatment and torture).

[4] Comm. Against Torture, Concluding Observations on the Third to Fifth Periodic Reports of United States of America, U.N. Doc. CAT/C/USA/CO/3-5 (Nov. 20, 2014), at ¶¶ 5, 10, 14 (noting United States official policy that "U.S. personnel are legally prohibited" under Convention "from engaging in torture or cruel, inhuman" treatment "at all times, and in all places"); *see also* CAT, art. 2(1); ICCPR, art. 7; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136, ¶ 109 (2004); Human Rights Comm., General Comment No. 31 on the Nature of the General Legal Obligation Imposed on State Parties to the Covenant, U.N. Doc CCPR/C/21/Rev. 1/Add. 13, ¶ 10 (May 26, 2004).

[5] Convention Against Torture, art. 14(1); ICCPR, arts. 2(3), 9(5), 14(6).

Torture, ¶ 5 (Apr. 28, 2006), *available at* http://www.state.gov/j/drl/rls/68554.htm; *see also Vance*, 701 F.3d at 208-09 (Wood, J., concurring in judgment); *id.* at 219 (Hamilton, J., dissenting); *Arar v. Ashcroft*, 585 F.3d 559, 619 (2d Cir. 2009) (en banc) (Parker, J., dissenting).

Denying Meshal the recourse that the United States has asserted he has—the ability to bring a *Bivens* action—leads to an inexplicable result: civil remedies are available to most victims of torture, *except* a United States citizen tortured by United States agents abroad. An American subjected to arbitrary arrest and coercive interrogation by federal officials within the United States would typically have a civil remedy under *Bivens*. *See* Maj. Op. at 13. The majority leaves open whether a United States citizen abused by federal agents abroad as part of an investigation *not* implicating national security would be able to bring a *Bivens* action and offers no reason why such a suit would be barred. *See* Maj. Op. at 3, 16. A United States citizen tortured by foreign officials could file suit under the Torture Victim Protection Act. *See* 28 U.S.C. § 1350 Note. A foreign citizen tortured by United States officials within the United States could file suit under the Federal Tort Claims Act and the Alien Tort Statute. *See* 28 U.S.C. § 1346(b)(1); *id.* § 1350. And a foreign citizen tortured by American agents acting abroad could seek redress under the Alien Tort Statute or in his nation's courts. Yet, under defendants' view, a United States citizen tortured by American agents acting abroad has no recourse in his own nation's courts. It makes no sense that Congress would have selectively denied to Americans abused abroad by United States agents the remedies it has extended to

all others. The far more tenable conclusion is that Congress recognized that citizens already had a remedy under *Bivens* for such wrongs.

The Constitution includes a Bill of Rights because the Framers ultimately recognized that a Congress responsive to the will of the majority would not always adequately protect individual rights that might be unpopular with majorities. *Bivens*, 403 U.S. at 407 (Harlan, J., concurring in judgment) ("[I]t must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities."). Adjudication of claims of individual rights has always been the distinctive province of the Article III courts. The genius of *Bivens* is precisely that it fulfilled a rights-protective function that the Framers knew was unrealistic to leave only with a majoritarian Congress, even while the Court acknowledged Congress's power to displace *Bivens* by crafting an alternative remedy or "comprehensive statutory scheme" in its stead. *See Schweiker*, 487 U.S. at 424-27; *Bush*, 462 U.S. at 388. Because Congress has not done so here, it has provided no ground for dismissing Meshal's *Bivens* claims.

B.

Our second task in considering whether Meshal may proceed with his *Bivens* claim is to "make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation," *Wilkie*, 551 U.S. at 550 (internal quotation marks omitted), in "the absence of

affirmative action by Congress," *Carlson*, 446 U.S. at 18 (quoting *Bivens*, 403 U.S. at 396). The majority concludes that two factors counsel decisively against recognizing a remedy here: foreign policy and national security concerns. Maj. Op. at 16-18. Defendants have not persuasively shown that either of those factors precludes a *Bivens* action in the circumstances alleged here. Moreover, there is no reason to conclude that a federal district court could not resolve whatever national security concerns might arise.

1.

The fact that the conduct Meshal complains of occurred abroad should not vitiate all remedy here. Defendants point to allegations that they harmed Meshal during an investigation "allegedly undertaken jointly with foreign government officials, and while plaintiff was detained by foreign governments." Appellee Br. 21. It is not clear why those facts, although potentially relevant to how his lawsuit would need to be litigated and managed, *see infra* Part II.B.4, should foreclose the suit. United States law enforcement cooperation with foreign governments around the world has become commonplace. Defendants have not explained how litigation of Meshal's claim would pose foreign policy difficulties. *See* J.A. 13-14; Oral Arg. Tr. at 30 (defendants' counsel referring generally to "our relationship with foreign governments" as the sensitive national security issue raised by Meshal's claims).

Our government's power is defined and limited by the Constitution. "It can only act in accordance with all the limitations imposed by the Constitution.

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. This is not a novel concept. To the contrary, it is as old as government." *Reid*, 354 U.S. at 6. Fidelity to the Constitution should have prevented the FBI's alleged mistreatment of Meshal in Kenya, Somalia, and Ethiopia. Judicial recognition of a claim against those nonmilitary law enforcement officers for having acted in ways long known to be contrary to the Constitution cannot fairly be condemned as "courts . . . *unilaterally* recogniz[ing] new limits that restrict officers' wartime activities." *Cf.* Conc. Op. at 5 (emphasis in original).

In denying Meshal a remedy under *Bivens*, the majority contends that the fact that Meshal's mistreatment occurred outside the United States is a "special factor" counseling against a constitutional damages claim. *See* Maj. Op. at 3, 15-17; Conc. Op. at 3-4 (describing the foreign location of the alleged abuse as the "[m]ost important[]" factor). The court relies for support on the presumption against extraterritorial application of statutes. *See* Maj. Op. at 15-16 (citing *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013); *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010)). It is well established that Congress has the power to regulate actions of United States citizens outside the territory of the United States and, given the proliferation of transnational conduct, it increasingly does so. The presumption sets only a default rule of statutory construction to aid courts in determining whether Congress intended to legislate with respect

to foreign occurrences. *See Kiobel*, 133 S. Ct. at 1665; *Morrison*, 561 U.S. at 255. However, that presumption has no relevance to Meshal's *Bivens* claims to enforce constitutional provisions that all agree apply abroad, especially given that the very genesis of *Bivens* lies in the acknowledged inactivity of Congress.

Even if we were to assume an analogue to the presumption against statutory extraterritoriality for *Bivens* claims, it would be inapposite here because the factors that animate such a presumption are absent. Entertaining Meshal's suit poses no risk of "impos[ing] the sovereign will of the United States" onto conduct by foreign officials in a foreign land. *Kiobel*, 133 S.Ct. at 1667. Application of the United States Constitution to govern interactions between Americans would not control the subjects of an independent sovereign or clash with its law, sending the controversial message that United States law "rule[s] the world." *Cf. id.* at 1664 (*quoting Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)). This case involves pursuit of purely retrospective relief by *our* citizen under *our* Constitution against *our* government's criminal investigators. The Supreme Court in *Kiobel*—a case by aliens against foreign defendants to enforce international norms—noted the inapplicability of the presumption against extraterritoriality when overseas conduct touches and concerns the United States with sufficient force. *See id.* at 1669; *see also Morrison*, 561 U.S. at 264-65. Meshal's claims powerfully touch and concern the United States. Defendants have failed to show that any other nation has any conflicting interest in this case or that our foreign relations would be affected were it to proceed.

Defendants relatedly assert that adjudicating Meshal's allegations that defendants at times worked together with foreign agents to detain and transport Meshal requires federal courts to intrude on foreign justice systems and would upset diplomatic relations. Appellee Br. at 21, 24-26; s*ee* Maj. Op. at 18-19. But we have rejected the position that the cooperation of foreign law enforcement with United States agents renders a claim too sensitive to adjudicate: "[T]eaming up with foreign agents cannot exculpate officials of the United States from liability to United States citizens for the United States officials' unlawful acts." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1542-43 (D.C. Cir. 1984) (en banc), *rev'd on other grounds*, 471 U.S. 1113 (1985); *cf. also Johnson v. Eisentrager*, 339 U.S. 763, 795 (1950) (Black, J., dissenting) ("The Court is fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive's illegal incarcerations."); *Abu Ali v. Ashcroft*, 350 F.Supp.2d 28, 50, 54 (D.D.C. 2004) (circumstances in which "a citizen is allegedly being detained at the direction of the United States in another country without any opportunity at all to vindicate his rights" amount to "an exceptional situation that demands particular attention to the rights of the citizen"). Many of the Guantanamo detainees were captured by foreign governments and handed over to the United States, yet courts regularly review the facts and circumstances of the detainees' capture and detention when they adjudicate habeas claims. *See Rasul v. Bush*, 542 U.S. 466, 470-72, 483-84 (2004);

see, e.g., *Anam v. Obama*, 696 F. Supp. 2d 1, 5-7 (D.D.C. 2010).

Our court has identified foreign policy implications as potential "special factors" in cases involving foreign plaintiffs but has specified that such concerns are removed when the plaintiff is a United States citizen. In *Doe*, we acknowledged that the plaintiff's "United States citizenship does remove concerns . . . about the effects that allowing a *Bivens* action would have on foreign affairs" even as we declined on other grounds to recognize a *Bivens* claim against the Secretary of Defense by a United States-citizen military contractor in Iraq. 683 F.3d at 396; *cf. Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208-09 (D.C. Cir. 1985) (noting, in special-factors analysis of Nicaraguans' *Bivens* challenge to United States' support of the Nicaraguan Contras, the "danger of foreign citizens using the courts . . . to obstruct the foreign policy of our government").

The majority cites *Munaf v. Geren*, 553 U.S. 674, 702 (2008), for the broad proposition that United States courts may not "second guess executive officials operating in foreign justice systems," Maj. Op. at 19, but that case does not support defendants' foreign-policy objection to Meshal's *Bivens* claims. The Court in *Munaf* unanimously held that United States citizens held by multinational forces have a right to seek habeas corpus relief in United States courts, 553 U.S. at 686-88, notwithstanding that the participation of cooperating foreigners in the circumstances of confinement might be exposed. *Munaf* also concerned a contest over which of two sovereigns should prosecute criminal suspects of interest to both—a contest absent here, where no

prosecution occurred and no other sovereign has claimed an interest in Meshal's civil case. *See id.* at 697-98. The Supreme Court's conclusion—that the United States government's decision not to "shelter [American] fugitives from the criminal justice system of the sovereign with authority to prosecute them" was beyond judicial review, *id.* at 705—has no relevance here. It fails to provide even indirect support for defendants' much broader contention that a "foreign policy" factor weighs against *any* adjudication of rights abuses arising from investigations involving international cooperation.

2.

Defendants also have not shown how the "special factor" of national security prevents recognition of a *Bivens* claim here. *See* Oral Arg. Tr. at 23 (defendants' counsel claiming that it "is the mere prospect of [national security related] litigation inquiry that raises" national security sensitivities). The executive and legislative branches have primary authority over national security matters, but their authority is not entirely insulated from the courts, which play a vital role in protecting constitutional rights. The Supreme Court has long "made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," and underscored that, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536. Because "[n]ational security tasks . . . are carried out in secret . . . , it is far more likely that

actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 522 (1985). Courts must take care in accepting assertions of necessity based on national security, because, as the Supreme Court has observed, "the label of 'national security' may cover a multitude of sins." *Id.* at 524.

The law enforcement investigations in *Turkmen v. Hasty*, 789 F.3d 218 (2d Cir. 2015), were at least as related to the investigation of suspected terrorism as the investigation at issue here, but the Second Circuit found no bar to *Bivens* claims. *See id.* at 233-37. The *Turkmen* plaintiffs were detained in the wake of the September 11th attacks and held until the government could clear them of any involvement with terrorism. *Id.* at 226-27. The fact that the investigation concerned terrorism did not preclude the court from recognizing a *Bivens* remedy. The court acknowledged that "[i]t might well be that national security concerns motivated the Defendants to take action, but that is of little solace to those who felt the brunt of that decision. The suffering endured by those who were imprisoned merely because they were caught up in the hysteria of the days immediately following 9/11 is not without a remedy." *Id.* at 264. The national security character of the investigation was not dispositive there, nor should it be here.

I appreciate the majority's efforts to cabin its holding to cases touching on national security *and* arising abroad. *See* Maj. Op. at 3, 16-17; *see also* Oral Arg. Tr. at 28, 30 (government disclaiming any rule barring all *Bivens* claims involving counter-terrorism

investigations, or all claims based on overseas conduct). But I fear that relying on general national security concerns unconnected to military operations goes too far toward eliminating *Bivens* altogether. On its own, national security is a malleable concept. According to one scholar who exhaustively canvassed the field, "[d]espite its appearance throughout history and its use in relation to statutory authorities . . . 'national security' is rarely defined," and when Congress and the executive branch define it, they do so broadly; the Supreme Court, for its part, "has acknowledged that the term is frustratingly broad, [and that it gives] rise to important constitutional concerns." Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1579-84 (2011). Defendants provide no principle limiting their proffered "national security" rationale for defeating *Bivens* liability and shielding federal agents from constitutional accountability. The boundlessness of their position is particularly problematic when "[n]o end is in sight" to the war against terrorism. Conc. Op. at 1. Defendants' open-ended invocation of "national security" to defeat *Bivens* is unprecedented.

All of the cases defendants cite as dismissing *Bivens* claims for national security reasons are readily distinguishable from this one as involving the military. *See Doe*, 683 F.3d 390; *Vance*, 701 F.3d 193; *Lebron*, 670 F.3d 540. Both *Doe* and *Vance* concerned abuses allegedly committed by military officials and challenged military decisions about operations in the theater of war. *Doe*, 683 F.3d at 392; *Vance*, 701 F.3d at 195-96, 199. Those decisions hinged, in part, on the fact that the plaintiffs were the functional equivalent of members of the armed services. For

example, plaintiff Doe was a defense contractor detailed to a Marine unit on the Iraqi-Syrian border who was detained by the military and determined by a Detainee Status Board to be a threat to the Multi-National Forces in Iraq. *See Doe*, 683 F.3d at 391-92. Although Doe was "a contractor and not an actual member of the military," we saw "no way in which this affects the special factors analysis" of *Stanley* and *Chappell*, which was based on the exclusive system of military justice and discipline. *See Doe*, 683 F.3d at 393-94. Notably, in *Doe*, we referred collectively to the "military, intelligence, and national security" aspect of the case, never invoking "national security" alone or as it might relate to a criminal investigation. *Id.* at 394. *Vance*, too, involved claims of military contractors "performing much the same role as soldiers." 701 F.3d at 198-99. They were detained by military personnel in a combat zone on suspicion of supplying weapons to groups opposed to the United States. The Seventh Circuit refused to recognize a *Bivens* remedy for their claims, reasoning that "[t]he Supreme Court's principal point was that civilian courts should not interfere with the military chain of command." *Id.* at 199.

In *Lebron*, plaintiff Jose Padilla was "convicted of conspiring with others within the United States to support al Qaeda's global campaign of terror" before he sued military policymakers and military officers for his prior military detention as an enemy combatant. 670 F.3d at 544. Although Padilla was neither a service member nor a contractor functioning as one, the defect in his suit, as in *Doe* and *Vance*, was that he sued the military and his

claims threatened to "interfere[] with military and intelligence operations on a wide scale." *Id*. at 553.

Meshal's suit does not arise out of or seek to scrutinize military service or military activity—he is not a service member or military contractor nor is he challenging any conduct of military officials. He was detained by FBI agents during the course of a national-security related law enforcement operation. Unlike its treatment of *Bivens* claims arising from and challenging military actions, the Supreme Court has never hesitated to recognize the viability of a damages suit against federal agents engaged in law enforcement activities or responsible for supervising prisoners. *Compare Chappell*, 462 U.S. at 300, *with Bivens*, 403 U.S. 397-98, *and Carlson*, 446 U.S. at 17-19.

3.

Even accepting that the intersection of foreign policy and national security concerns might sometimes amount to "special factors" counseling decisively against a *Bivens* claim, defendants have failed utterly to explain why those factors should be dispositive here. Defendants' contention that litigating Meshal's claims could jeopardize national security has been made in a cursory fashion, and only in legal briefing. Defendants repeatedly assert, for example, that Meshal's suit would "enmesh the judiciary in the evaluation of national security threats in the Horn of Africa region" and compromise "the substance and sources of intelligence." Appellee Br. 13, 24, 25, 37. That is insufficient. The scope or urgency of the national security threat in the Horn of Africa has not been shown to be incompatible with

remedying violations of Americans' Fourth and Fifth Amendment rights.

The government's assertion of national security interests here is quite different from the assertion that persuaded the Fourth Circuit in *Lebron* to decline to recognize a *Bivens* claim. There, the court noted that Congress and the executive had acted in concert in support of the power over military affairs that constituted a "special factor." *Lebron*, 670 F.3d at 549. Congress enacted the Authorization for the Use of Military Force, and the President formally designated Padilla as an enemy combatant pursuant to that authorization. *Id*. Here, no designation was made, and no military power asserted. The concurrence characterizes FBI activities in foreign countries as part of an "integrated war effort" under the national security umbrella of the President's war power, and suggests that defendants were privileged to act as they did because they "suspected that Meshal was an al Qaeda terrorist." Conc. Op. at 1. But defendants do not claim that they acted pursuant to presidential war powers, nor have they provided any grounds for treating Meshal as a terrorist.

If Article III judges must sometimes cede our rights-protective role in deference to the political branches on matters of national security, we should do so only with a responsible official's authoritative and specific assurance of the imperative of doing so. "[H]istory and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse . . . ." *Hamdi*, 542 U.S. at 530. Not every Justice Department lawyer assigned to represent individual

defendants sued under *Bivens*, *see* 28 C.F.R. § 50.15, has the authority to invoke the prerogatives of the Commander in Chief.

Before declining to recognize a cause of action because of national security concerns, the court should require the government to provide a concrete, plausible, and authoritative explanation as to why the suit implicates national security concerns. That judges cannot "forecast" on our own whether or how this suit might affect national security, *see* Maj. Op. at 19, only underscores why we must require that the government take responsibility for invoking any such rationale. If this case indeed raises national security concerns, our law provides the United States with the opportunity to advance them, and gives courts more nuanced and focused ways to address such concerns.

In order to invoke the state secrets evidentiary privilege, for example, the head of the department with control over a matter must personally consider the issue and make a formal claim of privilege. *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). Courts give careful scrutiny to such assertions. *See, e.g.*, *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) ("Simply saying 'military secret,' 'national security' or 'terrorist threat' or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege. Sufficient detail must be—and has been—provided for us to make a meaningful examination."). Here, by contrast, defendants have provided no affidavit or certification from a high-level government official explaining how Meshal's suit would implicate national security. Defendants' broad

claim that this case implicates national security is entirely unsupported and conjectural. It does not justify refusing to recognize a *Bivens* claim here.

4.

If Meshal were permitted to press his claim, it is entirely possible that during the proceedings a national-security related issue would arise, and that such an issue might prove to be an obstacle to the suit. But that is no reason to halt his suit at the threshold. As the majority notes, Maj. Op. at 17, defendants' counsel at argument was unable to explain how litigating Meshal's claim might reveal national security information or be insusceptible of management through the many other doctrines designed to enable litigation consistent with national security interests. *See* Oral Arg. Tr. at 23, 25.

Federal courts frequently decide cases raising national security issues and are well equipped to handle them. Among the responsibilities of Article III courts is the duty to evaluate the factual and legal bases of the government's detention of United States citizens designated as enemy combatants, *Hamdi*, 542 U.S. at 509, 536, to adjudicate habeas petitions brought by enemy combatants detained at Guantanamo Bay, *Boumediene v. Bush*, 553 U.S. 723, 732 (2008), and to decide whether federal agents were engaged in a "joint venture" with foreign law enforcement officials to circumvent *Miranda* warnings, *United States v. Abu Ali*, 528 F.3d 210, 226-28 (4th Cir. 2008). The judiciary has a wide range of tools to address national security concerns as they arise during the course of a lawsuit. In light of those tools, defendants have failed to show that

there is a reason to deny categorically Meshal's constitutional tort claims.

Under the state-secrets privilege, for example, the government can withhold information from discovery if disclosure of that information would imperil national security or foreign policy. *See, e.g.*, *Reynolds*, 345 U.S. at 7-8; *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982). Once the government properly invokes the privilege, a plaintiff cannot defeat it even if his suit would fail without the privileged material. *See, e.g.*, *Reynolds*, 345 U.S. at 11; *Halkin*, 690 F.2d at 990. The state-secrets privilege is designed precisely to prevent disclosure of information that would impair the nation's defense capabilities or diplomatic interests.

Courts have developed a variety of additional procedures for managing cases that implicate sensitive issues. *See* Federal Judicial Center, *National Security Case Studies: Special Case-Management Challenges* (June 25, 2013) (hereinafter "FJC"). Courts are equipped to evaluate classified and sensitive evidence while maintaining secrecy. Classified or secret evidence is often submitted to courts under seal, and courts can issue opinions without disclosing that evidence. *See, e.g.*, *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 202 (D.C. Cir. 2001) ("We acknowledge that in reviewing the whole record, we have included the classified material. As we noted above . . . we will not and cannot disclose the contents of the record."); *U.S. Info. Agency v. Krc*, 989 F.2d 1211, 1220 n.4 (D.C. Cir. 1993) ("[Secret] information has been submitted to the court under seal and cannot be discussed in this opinion."). Court personnel and non-government

attorneys may be eligible for security clearances that permit them to view and use classified documents and materials for purposes of litigating claims touching on national security. *See, e.g.*, *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 595 F. Supp. 2d 1077, 1089 (N.D. Cal. 2009); *see also United States v. Moussaoui*, 591 F.3d 263, 267 (4th Cir. 2010); FJC at 416, 422 (collecting examples). Courts can assign codes or aliases in a case to enable witnesses to testify about secret matters in a way in which the judge, jury, and attorneys will understand, but the public will not. *See* FJC at 407-08. Secure video connections can enable depositions and recorded testimony from witnesses living abroad. FJC at 64, 130-31, 187. Defendants have given no reason to believe that the tools available to courts to respond to such concerns would be inadequate in Meshal's case.

* * *

Constitutional damages remedies hold out hope of redress to survivors of what is sometimes truly horrific abuse at the hands of government agents. Witness this case. Such claims are rarely brought and, due to legal and factual complexities, they almost never succeed. Yet their existence has enormous value. As Judge Easterbrook observed for the *en banc* Seventh Circuit in *Vance*, "[p]eople able to exert domination over others often abuse that power; it is a part of human nature that is very difficult to control." 701 F.3d at 205. The Supreme Court recognized constitutional torts to deter that kind of abuse of power. United States law enforcement is more active internationally today than ever before, increasing the relevance of *Bivens*' remedial and deterrent functions in cases like this

one. Because I do not believe that precedent supports eliminating Meshal's suit or that defendants made a showing that any congressional action or special factors should preclude it, I respectfully dissent.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMIR MESHAL,

Plaintiff,

v. Case No. 1:09-2178 (EGS)

CHRIS HIGGENBOTHAM, et al.,

Defendants.

MEMORANDUM OPINION

Amir Meshal is an American citizen who alleges that, while travelling in the Horn of Africa, he was detained, interrogated, and tortured at the direction of, and by officials in, the American government in violation of the United States Constitution. After four months of mistreatment, Mr. Meshal was returned home to New Jersey. He was never charged with a crime. Mr. Meshal commenced this suit against various U.S. officials under *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which allows a victim of constitutional violations to sue the responsible federal officers or employees for damages. The defendants have moved to dismiss his case, alleging that even if Mr. Meshal's allegations are true, he has no right to hold federal officials personally liable for their roles in his detention by foreign governments on foreign soil.

The facts alleged in this case and the legal questions presented are deeply troubling. Although Congress has legislated with respect to detainee rights, it has provided no civil remedies for U.S.

citizens subject to the appalling mistreatment Mr. Meshal has alleged against officials of his own government. To deny him 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.

Nevertheless, in the past two years, three federal courts of appeals, including the United States Court of Appeals for the District of Columbia Circuit, have expressly rejected a *Bivens* remedy for 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. This Court is constrained by that precedent. Only the legislative branch can provide United States citizens with a remedy for mistreatment by the United States government on foreign soil; this Court cannot. Accordingly, defendants' motion to dismiss must be **GRANTED.**

I. BACKGROUND

For the purposes of the pending motion to dismiss, the Court accepts as true the following factual allegations in Plaintiff Amir Meshal's Second Amended Complaint. Mr. Meshal is a U.S. citizen who was born and raised in New Jersey. In November 2006, he travelled to Somalia. Sec. Am. Compl. ¶ 23. A few weeks after his arrival, fighting erupted between the Supreme Council of Islamic Courts, which then controlled portions of Somalia, and the Transitional Federal Government of Somalia. *Id.* ¶ 34. Plaintiff fled Mogadishu along

with thousands of other civilians. *Id.* ¶ 36. He then attempted to flee from Somalia to Kenya on or about January 3, 2007. *Id.* ¶ 38.

Around the same time, U.S. officials planned to intercept individuals entering Kenya in an attempt to capture al Qaeda members. By way of background, after the 1998 bombings of the American Embassies in Kenya and Tanzania, the U.S. government deployed civilian and military personnel to the Horn of Africa to identify, arrest, and detain individuals suspected of terrorist activity. *Id.* ¶ 24. Following the terrorist attacks of September 11, 2001, the U.S. government was of the opinion that Somalia was a potential haven for members of al Qaeda fleeing Afghanistan. *Id.* ¶ 26. Accordingly, in 2002, the Department of Defense initiated joint counterterrorism operations with nations in the Horn of Africa region, including Kenya and Ethiopia. *Id.* ¶ 27. Since at least 2004, military personnel and FBI agents have been directly involved in training foreign armies and police units and conducting criminal investigations of individuals with alleged ties to foreign terrorists or terrorist organizations. *Id.* ¶ 29. According to FBI procedures and policies, FBI officers have no law enforcement authority in foreign countries, but may conduct investigations abroad with the approval of the host government. *Id.* ¶ 30. Such extraterritorial activities may be conducted "with the written request or approval of the Director of Central Intelligence and the Attorney General or their designees." *Id.* ¶ 56.

On or about January 24, 2007, Mr. Meshal was captured by Kenyan soldiers and interrogated by Kenyan authorities. *Id.* ¶ 46. The following day, he

was hooded, handcuffed and flown to Nairobi, where he was taken to the Ruai Police Station and questioned by an officer of Kenya's Criminal Investigation Department. *Id.* ¶ 51. The officer told Mr. Meshal that he had to find out what the United States wanted to do with him before he could send him back to the United States. *Id.* ¶ 52. Plaintiff was detained at Ruai for approximately one week. He was not allowed to use the telephone or have access to an attorney. *Id.* ¶¶ 54-55, 71, 99. On approximately February 3, 2007, he was escorted outside the police station for an encounter with three Americans, who identified themselves as "Steve," "Chris," and "Tim." *Id.* ¶ 58. "Steve" is defendant FBI Supervising Special Agent Steve Hersem, and "Chris" is FBI Supervising Special Agent Chris Higgenbotham. "Tim" is Doe 1. *Id.* ¶ ¶ 59-63. During the following week, Hersem, Higgenbotham, and Doe 1 interrogated Mr. Meshal at least four times. Each session lasted a full day and took place in a suite in a building controlled by the FBI. *Id.* ¶ 69-70. When he was not being questioned by Defendants, he remained in a cell at a Kenyan police station. *Id.* ¶ 90.

On the first day of interrogation, Doe 1 presented a form to Mr. Meshal that notified him he could refuse to answer any questions without a lawyer present. *Id.* ¶ 71. When Mr. Meshal asked for an attorney, however, Doe 1 said that he was not permitted to make any phone calls. *Id.* When Mr. Meshal asked if 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." *Id.* Higgenbotham also told Mr. Meshal that he was being held "in a 'lawless country' and did not have any right to legal representation." *Id.* Mr. Meshal was presented with the same document for signature before each subsequent interrogation in Kenya. *Id.* ¶ 83. Mr. Meshal maintains that he signed the documents because he believed he had no choice and hoped that it would expedite his return to the United States. *Id.* ¶ 71.

During these interrogation sessions, Mr. Meshal was continuously accused of having received weapons and interrogation resistance training in an al Qaeda camp. *Id.* ¶ 84. Hersem told Mr. Meshal that "his buddy 'Beantown,'" a U.S. citizen named Daniel Maldonado, who Mr. Meshal met in Kenya and who was seized by Kenyan soldiers on or about January 21, 2007, "had a lot to say about [Mr. Meshal]." *Id.* ¶ 65-67. Hersem told Mr. Meshal that his story would have to match Maldonado's.[1] *Id.* ¶ 66.

The Defendants mistreated Mr. Meshal during the interrogation sessions. *Id.* ¶¶ 86-88. Higgenbotham threatened to send Mr. Meshal to Israel, where he said the Israelis would "make him disappear." *Id.* ¶ 86. Hersem told Mr. Meshal that if he confessed his connection to al Qaeda, he would be returned to the United States to face civilian courts there, but if he refused to answer more questions he

[1] Maldonado was taken back to the U.S. from Kenya and charged in U.S. courts with receiving military-type training from a foreign terrorist organization. Sec. Am. Compl. ¶ 120. According to one U.S. official, Mr. Meshal was not brought home because there was insufficient evidence to detain or charge him in the United States. *Id.* ¶ 121.

would be returned to Somalia. *Id.* ¶ 87. Hersem also told Mr. Meshal that he could send him to Egypt, where he would be imprisoned and tortured if he did not cooperate and admit his connection with al Qaeda, and told him "you made it so that even your grandkids are going to be affected by what you did." *Id.* ¶ 88. At one point, Higgenbotham "grabbed" Mr. Meshal and "forced" him to the window of a room, *id.* ¶ 86; at another, Hersem "vigorously pok[ed]" Mr. Meshal in the chest while yelling at him to confess his connection to al Qaeda. *Id.* ¶ 87.

Kenyan authorities never interrogated or questioned Mr. Meshal, nor did they provide him with any basis for his detention. *Id.* ¶¶ 76, 78. On February 7, 2007, a consular affairs officer from the U.S. Embassy in Nairobi, accompanied by a Kenyan man, visited Mr. Meshal in jail. *Id.* ¶ 103. 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.* Also on or about February 7, 2007, Kenyan courts began hearing habeas corpus petitions allegedly filed by the Muslim Human Rights Forum (MHRF), a Kenyan human rights organization, on behalf of Mr. Meshal and other detainees who were seized fleeing Somalia and held without charge. *Id.* ¶ 100.

On February 9, 2007, Kenyan officials removed Mr. Meshal from the jail, hooded and handcuffed him, and flew him and twelve others to Somalia. *Id.* ¶¶ 109-12. There, he was detained in handcuffs in an underground room, with no windows or toilets, referred to as "the cave." *Id.* ¶¶ 111-12. Immediately after Mr. Meshal's rendition, Kenyan authorities presented evidence to the Kenyan court

showing that he was no longer in Kenya; the court dismissed the habeas petition for lack of jurisdiction. *Id.* ¶ 114. Mr. Meshal alleges that Defendants arranged for his removal from Kenya so they could continue to detain and interrogate him without judicial pressure from Kenyan courts. *Id.* ¶¶ 108, 128.

On or around February 16, 2007, Mr. Meshal was transported, still handcuffed and blindfolded, by plane to Addis Ababa, Ethiopia, and driven to a military barracks where he was detained by the Ethiopian government with others who had been rendered from Kenya to Somalia and Ethiopia. *Id.* ¶¶ 117-119, 130-137. After a week of incommunicado detention, and continuing over the next three months, Ethiopian officials regularly transported Plaintiff and other prisoners to a villa for interrogation. *Id.* ¶¶ 140-41, 151. Plaintiff was interrogated by Doe 1, who had interrogated him in Kenya, and Doe Defendant 2, a U.S. official who introduced himself as "Dennis," and whose name has been filed with the Court under seal. *Id.* ¶¶ 140-41, 144-45. Apart from a brief initial interrogation upon his arrival, Mr. Meshal was never questioned by Ethiopian officials. *Id.* ¶¶ 132-33. Doe 1 led all but one of the interrogations of Mr. Meshal in Ethiopia. *Id.* ¶¶ 146, 149. He was joined at times by Doe 2, who led the final interrogation. *Id.* ¶ 146. Each time, Doe 1 made Mr. Meshal believe that he and the other FBI agents would send Mr. Meshal home if he was "truthful". *Id.* ¶¶ 148-49. Does 1 and 2 refused Mr. Meshal's repeated requests to speak with a lawyer. *Id.* ¶ 152. When he was not being interrogated, Plaintiff was handcuffed in his prison cell. He was

twice moved into solitary confinement for several days. *Id.* ¶ 154.

No charges were ever filed against Mr. Meshal in Ethiopia. *Id.* ¶¶ 155, 160, 162. On three occasions, he was taken for closed proceedings before a military tribunal. *Id.* After the first proceeding, Doe 1 pressed Mr. Meshal to admit that he was connected to al Qaeda and told him that he would not be allowed to go home unless he told Doe 1 what he wanted to hear. *Id.* ¶ 156. Although FBI agents had been regularly interrogating Mr. Meshal in Ethiopia for more than a month, U.S. consular officials did not gain access to him until on or about March 21, 2007, after the fact of his detention became public knowledge when McClatchy Newspapers first reported that he was being held at a secret location in Ethiopia. *Id.* ¶ 157. On or about May 24, 2007, Mr. Meshal was taken to the U.S. Embassy in Addis Ababa and flown to the United States, where he was released. During the four months he was detained abroad, he lost approximately eighty pounds. *Id.* ¶¶ 166-67. He was never charged with a crime.

Plaintiff seeks to hold Defendants individually liable for monetary damages for violations of his constitutional and statutory rights. Count I alleges Defendants violated his Fifth Amendment right to substantive due process by threatening him with disappearance and torture; by directing, approving and participating in his detention in Kenya and his illegal rendition to Somalia and Ethiopia without due process; and by subjecting him to months of custodial interrogation in Africa. Count II alleges Defendants violated Mr. Meshal's Fifth Amendment right to procedural due process by subjecting him to

prolonged and arbitrary detention without charge; denying him access to a court or other processes to challenge his detention; and denying him access to counsel. Count III alleges Defendants violated his Fourth Amendment right to be free from unreasonable seizure without a probable cause hearing. Count IV alleges Defendants violated his rights under the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350, note. *Id.* ¶¶ 171-213.

Defendants have moved to dismiss all counts of the complaint. They argue that the Court should also dismiss the constitutional claims because (1) "special factors" preclude implying a cause of action under *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971); and (2) Defendants are entitled to qualified immunity. They also argue that Mr. Meshal's TVPA claim must be dismissed because none of the Defendants were acting under color of foreign law. For the reasons explained below, the motion to dismiss will be granted because binding precedent from this Circuit prohibits either a TVPA or a *Bivens* remedy for Mr. Meshal.

II. STANDARD OF REVIEW

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal

quotation marks and citations omitted). While detailed factual allegations are not necessary, plaintiff must plead enough facts "to raise a right to relief above the speculative level." *Id.* The Court must construe the complaint liberally in plaintiff's favor and grant plaintiff the benefit of all reasonable inferences deriving from the complaint. *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). However, the Court must not accept plaintiff's inferences that are "unsupported by the facts set out in the complaint. . . . [or] legal conclusions cast in the form of factual allegations." *Id.* "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

III. ANALYSIS

A. Plaintiff Has Alleged Deprivations of His Constitutional Rights

In analyzing a *Bivens* claim, a court must first "identify the exact contours of the underlying right said to have been violated" and determine "whether the plaintiff has alleged a deprivation of a constitutional right at all." *Cnty. Of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998); *Al-Aulaqi v. Panetta*, Civ. No. 12-1192, 2014 U.S. Dist. LEXIS 46689 *37 (D.D.C. Apr. 4, 2014). Plaintiff has stated a plausible violation of both the Fourth and Fifth Amendments.

It 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." *United States v. Toscanino*, 500 F.2d 267, 280-81 (2d Cir. 1974).

> The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. 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).

Plaintiff has alleged that Defendants violated his Fourth Amendment rights by detaining him for four months without a probable cause hearing. The Fourth Amendment requires a "prompt" hearing to assess the sufficiency of evidence supporting detention. *See Gerstein v. Pugh*, 420 U.S. 103, 125 (1975). "The touchstone of [such an inquiry] is reasonableness." *United States v. Knights*, 534 U.S. 112, 118 (2001). In the criminal context, a detained individual must receive a hearing within 48 hours of seizure. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). Non-citizens detained under the USA Patriot Act must receive a probable cause hearing within seven days. *See* 8 U.S.C. § 1226a(a)(5). Plaintiff has plausibly alleged that his detention without a hearing for four months – particularly when Defendants told him over and over that they

had the power to send him back to the United States at any time – is unreasonable.[2]

Mr. Meshal also asserts that Defendants deprived him of his Fifth Amendment right to substantive due process by, *inter alia*, coercively interrogating him during his detention and extraordinary rendition, including threatening him with torture, disappearance and death. Sec. Am. Compl. ¶¶ 86-88.[3]

To state a substantive due process claim, a plaintiff must assert that government officials were

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[2] The Second Circuit has recognized that the Fourth Amendment attaches "where the cooperation between the United States and law enforcement officials is designed to evade constitutional requirements applicable to American officials." *U.S. v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992). Mr. Meshal claims exactly that. He alleges that Defendants told him if he confessed his involvement with al Qaeda he would immediately be returned to the United States to face civilian courts, but if he refused to answer more questions he would be returned to Somalia. Sec. Am. Compl. ¶ 87. Plaintiff claims that another individual detained under similar circumstances, Daniel Maldonado, was in fact returned to the United States to be charged after he confessed to receiving terrorist training, and alleges Defendants deliberately kept Plaintiff from returning home because they did not have enough information to charge him. *Id.* ¶¶ 120-21. These allegations do not suggest that it was "unreasonable" for Mr. Meshal to expect a probable cause hearing; to the contrary, Defendants deliberately refused to provide him access to one.

[3] Mr. Meshal has also alleged other violations of his Fifth Amendment rights; however, it is unnecessary to determine whether each and every one would go forward. For the purpose of the *Bivens* analysis, it is enough to conclude that Plaintiff has plausibly alleged a deprivation of at least *some* constitutional rights. *Lewis*, 523 U.S. at 841, n.5.

so "deliberately indifferent" to his constitutional rights that the officials' conduct "shock[s] the . . . conscience." *Estate of Phillips v. Dist. of Columbia*, 455 F.3d 397, 403 (D.C. Cir. 2006). Every substantive due process inquiry "demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." *Lewis*, 523 U.S. at 850.

The parties have cited no case law examining the precise substantive due process rights of a U.S. citizen coercively interrogated while on foreign soil. The government concedes, however, that coercive interrogation, standing alone, may give rise to a substantive due process claim. Defs.' Mot. to Dismiss at 30; *see Chavez v. Martinez*, 538 U.S. 760, 779 (2003). Within the United States, plaintiffs may state a claim for a substantive due process violation where they have been verbally threatened with "the terror of instant and unexpected death at the whim of [their] . . . custodians," *Burton v. Livingston*, 791 F.2d 97, 100 (8th Cir. 1986), or when the interrogation is "so terrifying in the circumstances . . . that [it] is calculated to induce not merely momentary fear or anxiety, but severe mental suffering." *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989). In this case, 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.

The Court does not determine whether Mr. Meshal would prevail on his constitutional claims, if he were permitted to assert them. It does, however, hold that he has stated a "plausible claim for relief" under the Fourth and Fifth Amendments to the Constitution. *Iqbal*, 556 U.S. at 679.

B. Binding Precedent Deprives Mr. Meshal of a Remedy for the Alleged Deprivations of His Constitutional Rights.

1. Mr. Meshal Has No Other Remedies: It is "Damages or Nothing."

In *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971), the Supreme Court established that victims of constitutional violations by a federal agent have a right to recover damages against the official in federal court despite the absence of a statute conferring that right.[4] A court follows a two-step process to determine whether a *Bivens* remedy is available. First, it must consider whether "any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (citations omitted). If an alternative remedy does not exist, the court proceeds

[4] "A *Bivens* suit is the federal counterpart of a claim brought pursuant to 42 U.S.C. § 1983 against a state or local officer/employee for the violation of the claimant's constitutional rights." *Rasul v. Myers*, 512 F.3d 644, 652 n.2 (D.C. Cir. 2008), *vacated*, 555 U.S. 1083 (2008).

to step two: "mak[ing] the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Bush v. Lucas*, 462 U.S. 367, 378 (1983); *see also Bivens*, 403 U.S. at 396 (a cause of action for damages against federal officials may not lie where there are "special factors counseling hesitation in the absence of affirmative action by Congress."). These special factors "relate not to the merits of a particular remedy, but to the question of who should decide whether such a remedy should be provided." *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (citations omitted).

The parties agree that Mr. Meshal has no alternative remedy for his constitutional claims. "Without [*Bivens]*, Meshal has no recourse and the judiciary will be powerless to vindicate the constitutional rights of a U.S. citizen against illegal detention and mistreatment by officials of his own government. Here, as in *Bivens*, it is 'damages or nothing.'"[5] Pl.'s Opp'n at 8, (quoting *Bivens*, 403 U.S.

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[5] Plaintiff has also alleged a violation of the Torture Victim Protection Act, 28 U.S.C. § 1350, note ("TVPA"), which, if successful, would provide a partial, limited remedy against two of the individual Defendants for the use of torturous interrogation techniques. Sec. Am. Compl. ¶¶ 204-13. The TVPA, however, is not available to Mr. Meshal. In *Doe v. Rumsfeld*, this Circuit reaffirmed that the TVPA "[does] not include as possible defendants either American government officers or private U.S. persons." 683 F.3d 390, 396 (D.C. Cir. 2012) (quoting *Saleh v. Titan Corp.*, 580 F.3d 1, 16 (D.C. Cir. 2009). Accordingly, Plaintiff's TVPA claim must be **DISMISSED.**

at 410 (Harlan, J., concurring)). They dispute, however, whether "special factors counsel hesitation" in implying a *Bivens* cause of action on these facts.

2. The Special Factors Counseling Hesitation

Defendants argue that "matters implicating national security and intelligence operations, particularly those involving foreign governments, are 'the province and responsibility of the Executive.'" Defs.' Mot. to Dismiss Pl.'s Am. Compl. at 11 (quoting *Dep't of Navy v. Egan*, 484 U.S. 518, 529-30 (1988)). Defendants argue that Mr. Meshal is essentially attacking the nation's foreign policy, specifically joint operations in the Horn of Africa and executive policies which permit FBI agents to conduct and participate in investigations abroad. *Id*. at 12. They claim that, if allowed to go forward, Mr. Meshal's claims would interfere with the management of our country's relations with other sovereigns, a power constitutionally allocated to the executive branch. *Id.* at 13. Defendants argue that this is not the judiciary's role, impinges on bedrock separation of powers principles, and would "undermine the Government's ability to speak with one voice in this area." *Id.* (quoting *Munaf v. Geren*, 128 S.Ct. 2207, 2226 (2008)). In a related argument, Defendants claim the litigation would threaten national security by necessitating inquiry into, *inter alia*, specific terrorist threats, substances and sources of intelligence, and the extent to which other countries cooperate with the United States. *Id.* at 13-14. Defendants also argue that this litigation would "enmesh foreign countries and their officials in civil

litigation in U.S. courts," which could impact relations with those countries. *Id.* at 16.

Plaintiff responds that no special factors counsel hesitation in this case. First, he argues that he does not challenge the nation's foreign policy. "[R]ather, this suit concerns only *the manner* in which four federal law enforcement officers treated a U.S. citizen . . . . Recognizing a judicial remedy here would not prevent the government from carrying out counter-terrorism operations in the Horn of Africa . . . . It would require only that U.S. officials abide by the Constitution in their treatment of U.S. citizens during the course of those operations[.]" Pl.'s Opp'n at 9-10. Plaintiff maintains that separation of powers principles underscore why this Court should permit a *Bivens* remedy here: the Court would be performing its traditional role of protecting the constitutional rights of a U.S. citizen. *Id.* at 10-11. Plaintiff contends that Defendants should not be able to escape their constitutional obligations to American citizens "by directing or colluding with foreign actors or hiding behind the fig-leaf of a foreign custodian." *Id.* at 11. In response to Defendants' predictions that the litigation would entail a broad-based inquiry into matters of national security and foreign affairs, Plaintiff argues that while the litigation "may require some inquiry into the Defendants' relationship and communication with foreign officials," the focus of the litigation is on conduct by U.S. officials against a U.S. citizen. *Id.* at 14. Plaintiff further argues that the judiciary has the experience and institutional competence to conduct necessary inquiries into cooperation between the United States and foreign governments, as well as matters involving national security. *Id.* at 14-15.

3. The Judiciary's Traditional Ability to Protect the Rights of American Citizens

In *Bivens*, the Supreme Court held that a damages remedy exists in the rare case in which "[t]he mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist. . . . In such case, there is no safety for *the citizen*, except in the protection of judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name." *Bivens*, 403 U.S. at 394-95 (citing *Weeks v. United States*, 232 U.S. 383, 386 (1914); *United States v. Lee*, 106 U.S. 196, 219 (1882) (emphasis added)). Even when such 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. *See Reid v. Covert*, 354 U.S. at 5-6 (plurality opinion) ("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.").

In *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985), this Circuit declined to imply a *Bivens* remedy for Nicaraguan citizens. In that case, the plaintiffs claimed that as a result of American support, the Contras carried out widespread attacks on Nicaraguan civilians. The D.C. Circuit relied heavily on the fact that the plaintiffs were foreign nationals:

> Just as the special needs of the armed forces require the courts to leave to

> Congress the creation of damage remedies against military officers for allegedly unconstitutional treatment of soldiers, so also the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad . . . . [T]he danger of foreign citizens using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist.

770 F.2d at 208-209 (internal citations omitted). See also *Arar v. Ashcroft,* 585 F.3d 559, 575-76 (2d Cir. 2009) (foreign nationals may not seek damages against U.S. officials for actions abroad, relying on *Sanchez-Espinoza*); *In re Iraq & Afghanistan Detainees Litig.*, 479 F.Supp.2d 85, 105-106 (D.D.C. 2007) (same), *aff'*d *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011).

By contrast, where American citizens' constitutional interests are at stake, courts have traditionally been far less willing to allow foreign policy concerns to extinguish the role of the judiciary. In *Ramirez de Arellano v. Weinberger,* 745 F.2d 1500 (D.C. Cir. 1984), this Circuit allowed a U.S. citizen to sue for declaratory and injunctive relief when the U.S. military seized his ranch in Honduras. The Court held that "[w]hile separation of powers concerns may outweigh judicial adjudication in the typical case involving a foreign act of state, the

prudential balance may shift decidedly when [U.S.] citizens assert constitutional violations by [U.S.] officials. . . . [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.* at 1542-43. Likewise, in *Abu Ali v. Ashcroft*, 350 F.Supp.2d 28, 61 (D.D.C. 2004), the district court found that an American citizen indefinitely detained in a Saudi Arabian prison, allegedly at the behest of U.S. authorities, could challenge his detention in a habeas proceeding. The district court acknowledged the considerable authority of the executive branch in diplomatic relations, and noted that such authority would "cabin the Court's inquiry" so as not to intrude on executive functions. *Id.* Ultimately, however, the court found "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. Finally, in *Hamdi v. Rumsfeld*, 542 U.S. 507, 535-36 (2004), the Supreme Court rejected the argument that separation of powers principles prohibit the judiciary from examining the indefinite detention of American citizens by their own governments, even when the detainee is captured on a foreign battlefield fighting against the U.S., and even when he has been designated an enemy combatant. "[T]he position that the courts must forgo any examination of the individual case . . . serves only to *condense* power into a single branch of government." *Hamdi*, 542 U.S. at 535-36 (emphasis in original). "We have long since made clear that a state of war is not a blank check

for the President when it comes to the rights of *the Nation's citizens*." *Id.* at 536 (emphasis added).

In short, 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. *United States v. Yousef*, 327 F.3d 56, 145 (D.C. Cir. 2003) (for suppression purposes, courts must inquire into statements elicited in overseas interrogation conducted by foreign police to determine whether U.S. agents actively participated in the questioning, or used the foreign for the interrogation in order to circumvent constitutional requirements such as *Miranda*); *United States v. Toscanino*, 500 F.2d 267, 281 (2d Cir. 1974) (trial court must conduct an evidentiary inquiry to determine whether the defendant was brought into the jurisdiction of court through abduction at the hands of foreign officials at the behest of U.S.); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 155 (D.D.C. 1976) (plaintiffs were entitled to discovery of facts which would show that the German government wiretapped American citizens at the direction of the United States).

4. *Doe, Lebron, and Vance*

Notwithstanding our courts' long history of providing judicial access to citizens whose rights are violated by our government, in the last two years, three courts of appeals, including this Circuit, have dismissed *Bivens* actions by U.S. citizens alleging constitutional violations by U.S. government officials.

In *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012), the Fourth Circuit refused to recognize a *Bivens* remedy for Jose Padilla, an American citizen detained as an enemy combatant and allegedly tortured for three years while in U.S. military custody. The circuit rejected Padilla's claims against seven defendants, high ranking policy makers as well as the two former commanders of the Naval Consolidated Brig in which he was held. It found that under separation of powers principles, the Constitution assigned the legislature plenary control over the military establishment, and the President control over national security and military affairs as Commander in Chief. *Lebron*, 670 F.3d at 549 (citing U.S. Const. art. II, § 2, cl. 1); *see also Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) (judges "traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"); *Winter v. NRDC, Inc.*, 555 U.S. 7, 24, 26 (2008) (courts must afford "great deference" to what "the President – the Commander in Chief – has determined . . . to [be essential to] national security"). The *Lebron* court explicitly found the question of citizenship not to be dispositive, as "[t]he source of hesitation is the nature of the suit and the consequences flowing from it, not just the identity of the plaintiff." 670 F.3d at 554. The court found that the plaintiff's lawsuit would intrude into military affairs, in violation of the separation of powers. *Id.* at 550. It also found troubling that the lawsuit challenged the government's detainee policies, both as applied to Padilla and much more generally.

> In short, Padilla's complaint seeks . . . to have the judiciary review and

> disapprove sensitive military decisions made after extensive deliberations within the executive branch as to what the law permitted, what national security required, and how best to reconcile competing values. It takes little enough imagination to understand that a judicially devised damages action would expose past executive deliberations affecting sensitive matters of national security to the prospect of searching judicial scrutiny.

Id. at 551. The *Lebron* court recognized that people may "not agree with [these] policies. [People] may debate whether they were or were not the most effective counterterrorism strategy. But the forum for such debates is not the civil cause of action pressed in the case at bar. The fact that Padilla disagrees with policies allegedly formulated or actions allegedly taken does not entitle him to demand the blunt deterrent of money damages under *Bivens* to promote a different outcome." *Id.* at 552.

In *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012) *pet. For reh'g en banc denied*, 2012 U.S. App. LEXIS 15717 (D.C. Cir. July 30, 2012), the D.C. Circuit refused to allow a *Bivens* remedy for a U.S. citizen, a government contractor who alleged he was illegally detained, interrogated, and tortured for nearly ten months on a U.S. military base in Iraq before being released without charges. The *Doe* court began with the observation that courts have been reluctant to extend *Bivens* remedies to new contexts, and "[t]he Supreme Court has never implied a *Bivens* remedy in a case involving the military, national

security, or intelligence . . . caution[ing] that matters intimately related to . . . national security are rarely proper subjects for judicial intervention." *Id.* at 394-95 (internal citations and quotation marks omitted). With respect to intelligence gathering, the court observed that the D.C. Circuit had recently declined to recognize a *Bivens* cause of action in *Wilson v. Libby*, in which undercover CIA operative Valerie Plame and her husband Joseph Wilson sought a *Bivens* remedy from Bush Administration officials who deliberately revealed her identity. "[T]he required judicial intrusion into national security and intelligence matters was . . . a special factor counseling hesitation because such intrusion would subject sensitive operations and operatives to judicial and public scrutiny." *Id.* (*citing Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008)) (quotation marks omitted). Finally, the Circuit rejected the plaintiff's argument that his United States citizenship distinguished his case from *Arar v. Ashcroft* and *Ali v. Rumsfeld*, in which the courts rejected non-citizens' *Bivens* claims against American officials based on alleged torture in the United States and abroad, noting that "[Doe's] citizenship does not alleviate the . . . special factors counseling hesitation." *Id.* at 396.

Most recently, in *Vance v. Rumsfeld,* 701 F.3d 193 (7th Cir. 2012) (*en banc*), *cert. denied*, 133 S. Ct. 2796 (2013), a divided Seventh Circuit, sitting *en banc*, reversed a panel judgment and dismissed the *Bivens* claims of two government contractors, both American citizens, who were allegedly arrested, detained and tortured by the U.S. military in Iraq. One was detained for about one month, the other for three months; as in *Doe*, neither was ever charged

with a crime. The circuit began by noting that the Supreme Court "has never created or even favorably mentioned a non-statutory right of action for damages on account of conduct that occurred outside the borders of the United States." *Id.* at 198-99. Like the *Doe* and *Lebron* courts, the *Vance* court found plaintiffs' American citizenship not "dispositive one way or the other," *id.* at 203; the principal point was that civilian courts should not interfere with the military chain of command or with "[m]atters intimately related to national security." *Id.* at 199-200.

Several judges wrote separately to explain their disagreement with the reasoning and/or dissent from the outcome of the *Vance* decision. They observed that Congress has legislated remedies for U.S. citizens to sue foreign officials for damages, and non-citizens to sue anyone who has committed a tort in violation of the law of nations, but *not* for U.S. citizens to sue U.S. officials.

> [I]f it were true that there is no *Bivens* theory under which a U.S. citizen may sue an official of the U.S. government . . . who tortures that citizen on foreign land under the control of the United States . . . then U.S. citizens will be singled out as the only ones *without* a remedy under U.S. law. . . . . Only by acknowledging the *Bivens* remedy is it possible to avoid treating U.S. citizens worse than we treat others. The fear of offense to our allies that the majority fears dissipates as soon as we look at the broader picture.

Vance, 701 F.3d at 209 (Wood, J., concurring) (discussing TVPA and Alien Tort Statute, 28 U.S.C. § 1350); *see also id.* at 218-20 (Hamilton, J., dissenting). The *Vance* concurrence and dissents argue that citizenship matters: The government has a well-established obligation to protect its own citizens' constitutional rights abroad. *Id.* at 221-22 (Hamilton, J., dissenting). And they maintain that *Bivens* must provide a remedy against, at the very least, the individual officers who are alleged to have committed the mistreatment.

> Every government institution errs . . . . The point of judicial participation is not infallibility but independence and neutrality, something executive entities do not have when evaluating their own officers' conduct . . . . I cannot agree that the separation of powers bars a citizen's recovery from a rogue officer affirmatively acting to subvert the law. That is a quintessential scenario where *Bivens* should function to enforce individual rights.

See id. at 230-31 (Williams, J., dissenting); *see also id.* at 207-08 (Wood, J., concurring); *id.* at 222-24 (Hamilton, J., dissenting).

5. *Doe, Lebron, and Vance Doom Mr. Meshal's Claims*

Mr. Meshal struggles to distinguish this case from *Doe*, *Vance*, and *Lebron*. First, he argues that these cases only prohibit *Bivens* actions against the military, or on the battlefield. Pl.'s Resp. to Defs.' Dec. 5, 2012 Notice of Suppl. Authority, 1-3. The

cases cannot be read that narrowly. Each case states that the same special factors compelling hesitation in military cases also compel hesitation in cases involving national security and intelligence. *Lebron*, 670 F.3d at 549 (noting that judges "traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs," and courts must afford "great deference" to what "the President – the Commander in Chief – has determined . . . is essential to national security.") (citations omitted); *Doe*, 683 F.3d at 395 ("In the context of national security and intelligence, the Court has cautioned that matters . . . are rarely proper subjects for judicial intervention.")(internal citations and quotation marks omitted); *Vance*, 701 F.3d at 199-200, 203 (finding plaintiffs' American citizenship not "dispositive one way or another," – either way, civilian courts should not interfere with the military chain of command or with matters intimately related to national security). The cases hold that implying a *Bivens* cause of action in any of these types of cases would intrude into the affairs of the legislative and executive branches, in violation of the separation of powers. *Lebron*, 670 F.3d at 550; *Doe*, 683 F.3d at 394-95; *Vance*, 701 F.3d at 198-99.

In this case, Mr. Meshal alleges that Defendants acted in accordance with guidelines established by the executive branch. Specifically, he alleges that Defendants were part of the Combined Joint Task Force-Horn of Africa, a joint counterterrorism operation with nations in the Horn of Africa region, which was established by the U.S. government and includes military employees, civilian employees, including FBI agents, and representatives of coalition countries. Defs.' Mot. to

Dismiss at 12; *see also* Second Amended Compl. ¶¶ 24-30, 56. A central theme of Mr. Meshal's claims is that Defendants in this case acted with the cooperation of the foreign governments which held him in their prisons, transferred him between nations, and permitted Defendants access to him. *See generally* Second Am. Compl. As the government points out, these claims have the potential to implicate "national security threats in the Horn of Africa region; substance and sources of intelligence; the extent to which each government in the region participates in or cooperates with U.S. operations to identify, apprehend, detain, and question suspected terrorists on their soil; [and] the actions taken by each government as part of any participation or cooperation with U.S. operations." Mot. To Dismiss at 13. They involve the same separation of powers concerns which were decisive in *Lebron*, *Doe*, and *Vance*.

Second, Mr. Meshal tries to distinguish *Lebron*, *Doe*, and *Vance* by arguing that he only brings this action against the "non-supervisory law enforcement officers directly involved in his detention and mistreatment," and does not seek to hold remote superiors liable for his constitutional abuses. Pl.'s Response to Notice of Supp. Auth., ECF #59 at 2; *see also* Pl.'s Response to Notice of Supp. Auth., ECF #57 at 2-3. He therefore claims that his lawsuit would not require the Court to intrude into the functions of the other branches of government. *Id.* at 2; *see also* ECF #59 at 2. This argument also cannot survive. *Lebron* and *Vance* also included defendants who were directly responsible for their torture; the plaintiffs in those cases argued they implemented the policies "devised and authorized" by

the cabinet officials at the highest levels of government. *Lebron*, 670 F.3d at 547; *see also Vance*, 701 F.3d at 196, (plaintiffs sued "persons who conducted or approved their detention and interrogation, and many others who had supervisory authority over those persons"). Neither court differentiated among the defendants in denying a *Bivens* remedy; as the *Lebron* court stated: "The source of hesitation is the nature of the suit and the consequences flowing from it," not the identity of the parties to the lawsuit. 670 F.3d at 554; *see also Vance*, 701 F.3d at 198-99 (no right of action against either the soldiers who mistreated plaintiffs or their remote supervisors).

Even if the defendants' place in the chain of command were relevant under *Vance*, *Doe*, and *Lebron*, the Second Amended Complaint makes clear that this case is about far more than Mr. Meshal's own experiences. The Complaint explicitly alleges that Mr. Meshal's detention, transfer, and interrogation were part of a much larger trend: the government's "increasing[] engage[ment] in 'proxy detention,' a practice in which individuals alleged or suspected to have ties to foreign terrorists or foreign terrorist organizations are detained by foreign authorities at the behest of, the direction of, and/or with the active and substantial participation of the United States." Second Am. Compl. ¶ 31. Central to Mr. Meshal's complaint are his allegations that Kenyan, Somalian, and Ethiopian officials were substantial participants in his detention and transfer between countries. *Id.* ¶¶ 56-59, 76-82, 108-12, 115-19, 123-25, 130-37. He alleges that they were also partners in the similar treatment of many other people of interest to the United States. *Id.* ¶¶ 122-23,

134-39. Moreover, he claims that his treatment and the similar treatment of others was authorized by and/or conducted with full awareness of other U.S. officials, "including officials designated by the Attorney General and the Director of Central Intelligence." *Id.* ¶ 139; *see also* ¶¶ 56-57, 129A, 122, 134-37, 165A, 170C, 170D. Like the complaints in *Lebron*, *Doe*, and *Vance*, "it takes little enough imagination to understand that a judicially devised damages action would expose past executive deliberations affecting sensitive matters of national security" as well as sensitive matters of diplomatic relations, "to the prospect of searching judicial scrutiny." *Lebron*, 670 F.3d at 551. In these circumstances, special factors counsel hesitation in the judicial creation of damages remedies. *Id.*; *see also Doe*, 683 F.3d at 394; *Vance*, 701 F.3d at 199-200.

Finally, Mr. Meshal argues that *Vance* is distinguishable because the plaintiff in that case had access to other, "albeit partial" remedies for his injuries, while for Mr. Meshal, it is "damages or nothing." ECF #59 at 3 (noting that the *Vance* plaintiffs could seek monetary damages under the Military Claims Act or the Foreign Claims Act). Plaintiff acknowledges that the *Doe* plaintiff had no alternative remedy but seeks to distinguish that decision on grounds that Congress had deliberately acted to deprive military detainees of a private right of action by passing the Detainee Treatment Act. ECF #57 at 4. He argues that Congress has not affirmatively acted to foreclose a private right of action for plaintiffs such as himself, and accordingly, the judiciary is free to create a *Bivens* remedy. *Id.*

Again, this argument cannot survive *Doe*, which holds that as long as special factors counseling hesitation exist, congressional action or inaction is irrelevant to the creation of a *Bivens* remedy. On the one hand, the existence of a statute that provides a partial remedy to a plaintiff seeking a *Bivens* remedy precludes a *Bivens* cause of action, even though the statute does not provide complete relief. *Doe*, 683 F.3d at 396 (citing *Bush v. Lucas*, 462 U.S. 367, 380, 388 (1983)). On the other hand, "the absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Id.* (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 421-22 (1988)). When Congress has acted to legislate in a subject matter area, "congressional inaction can also inform [the judiciary's] understanding of Congress's intent" with respect to creation of a *Bivens* remedy. *Doe*, 683 F.3d at 397 (explaining that where Congress has legislated in an area but failed to provide a private cause of action for damages, "[i]t would be inappropriate for this Court to presume to supplant Congress's judgment in a field so decidedly entrusted to its purview.").

Congress has legislated with respect to detainee rights both in the United States and abroad. *See inter alia*, Torture Victim Protection Act, 28 U.S.C. § 1350, note; Military Claims Act, 10 U.S.C. § 2733; Foreign Claims Act 10 U.S.C. § 2734; and Federal Anti-Torture Statute, 18 U.S.C. § 2340. Some of these statutes provide private causes of action for money damages; others authorize criminal prosecution. The fact that none of these acts extends a cause of action for detainees similarly situated to

Mr. Meshal to sue federal officials in federal court does not lead to the conclusion, as Mr. Meshal argues, that Congress intended the judiciary to recognize such a cause of action. On the contrary, under *Doe*, "evidence of congressional inaction . . . supports our conclusion that this is not a proper case for the implication of a *Bivens* remedy." *Doe*, 683 F.3d at 397.

IV. CONCLUSION

When *Bivens* was decided over forty years ago, it was intended for cases in which "[t]he mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist . . . . In such case, there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name." *Bivens*, 403 U.S. at 394-95 (citations omitted). Mr. Meshal has come to court seeking the protection of judicial tribunals as the only way to provide for his safety. Under *Lebron*, *Doe*, and *Vance*, however, when a citizen's rights are violated in the context of military affairs, national security, or intelligence gathering *Bivens* is powerless to protect him. As one of the *Vance* dissenters predicted, this evisceration of *Bivens* risks "creating a doctrine of constitutional triviality where private actions are permitted only if they cannot possibly offend anyone anywhere. That approach undermines our essential constitutional protections in the circumstances when they are often most necessary." *Vance*, 701 F.3d at 230 (Williams, J., dissenting). In issuing today's opinion, the Court fears that this prediction is arguably correct.

This Court is outraged by Mr. Meshal's "appalling (and, candidly, embarrassing) allegations" of mistreatment by the United States of America. *Doe v. Rumsfeld*, Case No. 08-cv-1902, 2012 U.S. Dist. LEXIS 127184, *5 (D.D.C. Sept. 7, 2012). Nevertheless, this Court is not writing on a clean slate; rather, it is constrained by binding precedent. Only Congress or the President can provide a remedy to U.S. citizens under such circumstances. Accordingly, Defendants' motion to dismiss is **GRANTED**. An appropriate order accompanies this Memorandum Opinion.

SIGNED: Emmet G. Sullivan
United States District Judge
June 13, 2014