UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

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

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By Minute Order dated February 21, 2012, the Court granted Plaintiff Amir Meshal's Motion for Leave to File a Second Amended Complaint.[1] The Court's Order also permitted Defendants Steve Hersem, Chris Higginbotham, John Doe 1, and John Doe 2 (collectively, the "Defendants") to file a supplemental memorandum in support of their pending Motion to Dismiss Plaintiff's First Amended Complaint. In accordance with the Court's Order, the Defendants respectfully submit this Supplemental Memorandum in support of their pending motion to dismiss.

Plaintiff's Second Amended Complaint adds or slightly modifies only a few allegations contained in the First Amended Complaint. *See* Second Amended Complaint ("AC") ¶¶ 129A, 157, 165A, 170A-D. For the reasons stated in the Defendants' Motion to Dismiss, the Reply in Support thereof, the Notices of Supplemental Authority filed subsequently, and at the July 12, 2011, oral argument on the Defendants' Motion to Dismiss, the additional and/or amended allegations do not alter the conclusion that all of Plaintiff's claims fail as a matter of law.[2]

## I. COUNTS I, II, AND III SHOULD BE DISMISSED BECAUSE SPECIAL FACTORS COUNSELLING HESITATION FORECLOSE JUDICIAL CREATION OF THE *BIVENS* REMEDY PLAINTIFF SEEKS

The Supreme Court has recognized that as a threshold matter, before a suit is allowed to proceed under the theory of *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), a court must first determine whether there are any "special factors counseling

[1] Plaintiff's original complaint in this case was filed on November 10, 2009. *See* Docket # 3. The Defendants moved to dismiss that complaint in April 2010. Plaintiff filed an Amended Complaint on May 10, 2010, *see* Docket # 31. The Defendants moved to dismiss the Amended Complaint on June 23, 2010. *See* Docket # 33; Docket # 37 (Reply). That motion to dismiss was argued on July 12, 2011, and remains under submission.

[2] The Defendants hereby incorporate by reference all of the arguments made in their Motion to Dismiss Plaintiff's First Amended Complaint ("MTD"), the Reply in Support thereof ("Reply"), the Notices of Supplemental Authority filed in support thereof (*see* Docket #'s 33, 37, 41, 43, 45) and at the July 12, 2011, oral argument on their Motion to Dismiss.

hesitation" in recognizing a *Bivens* remedy. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 280 (1997) (*quoting Bivens*, 403 U.S. at 396). This precept is in keeping with the Court's "usual adjudicatory rules," including that Congress – not the courts – generally decides whether and how to fashion causes of action, as well as the "longstanding principle of judicial restraint [which] requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011) (*quoting Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 445 (1988)).

The factual allegations added to the Second Amended Complaint in no way alter, and indeed are legally irrelevant to, the question whether the Court should imply a remedy in the first instance.[3] With respect to that threshold question, it is clear that a plaintiff alleging a constitutional violation has no automatic, unqualified right to a *Bivens* remedy, *see Wilkie v. Robbins*, 127 S. Ct. 2588, 2597 (2007); to the contrary, the Supreme Court has "in most instances . . . found a *Bivens* remedy unjustified," *id.* The power to create a new constitutional-tort cause of action "not expressly authorized by statute" is an exceptional one in our system of separation of powers and therefore it must be exercised with great caution, if at all. *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 66-70 (2001). The Supreme Court has determined that a wide range of factors may make it inappropriate for federal courts to create a *Bivens* remedy in a particular context, even where a plaintiff has no alternative statutory remedy available. *See, e.g.,*

[3] Because the determination of whether special factors counsel hesitation in creating a *Bivens* remedy is a threshold determination to be made by the Court before addressing the issue of qualified immunity, at the oral argument on the Defendants' Motion to Dismiss the parties first addressed the special factors inquiry before turning to the issue of qualified immunity. *See* July 12, 2011 Hearing Tr. ("Tr.") at 4. The Defendants explicitly distinguished between the question of the existence of an underlying *right* and the availability of an implied *remedy* to enforce that right. *See, e.g.*, Tr. at 14.

*Wilkie*, 127 S. Ct. at 2598 ("even in the absence of an alternative [existing process to protect a constitutional interest], a *Bivens* remedy is a subject of judgment"). For several decades, the Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68.

In their Motion to Dismiss and at the oral argument on the motion, the Defendants showed that the *Bivens* remedy sought by Plaintiff would constitute an unprecedented extension of *Bivens* into a new and highly sensitive context – extraterritorial national security investigations in which the United States and foreign governments allegedly work together to identify, apprehend, detain, and question suspected terrorists.[4] No court has ever recognized a *Bivens* remedy in this context. In fact, the only court to consider a remedy in a *remotely* similar context – in that it also involved allegations of unlawful transfer and abuse with the complicity of foreign governments – refused to recognize one. *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc), *cert. denied*, No. 09-923, 2010 WL 390379 (U.S. Jun. 14, 2010). Permitting Plaintiff's claims to proceed would violate the bedrock separation-of-powers principle that courts should be hesitant to wade into such matters without congressional direction, and would constitute a departure from the Supreme Court's well-settled reluctance to extend *Bivens* liability to new contexts. Nothing in the Second Amended Complaint changes these conclusions.

**1.** The Defendants have shown that allowing Plaintiff's claims to proceed risks injecting this Court into sensitive overseas national security and intelligence domains, and that the remedy Plaintiff seeks could impinge upon the Executive Branch's ability to pursue cooperative arrangements with foreign governments aimed at protecting our nation from terrorist attack. *See*

[4] In this case, the investigation allegedly occurred in the Horn of Africa and involved the joint efforts of three regional governments and the United States. AC ¶¶ 2, 27-29.

MTD at 11-16. While Plaintiff characterizes this argument as "specious," his Opposition to the Defendants' Motion to Dismiss ("Opp.") at 9, offers no caselaw that allows the Court to assume this risk.

Plaintiff's self-serving characterization of his lawsuit as "*not* 'a constitutional challenge to the extraterritorial national security operations of the Executive Branch,'" Opp. at 9 (emphasis in original) (quoting MTD at 8), ignores what Plaintiff's underlying allegations make clear: that permitting this suit to proceed would implicate the United States' relationships with governments in the Horn of Africa and their purported joint counter-terrorism operations to identify, apprehend, detain, and question suspected terrorists in that region. *See, e.g.*, AC ¶¶ 24-29, 31. Indeed, it is precisely the alleged coordination between U.S. and foreign officials from which Plaintiff asks the Court to infer that the Defendants were personally involved in his detention and transfer.[5] Contrary to Plaintiff's argument, the Defendants need not show that a *Bivens* remedy in this context would "prevent" extraterritorial counter-terrorism operations, *see* Opp. at 9; it is enough that such a remedy has the potential to complicate or interfere with such operations or otherwise to place the judiciary in a role not contemplated by the Supreme Court's *Bivens* jurisprudence. The Defendants have clearly shown this. *See* MTD at 11-18.

Plaintiff's insistence that his suit "challenges only U.S. action and requires inquiry only into conduct by U.S. officials against a U.S. citizen," *see* Opp. at 14, cannot be squared with the affirmative facts he has pled. Even the newly pled allegations make clear that at a minimum, Plaintiff is challenging his "proxy" detention, AC ¶ 170D, *i.e.*, a detention by *foreign officials* for

[5] *See, e.g.*, Opp. at 21 (citing as "corroborating" evidence of the Defendants' personal participation "reports [] that U.S. officials controlled the detention in Kenya of individuals who had been seized fleeing Somalia and the detention and interrogation in Ethiopia of individuals rendered from Kenya and Somalia").

which the United States is assertedly responsible. In fact, the stated purpose for the most recent amendment of the complaint was to "bolster[] [Meshal's] allegations that his detention without due process was at the behest or with the active and substantial participation of the Defendant U.S. government officials." *See* Plaintiff's Motion for Leave to File Second Amended Complaint at 1-2.[6] As that formulation makes evident, litigating Plaintiff's claims necessarily requires inquiry into the actions of Kenyan, Somalian, and Ethiopian officials in Plaintiff's detention and transfer between countries. This inquiry, in turn, would almost invariably involve seeking discovery from – including deposing – foreign diplomatic, intelligence, and/or other officials on the exact nature of their countries' actions with respect to Plaintiff. It would also likely require identifying and deposing the Kenyan and Ethiopian officials who allegedly brought Plaintiff to, and in some cases were allegedly present during, the questioning by Defendants. It takes little imagination to construct what the potential, practical implications of embroiling foreign officials in domestic litigation over international counter-terrorism activities might be, if such officials were required to explain either their alleged actions or the alleged actions of U.S. officials in U.S. courts.[7]

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[6] As the Court repeatedly noted during oral argument on the motion to dismiss, *see, e.g.*, Tr. at 6, 12, 13, 20, 25, the Court is required to accept well plead factual allegations (but not legal conclusions) as true. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007) (citing the conclusory nature of the plaintiff's allegations as what disentitled them to the presumption of truth). The Court may not *selectively* accept those factual allegations in which Meshal states that U.S. officials were responsible for conduct directed towards him and ignore those factual allegations in which Meshal identifies conduct solely by foreign officials (such as Meshal's "rendition") as the asserted basis for the Defendants' liability.

[7] If indeed foreign states were cooperating with or taking direction from the United States on such matters, exploring that conduct through litigation could reasonably be expected to affect future cooperative relationships, and even in some circumstances to place individual officers or their families at personal risk from those hostile to the United States' counter-terrorism efforts. Such implications could have significant national security consequences. Although this case should be dismissed on the grounds articulated by the Defendants, the United States again explicitly reserves its right to assert the state secrets privilege, as necessary, in the event this

**2.** Plaintiff dismisses the Defendants' argument, *see* MTD at 13-16, that the limited institutional experience of the judiciary in the areas of national security, intelligence operations, and foreign policy is an additional special factor that counsels against the creation of the *Bivens* remedy he seeks. Plaintiff argues that "lower federal courts have considered challenges to government counter-terrorism policies and have demonstrated competence to resolve lawsuits implicating sensitive national security considerations." Opp. at 13.[8] Plaintiff, however, misses the point. The Defendants have not argued that the judiciary lacks capacity in general to examine matters involving national security, intelligence operations, or foreign policy. Rather, the Defendants have argued that an implied right of action without congressional sanction is not the proper vehicle to examine the national security, intelligence operations, and foreign policy considerations at issue in the specific context presented by the Second Amended Complaint.[9] *See* MTD at 8-18. The Defendants' argument is proven by the fact that Plaintiff cites no *Bivens* case (or case of any kind) involving foreign national security operations in cooperation with foreign governments as alleged here, in his examples of "[judicial] competence to resolve lawsuits implicating sensitive national security considerations," and judicial "competence and 'institutional experience'" to conduct inquiries into "the U.S. government's cooperation and communications with foreign governments." *See* Opp. at 13-15 & nn. 13-14 (citing non-*Bivens* cases brought

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litigation proceeds. *See* MTD at 17 n.13.

[8] As the Defendants previously explained, to the extent that Meshal relies on habeas cases for this proposition, his reliance is misplaced. *See* Reply at 8-9 & n.7. Similarly, the fact that this Court, in the context of habeas and criminal or other proceedings established by Congress, may consider classified material, *see* Tr. at 16-17, 28 (noting the Court's experience in dealing with classified material in other contexts), does not warrant implying a remedy where such information is at issue and Congress has not spoken. *See Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008); *Arar*, 585 F.3d at 577.

[9] The *en banc* Second Circuit has explicitly recognized this proposition in the context of an alleged "rendition." *See Arar*, 585 F.3d at 574.

under FOIA or other federal statutes, or in the criminal arena). As the D.C. Circuit recognized in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985), "[w]here [] the 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.'" (*quoting Bush v. Lucas*, 462 U.S. 367, 380 (1983))

**3.** As "further support" for the special factors identified by the Defendants as counseling hesitation in creating a *Bivens* remedy in this sensitive context, the Defendants argued that litigation of Plaintiff's claims necessarily would require reliance on "classified information that may undermine ongoing covert operations." *Wilson*, 535 F.3d at 710 (citation omitted); *see also* MTD at 16-18. Plaintiff discounts this concern by arguing that any security concerns could be addressed through "sealed records." *See* Opp. at 16-17. However, absent congressional guidance, the necessity to close court proceedings to adjudicate claims itself counsels hesitation in recognizing a *Bivens* remedy. *See Arar*, 585 F.3d at 577. Moreover, as is the case with his argument against the exercise of judicial restraint in this context, *see* Opp. at 13-16, Plaintiff's "open courts" argument is supported not by *Bivens* cases, but solely by cases in which federal courts had pre-existing statutory authority.[10] Because special factors are considered in the aggregate, or "taken together,"[11] with or without a formal assertion of the state secrets privilege, the likely need to consider classified information is one among the numerous factors identified in this context that makes clear that Congress, and not the courts, should speak to the question of

[10] *See Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (appellate review of criminal trial ruling); *In re Terrorist Bombings*, 552 F.3d 157 (2d Cir. 2008) (same); *United States Info. Agency v. Krc*, 989 F.2d 1211 (D.C. Cir. 1993) (appellate review of administrative decision); *In re Guantánamo Bay Detainee Litigation*, 630 F. Supp. 2d 1 (D.D.C. 2009) (habeas review); *In re Guantánamo Bay Detainee Litig.*, 624 F. Supp. 2d 27 (D.D.C. 2009) (same).

[11] *See Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

remedy here. *Accord Wilson*, 535 F.3d at 710.

**4.** While the facts added to the Second Amended Complaint do not alter the special factors analysis, the applicability of the special factors identified above to the claims asserted by Plaintiff in this case is squarely confirmed by the Fourth Circuit's recent decision in *Lebron v. Rumsfeld*, No. 11-6480, 2012 WL 213352 (4th Cir. Jan. 23, 2012). In *Lebron*, the Fourth Circuit unanimously found that *each* of the noted special factors – bedrock separation of powers principles, the limited institutional experience of the judiciary in the relevant subject matter, and the inevitability that the court would have to consider secret and classified information – applied to preclude the *Bivens* remedy sought. The plaintiffs in *Lebron* are Jose Padilla, an American citizen who had been designated an "enemy combatant," and his mother, Estela Lebron. Padilla and Lebron claim that Padilla's alleged incommunicado detention and coercive interrogation in a military facility *in the United States* violated Padilla's constitutional rights as well as the Religious Freedom Restoration Act. *Id.* at *3. The United States District Court for the District of South Carolina rejected all of the plaintiffs' claims, *Lebron v. Rumsfeld*, 764 F.Supp.2d 787 (D. S.C. 2011), and the Fourth Circuit affirmed that decision, *Lebron*, 2012 WL 213352 at *1.[12]

With respect to separation of powers principles, the Fourth Circuit observed that the *Lebron* plaintiffs' complaint sought "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." *Id.* at *8. The Court recognized that

> [i]t takes little enough imagination to understand that a judicially devised damages action would expose past executive deliberations affecting sensitive matters of national security

[12] The plaintiffs in *Lebron* have filed a motion for reconsideration.

> to the prospect of searching judicial scrutiny. It would affect future discussions as well, shadowed as they might be by the thought that those involved would face prolonged civil litigation and potential personal liability.

*Id.* Addressing the plaintiffs' challenge to the manner in which Padilla was interrogated while detained in a U.S. military facility in the territorial United States, the Court concluded that Padilla was asking the Court "to do what Congress did not do, namely to trespass into areas constitutionally assigned to the coordinate branches of our government." *Id.* at *9. The Fourth Circuit also found that additional separation of powers concerns were raised by the potential practical impact of the plaintiffs' suit on military intelligence operations. The Court noted that the *Bivens* remedy proposed by the plaintiffs "risks interference with military and intelligence operations on a wide scale." *Id.* at *10.

Considering the limited experience of the judiciary in the subject matters that provided the context for the claims in *Lebron*, the Fourth Circuit noted that the problems with the "administrability" of the claims were compounded by their relative "novelty." *Id.* at *10-11. The Court recognized that the inquiries mandated by the *Lebron* complaint were "far removed" from the "routine" questions considered by courts in *Bivens* actions. *Id.* at *11. The Court observed that while it is

> "inescapable . . . that the branches of government will sometimes interact" and that "courts will be called upon to take up sensitive matters, "[i]n those instances . . . Congress has often provided courts with specific means and mechanisms to consider delicate questions without imperiling national security. Congress has not just opened up something akin to a *Bivens* action to courts of general federal question jurisdiction and left them without guidelines how to proceed."

*Id.*

With respect to the inevitability that classified information would have to be considered in order to resolve the plaintiff's claims, the Fourth Circuit joined the District of Columbia and

Second Circuits, *see* MTD at 16-18, in finding this to counsel hesitation in implying a constitutional remedy under *Bivens*. Specifically, the Fourth Circuit found that while it had "no doubt" that courts would seek to protect sensitive information relevant to the conduct challenged by the plaintiffs,

> even inadvertent disclosure may jeopardize future acquisition and maintenance of the sources and methods of collecting intelligence. . . . The chilling effects on intelligence sources of possible disclosures during civil litigation and the impact of such disclosures on military and diplomatic initiatives at the heart of counterterrorism policy often elude judicial assessment. If courts assay such assessments, it should be because the legislative branch has authorized that course.

*Lebron*, 2012 WL 213352 at *10. The Court specifically rejected the argument made by Plaintiff Meshal in this case that the potential availability of the state secrets privilege undermines this special factor "because, when properly applied, [the privilege] gives courts an additional tool to prevent the disclosure of information, the release of which would harm national security, without dismissing the action." *See* Opp. at 17 n.16 (*citing United States v. Reynolds*, 345 U.S. 1 (1953)). On that question, the Fourth Circuit stated, "we need not await the formal invocation of doctrines such as qualified immunity or state secrets to say that the prospect of adverse collateral consequences confirms our view that Congress rather than the courts should decide whether a constitutional claim should be recognized in these circumstances." *Lebron*, 2012 WL 213352 at *12 (*citing Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008)).

The *Lebron* Court also explicitly addressed the relevance of citizenship. In this case, in his Opposition to the Defendants' Motion to Dismiss, Plaintiff repeatedly cites his status as a U.S. citizen to refute the Defendants' special factors argument, *see, e.g.*, Opp. at 8-11, and the Court repeatedly referred to Padilla's citizenship during the oral argument on the motion, *see, e.g.*, Tr. at 4, 5, 9. However, in *Lebron*, the Fourth Circuit stated that "[t]he source of hesitation [in

recognizing a *Bivens* remedy in a particular context] is the nature of the suit and the consequences flowing from it, *not just the identity of the plaintiff*." *See Lebron*, 2012 WL 213352 at *11 (emphasis added) The Court cited this rationale as the basis for its rejection of the *Lebron* plaintiffs' argument that special factors decisions such as *United States v. Stanley*, 483 U.S. 667 (1987) and *Chappell v. Wallace*, 462 U.S. 296 (1983), which found interference with military affairs as a special factor counseling hesitation in implying a *Bivens* remedy, did not apply to Padilla because he is not a member of the armed forces, as the plaintiffs in *Stanley* and *Chappell* were. *Lebron*, 2012 WL 213352 at *11. The Fourth Circuit stated that this argument "misconceives the nature of the special factors analysis." *Id.*

If anything, the context of Plaintiff Meshal's claims in this case presents an easier case for the application of special factors analysis than the context of the claims at issue in *Lebron*. Jose Padilla is a U.S. citizen who was held in U.S. custody by U.S. officials on U.S. soil. Plaintiff is a U.S. citizen who alleges he was detained on foreign soil by foreign authorities at the behest of U.S. officials. If Padilla's U.S. citizenship presented no bar to the application of special factors to his claims, Plaintiff's U.S. citizenship can present no bar to the application of special factors to Plaintiff's claims. Indeed, every U.S. Supreme Court case that has addressed the special factors inquiry involved constitutional claims asserted by a U.S. citizen.

## II. THE DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY AND THAT CONCLUSION IS UNCHANGED

The determination of whether the Defendants' actions are shielded by qualified immunity traditionally requires a two-step inquiry: 1) whether the alleged facts show that the defendant's personal conduct violated a statutory or constitutional right; and 2) whether that right was clearly established at the time of the conduct. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). In light of the

Supreme Court's decision in *Pearson v. Callahan*, 129 S. Ct. 808 (2009), this Court's qualified immunity analysis can and should both begin and end with the question of whether the rights claimed by Plaintiff were "clearly established" in the applicable context at the time of his alleged injuries. For it is plain that at the time of the events alleged, the rights Plaintiff asserts here were not clearly established, for qualified immunity purposes, in the exceptional factual context presented.[13]

Plaintiff defines the constitutional rights at issue in this case in exceedingly general terms, arguing that "it was well settled that Plaintiff was protected by the Fourth and Fifth Amendments from undue deprivations of his liberty and coercive interrogations by U.S. officials." Opp. at 24. At the oral argument the Court also discussed the rights at issue in very general terms. *See* Tr. at 26 ("Well, we know what the Fourth Amendment stands for. And it's clearly established, right?"). As the Supreme Court recently observed, "We have repeatedly told courts . . . not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (citations omitted) (reversing denial of qualified immunity). Defendants do not dispute that the Constitution protects U.S. citizens abroad and that U.S. citizens have Fourth Amendment rights; however, such broad and abstract assertions are wholly inadequate for qualified immunity purposes. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Saucier v. Katz*, 533 U.S. at 201; *Int'l Action Ctr. v. United States*, 365 F.3d 20, 25 (D.C. Cir. 2004).

When correctly viewed in light of the context-specific qualified immunity standard,

[13] In their Motion to Dismiss and Reply, the Defendants went through the qualified immunity analysis with respect to both prongs of the inquiry as appropriate. In light of the principles of constitutional avoidance discussed earlier, *see Camreta*, 131 S. Ct. at 2031, if the Court does not resolve the constitutional claims (Counts I-III) on special factors grounds, the Court should resolve them entirely on prong 2 of the qualified immunity inquiry, *see Pearson*, 129 S. Ct. at 818.

Plaintiff's new allegations do not alter the conclusion that he has failed to identify any applicable caselaw sufficient to constitute clearly established law or to overcome the Defendants' entitlement to qualified immunity. In his Second Amended Complaint (as in earlier iterations), Plaintiff challenges three discrete actions: his alleged detention, "rendition," and "custodial interrogations." The sum and substance of Plaintiff's newly-added allegations are contained in paragraph 170D, citing a purported government official who emailed Plaintiff's counsel stating in pertinent part, "Your assertion that U.S. officials used foreign proxies to detain Mr. Meshal when said foreign governments would not normally have detained your client is absolutely correct," and claiming, "FBI/JTTF was given carte blanche to do as they pleased with Mr. Meshal." AC ¶ 170D.

The newly-proffered allegations do not mention any "rendition." Moreover, since the sole published case that even raised the constitutionality of an alleged "rendition," *Arar v. Ashcroft*, dismissed the *Bivens* complaint on special factors grounds without reaching the constitutional question, Plaintiff cannot carry his burden of identifying a violation of clearly established law applicable to any "rendition" context. *See* MTD at 26-27, 29-33; Reply at 17-19. With respect to the alleged "interrogations," again, the added allegations make no mention of any conduct that occurred during the course of any interrogation. Thus, none of the "new" information offered in Plaintiff's Second Amended Complaint changes, much less cures, Plaintiff's failure to identify clearly established law that was violated by the alleged conduct of Defendants Hersem and Higginbotham – the only defendants with respect to whom personal participation in any interrogations is even pled.[14] *See* MTD at 35-37; Reply at 19-21.

[14] This is true whether the underlying challenge to the alleged interrogation is

Even in regard to Plaintiff's alleged detention, which is the only challenged act that is arguably addressed by the new allegations in the Second Amended Complaint, none of the new allegations cures the pleading deficiencies the Defendants have previously identified. The Defendants themselves are not mentioned in any of the new allegations, and in any event, the new allegations must be considered alongside the old (and remaining) allegations, which specifically implicate foreign sovereigns as *at least* sharing responsibility for Plaintiff's detention. Plaintiff cites no case in which a federal court discusses, let alone holds, that the relevant Fourth or Fifth Amendment protections apply as claimed in any context remotely similar to the instant one. Specifically, Plaintiff offers no authority to support the proposition that presentment or other constitutional requirements applicable in the garden variety domestic criminal law enforcement context apply in the same manner and to the same extent in the context pled here, where Plaintiff claims he was detained on foreign soil, in the physical custody, and under the legal authority of a foreign government, thousands of miles from any U.S. court.[15] As the Supreme Court reminded courts in February, even in routine domestic contexts, the

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constitutional, as pled in Count I, or statutory, as in the Torture Victim Protection Act claim pled in Court IV. In both instances, and for the limited purposes of their motion to dismiss, the Defendants assumed the truth of all of Plaintiff's allegations of their personal conduct and participation.

[15] Indeed, to require the United States to ensure a prompt probable cause hearing while a detainee is in foreign custody overseas, courts would have to explore numerous practical considerations before establishing – let alone clearly establishing – any law on this question. *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J. concurring) ("The conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous . . . The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country.").

Constitution's parameters may not be clearly established for qualified immunity purposes. *Messerschmidt v. Millender*, No. 10-704, 2012 WL 555206, at *8 (U.S. 2012) (Fourth Amendment warrant requirement). In this novel setting, Plaintiff's failure to identify clearly established law is not surprising. The absence of clearly controlling caselaw and the uniqueness of the factual context, which this Court specifically recognized at the oral argument on the Motion to Dismiss,[16] are both fatal to Plaintiff's ability to defeat qualified immunity here. Put plainly, Plaintiff cites no cases – and to the Defendants' knowledge there are none – involving either "materially" or "fundamentally" similar facts to those he presents here that "placed the statutory [and] constitutional question[s] [he raises] beyond debate. *Al-Kidd*, 131 S. Ct. at 2083. That was true with respect to the First Amended Complaint, and it remains true now.

Respectfully submitted,

Dated: March 6, 2012

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[16] *See* Tr. at 49 ("This case is totally atypical from any other case that's been argued, isn't it?").