

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMIR MESHAL,

Plaintiff,

v.

CHRIS HIGGENBOTHAM, *et al.*,

Defendants.

No. 09-cv-2178 (EGS)

**PLAINTIFF'S RESPONSE TO
DEFENDANTS' JUNE 22, 2012 NOTICE OF SUPPLEMENTAL AUTHORITY**

On June 22, 2012, Defendants notified this Court of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Doe v. Rumsfeld*, No. 11-5209, 2012 WL 2161133 (D.C. Cir. June 15, 2012). Defendants argue that *Doe* supports dismissal on *Bivens* special factors grounds of Mr. Meshal's Fourth and Fifth Amendment claims challenging his prolonged, arbitrary and indefinite detention, illegal rendition, and coercive interrogation by FBI agents. Defendants' arguments are unpersuasive for four main reasons.

First, this case presents none of the unique military considerations that the D.C. Circuit found to be special factors precluding recognition of a damages remedy in *Doe*. As an initial matter, Mr. Meshal's case involves core *Bivens* territory: misconduct by federal law enforcement officials who violated a U.S. citizen's Fourth and Fifth Amendment rights when investigating him for a crime. *See* Pl.'s Resp. to Defs.' Supplemental Mem. in Supp. of Mot. to Dismiss ("Pl.'s Supp. Opp'n Br.") 2-3, ECF No. 53. But, even if this Court were to find the context new in some respects, *Doe* does not support dismissal because this case concerns FBI investigative misconduct far from any

battlefield—a fact that Defendants concede. *See* Oral Arg. Tr. 5, July 12, 2011 (two statements by defense counsel that the alleged misconduct was “not in a war zone”). Moreover, unlike the *Doe* plaintiff, Mr. Meshal challenges only the actions of low-level law enforcement officers directly involved in his detention and mistreatment, and does not seek to hold the Secretary of Defense personally liable for what the D.C. Circuit described as “develop[ing], authoriz[ing], and implement[ing]” the military policies that caused him harm. *Doe*, 2012 WL 2161133 at *2. Litigation of this suit therefore would not, under the D.C. Circuit’s reasoning, “detract focus, resources, and personnel from the mission in Iraq” by implicating the military chain of command or military investigators’ discretion “to detain and question potential enemy combatants” in active war zones, requiring the testimony of “top military officials” or “forces on the ground,” or inviting the Court “to delve into” military policies concerning interrogation or “the designation of detainees as ‘security internees’ or ‘enemy combatants.’” *Id.* at *5. None of the military considerations that the D.C. Circuit emphasized in dismissing *Doe* are present in Mr. Meshal’s case.

Second, Defendants rely heavily on the D.C. Circuit’s discussion of *Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008), and *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), to argue that national security and intelligence special factors support dismissal of Mr. Meshal’s claims. Defs.’ Notice of Supplemental Authority, ECF No. 56, 2–3. Those cases are distinguishable. Under the D.C. Circuit’s reasoning, the national security and intelligence special factors in *Wilson* are not present here because this action does not challenge the disclosure of CIA operations or ask the court to delve into the “job risks and responsibilities of covert CIA agents.” 535 F.3d at 710. Moreover, there is no

“comprehensive remedial scheme” available to Mr. Meshal, whereas the existence of alternative remedies played a key role in the dismissal of *Wilson*. *Id.* at 709–10. *Arar* is distinguishable because the plaintiff was a non-citizen and his action for damages sought to hold senior policymakers liable for implementation of an extraordinary rendition policy. 585 F.3d at 574–76. Both factors weighed heavily in the Second Circuit’s decision to hold that national security and foreign affairs precluded an implied damages remedy. *Id.*; see Pl.’s Supp. Opp’n Br. 5–6. In contrast, Mr. Meshal’s U.S. citizenship alleviates foreign relations as a special factor (see below) and his case does not raise the same national security concerns because it challenges ordinary FBI agents’ personal use of torturous interrogation techniques and deprivation of his physical liberty. See Pl.’s Supp. Opp’n Br. 5–6.

Third, the D.C. Circuit’s analysis of the importance of U.S. citizenship in *Doe* supports recognition of a damages remedy for Mr. Meshal. The D.C. Circuit recognized that citizenship is an important factor to consider, but found that it was trumped by the unique military and national security concerns posed by the *Doe* plaintiff’s challenge to mistreatment in military detention, which are not present in this case. *Doe*, 2012 WL 2161133, at *6 (Doe’s citizenship “does remove concerns . . . about the effects that allowing a *Bivens* action would have on foreign affairs,” but did not “alleviate the other special factors counseling hesitation . . . discussed above.”). This Court should thus reject Defendants’ contention that resolution of Mr. Meshal’s claims would invite inquiry into, and disturb, the U.S. government’s cooperation and communications with foreign governments. See Pl.’s Opp’n to Defs.’ Mot. to Dismiss the Am. Compl. (“Pl.’s Opp’n

Br.”) 11, 14, ECF No. 35; Pl.’s Supp. Opp’n Br. 5; Defs.’ Supplemental Mem. in Supp. of Mot. To Dismiss Pl.’s Second Am. Compl. 3–5 & n.7, ECF No. 52.¹

Fourth, even if the D.C. Circuit’s reasoning on the import of congressional inaction in *Doe* is correct, it is limited to causes of action concerning military detention and interrogation. The D.C. Circuit determined that the Detainee Treatment Act governs the interrogation of detainees by U.S. military officials, and does not create a private right of action in a “field” that is “decidedly entrusted to [Congress’s] purview.” *Doe*, 2012 WL 2161133 at *6. This finding, however, does not apply to a damages remedy for Mr. Meshal’s claims against law enforcement abuse and mistreatment.

For the foregoing reasons, and those expressed previously, Defendants’ motion to dismiss should be denied.

Respectfully submitted,

/s/ Nusrat J. Choudhury

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¹ Mr. Meshal does not ask this Court to find that his citizenship is the *sole* factor weighing in favor of recognition of a damages remedy for the violation of his constitutional rights. The availability of a *Bivens* remedy is ultimately “a subject of judgment.” Pl.’s Supp. Opp’n Br. 4. Mr. Meshal has shown that his U.S. citizenship and other critical factors, including the fact that his claims concern core *Bivens* territory challenging law enforcement investigative misconduct, weigh in favor of a damages remedy. *Id.* at 2–3.

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