Meshal v. Higgenbotham: Has National Security Killed *Bivens*?

I. OVERVIEW

In November 2006, U.S. citizen Amir Meshal traveled to Mogadishu, Somalia, to enrich his Islamic faith.[1] Shortly after his arrival, Somalia's stable political state collapsed into violence led by two leading factions, causing Meshal and thousands of other civilians to flee Mogadishu.[2] Meshal attempted to reach Kenya in January 2007.[3] At the time, U.S. military personnel and Federal Bureau of Investigation (FBI) agents planned to intercept individuals crossing the Kenyan border in an effort to capture al-Qaeda members.[4] Consequently, on January 24, 2007,

1. Meshal v. Higgenbotham, 804 F.3d 417, 418 (D.C. Cir. 2015). In his brief, Meshal explained that he traveled to Mogadishu, Somalia, "to experience living under a country governed by Islamic law to deepen his understanding of Islam." *Id.*

2. Meshal v. Higgenbotham, 47 F. Supp. 3d 115, 117 (D.D.C. 2014).

3. *Meshal*, 804 F.3d at 419.

4. *Meshal*, 47 F. Supp. 3d at 117. In the wake of the September 11, 2001, terrorist attacks, in 2002, the U.S. Department of Defense launched a joint counterterrorism operation in the Horn of Africa with Kenya and Ethiopia, believing that Somalia may be a haven for al-Qaeda members fleeing from Afghanistan. Additionally, in 2004, U.S. military personnel and FBI agents began training foreign armies and police units as well as conducting criminal

when Meshal crossed the Kenyan border, he was captured and interrogated by Kenyan military personnel.[5] One day after his capture, Kenyan authorities hooded, handcuffed, and transported Meshal to Nairobi's Ruai Police Station for interrogation.[6] For seven days, the authorities imprisoned Meshal at Ruai, forbade him from using a telephone, and denied him access to an attorney.[7]

In early February 2007, Ruai officers introduced Meshal to three U.S. FBI agents.[8] Over the span of one week, the FBI agents interrogated Meshal at least four times—each session lasting twenty-four hours inside an FBI-controlled suite.[9] When Meshal was not being interrogated, he stayed locked in a cell at Ruai.[10] At each interrogation, an agent presented Meshal with a form notifying him of his right to refuse any questions without a lawyer present.[11] Meshal maintains that he only signed the documents under the belief that he had no other choice but to sign and in hopes that signing the documents would expedite his return home.[12] Throughout these interrogation sessions, the FBI agents also threatened Meshal with disappearance, torture, and death if he did not confess to having an al-Qaeda connection.[13] Meshal never confessed to such a connection.

Kenyan authorities neither interrogated Meshal nor provided any justification for his detention.[14] Upon a Kenyan human rights organization filing habeas corpus petitions with the Kenyan courts, Kenyan officials transported Meshal and others to Somalia.[15] While in Somalia, Meshal remained handcuffed inside an underground room with no windows or toilets, and the Kenyan court dismissed his habeas

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investigations of individuals with possible ties to foreign terrorists or terrorist organizations. According to FBI policy and procedure, FBI agents have no law enforcement authority in foreign countries but may conduct investigations abroad if the host government approves. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* All three FBI agents are defendants in this case, under the names of Hershem, Higgenbotham, and Doe 1, respectively. *Id.*

9. *Id.* at 117-18.

10. *Id.* at 118.

11. *Id.*

12. *Id.* When Meshal requested an attorney, Doe 1 refused Meshal access to a telephone. When Meshal asked whether he had a choice not to sign the document, because he did not have attorney representation, Higgenbotham responded: "[i]f 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." Additionally, Higgenbotham told Meshal he did not have a right to legal representation. *Id.*

13. *See id.*

14. *Id.*

15. *Id.* at 118-19.

petition for lack of jurisdiction because he was no longer within Kenyan borders.[16]

Around February 16, 2007, Kenyan officials once again transported Meshal, this time out of Somalia to Addis Ababa, Ethiopia.[17] The Ethiopian government detained Meshal and other prisoners and regularly transported them to a villa for interrogation sessions by U.S. officials.[18] Although FBI agents interrogated Meshal for over a month, U.S. consular officials did not gain access to him until March 21, 2007, only after his secret detention in Ethiopia had become public knowledge stateside.[19] Around May 24, 2007, Meshal was flown back to the United States and the U.S. government released him from custody.[20] During his four-month confinement abroad, Meshal lost approximately eighty pounds.[21] As of April 2017, Meshal has never been charged with a crime by the Somalian, Kenyan, Ethiopian, or U.S. governments.[22]

In 2009, Meshal filed a *Bivens* action in the United States District Court for the District of Columbia seeking civil damages from the FBI agents in their individual capacity for violations of his constitutional rights.[23] Specifically, Meshal alleged violations of his Fourth Amendment right to be free from unreasonable search and seizure as well as his Fifth Amendment right to substantive and procedural due process.[24] The district court granted the defendant's motion to dismiss all counts of the complaint.[25] The district court recognized the severity of the alleged mistreatment by the U.S. officials but held that it was

16. *Id.* at 119.
17. Meshal v. Higgenbotham, 804 F.3d 417, 419 (D.C. Cir. 2015).
18. *Id.* The interrogators repeatedly refused Meshal's request for an attorney. *Id.*
19. *Meshal*, 47 F. Supp. 3d at 119.
20. *Meshal*, 804 F.3d at 419.
21. *Meshal*, 47 F. Supp. 3d at 119.
22. *Meshal*, 804 F.3d at 420.
23. *Meshal*, 47 F. Supp. 3d at 119.
24. *Id.* In Count I of Meshal's complaint, he alleged 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." In Count II, Meshal alleged defendants also violated his 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." *Id.* at 119-20. The district court did not address these claims; therefore the United States Court of Appeals for the District of Columbia did not review them on appeal. *Meshal*, 804 F.3d at 420 n.3.
25. *Meshal*, 47 F. Supp. 3d at 130-31 (citation omitted) ("This Court is outraged by Mr. Meshal's 'appalling (and, candidly, embarrassing) allegations' of mistreatment by the United States. 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.").

constrained by binding precedent to dismiss Meshal's claims because—regardless of any violation of his constitutional rights—in the context of military affairs, national security, or intelligence gathering, "*Bivens* is powerless to protect him."[26] On appeal, in a 2-1 decision, the United States Court of Appeals for the District of Columbia affirmed the district court's decision and *held* that, in this context, where the FBI agents' actions took place abroad and during a criminal terrorism investigation, Meshal had no available civil remedy. *Meshal v. Higgenbotham*, 804 F.3d 417 (D.C. Cir. 2015).

II. BACKGROUND

A. Introduction

Ordinarily, Congress creates a statutory basis for a plaintiff to sue under a federal tort cause of action.[27] Certain causes of action allow a plaintiff to recover for tortious acts as a result of federal officers; however, such actions include specific limitations.[28] For example, the Federal Tort Claims Act excludes claims against federal officers for acts transpiring in a foreign country, and the Torture Victim Protection Act only allows causes of action against foreign officials, not U.S. officials.[29] Nevertheless, a plaintiff may seek monetary damages for unconstitutional conduct by federal U.S. officials despite the absence of a statute conferring a specific cause of action under the doctrine of a *Bivens* action, a type of constitutional tort claim.[30] The Court's power to grant relief not expressly authorized by Congress is grounded in its general jurisdiction to decide all cases "aris[ing] under the Constitution, laws, or treaties of the United States."[31] This jurisdictional grant confers the Court with the authority not only to determine whether the plaintiff states a valid cause of action but also the authority to select a judicial remedy for the vindication of a constitutional right.[32]

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26. *Id.*
27. *Meshal*, 804 F.3d at 420.
28. *Id.*
29. *Id.*
30. James L. Buchwalter, *Cause of Action Under "*Bivens*" Doctrine Against Federal Official for Violation of Constitutional Rights*, 56 CAUSES OF ACTION 2D 593, § 2 (Dec. 2016 Update).
31. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001) (quoting 28 U.S.C. § 1331).
32. Bush v. Lucas, 462 U.S. 367, 374 (1983).

B. Bivens *Actions*

In 1971, the United States Supreme Court, in the seminal case *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, created a cause of action directly under the Constitution for victims of constitutional violations by federal agents to recover civil damages against the official despite any statute granting such a right.[33] In *Bivens*, the Court held that a plaintiff stated a valid cause of action under the Fourth Amendment, entitling him to damages as a result of alleged injuries caused by Federal Bureau of Narcotics agents who, acting under the color of federal authority, made a warrantless entry into the plaintiff's apartment, conducted a warrantless search of his apartment, and effected a warrantless arrest for narcotic charges, all without probable cause.[34] The Court rooted its finding in the historical civil liberty principle originally instituted in *Marbury v. Madison*, that where a constitutionally protected right has been violated, an individual may claim the protections of the law, and the courts have discretion to fashion a remedy to provide the necessary relief.[35]

In *Bivens*, the Court acknowledged that the Fourth Amendment does not expressly provide an award of monetary damages as a consequence of violating the Fourth Amendment in order to enforce its protections.[36] However, the Court emphasized that where legal rights have been violated, federal courts may use any available remedy, where no explicit remedy exists, to cure the wrong if there are no special factors that counsel hesitation in recognizing such an action.[37] The harm done by such constitutional violations, as Justice Harlan noted, had already occurred, so that "[f]or people in Bivens' shoes, it is damages or nothing."[38] The Court later expanded such implied actions beyond the Fourth Amendment, including Due Process and Eighth Amendment claims.[39]

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33. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971); *see also* Carlson v. Green, 446 U.S. 14, 18-19 (1980).

34. *Bivens*, 403 U.S. at 389-90.

35. *Id.* at 392, 396-97 (quoting Marbury v. Madison 5 U.S. (1 Cranch) 137 (1803)) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

36. *Id.* at 396.

37. *See id.* at 395-96 (quoting United States v. Lee, 106 U.S. 196, 219 (1882)) (noting that other than a constitutional tort remedy, "[t]here remains to him but the alternative of resistance, which may amount to a crime").

38. *See id.* at 410 (Harlan, J., concurring).

39. Carlos M. Vásquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 549-50 (2013) (discussing the initial extension of *Bivens* remedies, including Davis v. Passman, 442 U.S. 228, 243-45 (1979)

In *Carlson v. Green*, the Supreme Court recognized a *Bivens* action under the Eighth Amendment when a deceased prisoner's parents brought a claim against his prison guards for violating the protection against cruel and unusual punishment.[40] The prisoner's death allegedly occurred after the guards' deliberate denial of medical treatment.[41] The Court's holding authorized courts to consider prisoners' constitutional claims against federal prison officials under *Bivens*, and suggested courts should presume the availability of a *Bivens* remedy in the absence of contrary measures.[42] However, in the same stroke, *Carlson* also codified the principle that the existence of "special factors" constitutes a reason disfavoring a *Bivens* action.[43] Since *Carlson*, the Court has declined to recognize a new type of *Bivens* action,[44] responding "cautiously to suggestions that *Bivens* remedies be extended into new contexts."[45] Still, the cases where the Supreme Court and Federal Circuit Courts have expressly declined to recognize a *Bivens* action fall into specific categories, where there is a: (1) new category of defendant; (2) alternate means of redress; (3) military context; or (4) a novel constitutional claim.[46]

(recognizing a *Bivens* remedy under the Due Process Clause of the Fifth Amendment for allegations of gender discrimination in staff hiring by a sitting Congressman) and Carlson v. Green, 446 U.S. 14, 19-23 (1980) (recognizing a *Bivens* remedy under the Cruel and Unusual Punishment Clause of the Eighth Amendment for allegations of medical mistreatment by federal prison guards)).

40. Carlson v. Green, 446 U.S. 14, 16-18 (1980).

41. *Id.*

42. Stephen I. Vladeck, *National Security and* Bivens *After* Iqbal, 14 LEWIS & CLARK L. REV. 255, 263 (2010) (discussing the thirty years after *Bivens*).

43. *Carlson*, 466 U.S. at 18-19. Justice Brennan wrote: "[V]ictims of a constitutional violation by a federal agent have a right to recover damages . . . despite the absence of any statute conferring such a right . . . [unless] defendants demonstrate 'special factors counseling hesitation in the absence of affirmative action by Congress . . . .'" *Id.* (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971)).

44. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001) ("Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants."). *Compare Carlson*, 446 U.S. 14 (1980) (recognizing a *Bivens* action based on the Cruel and Unusual Punishment Clause of the Eighth Amendment claim brought by the parents of a federal prison inmate who died after his prison guards allegedly denied him medical treatment) *with* Bush v. Lucas, 462 U.S. 367, 368 (1983) (refusing to recognize a *Bivens* action based on the First Amendment), *and* Wilkie v. Robbins, 551 U.S. 537 (2007) (refusing to recognize a *Bivens* action based on the Takings Clause of the Fifth Amendment).

45. Schweiker v. Chilicky, 487 U.S. 412, 421 (1988).

46. Steve Vladeck, Meshal*: The Last, Best Hope for National Security* Bivens *Claims?*, JUST SECURITY (June 17, 2014, 4:09 PM), https://www.justsecurity.org/11784/meshal.

C. Cases Declining To Expand Bivens

1. New Category of Defendant

In *F.D.I.C. v. Meyer*, the Supreme Court unanimously declined to extend *Bivens* to allow suits against a federal agency, even when it was otherwise susceptible to suit.[47] The Court held that such an extension was "not supported by the logic of *Bivens* itself" because in *Bivens*, the petitioner sued the federal agents who violated his constitutional rights, rather than suing the Federal Bureau of Narcotics itself.[48] Accordingly, the Court declined to recognize a new defendant outside of the typical *Bivens* defendant and dismissed the action against the Federal Savings and Loan Insurance Corporation in its capacity as a federal agency.[49] Furthermore, the Court observed that the purpose of *Bivens* is to "deter the officer."[50] Applying that purpose to the case, the Court determined that the deterrent force behind *Bivens* would be hollow if the Court allowed an implied action directly against agencies because then aggrieved parties would choose to bring actions against the agency instead of the responsible individual officers.[51] Such action, the Court determined, would render an action against the individual officers futile and the "deterrent effects of . . . *Bivens* . . . lost."[52] The Court further noted that a special factor counseled hesitation in recognizing agency liability under *Bivens*—that such an action posed a possibly massive financial burden on the Federal Government to pay the awards of its employees sued under *Bivens*.[53] Such a decision, as the Court stated, was one of "federal fiscal policy" for Congress and not the Court.[54]

In *Correctional Services v. Malesko*, the Supreme Court declined to extend *Bivens* to allow suit against a private entity, even when it acted under the color of federal law.[55] The Court held that a former federal inmate could not recover against a corporate entity housing federal prisoners because such an extension was not within "*Bivens*' core

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47. F.D.I.C. v. Meyer, 510 U.S. 471, 484-85 (1994). The Court determined that Congress had waived the agency's sovereign immunity. *Id.*

48. *Id.* at 486.

49. *Id.* at 484-86.

50. *Id.* at 485.

51. *Id.* (citing Carlson v. Green, 446 U.S. 14, 21 (1980)) ("Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States.").

52. *Id.* at 485-86 ("[T]he circumvention of qualified immunity would mean the evisceration of the *Bivens* remedy, rather than its extension.").

53. *Id.* at 486.

54. *Id.*

55. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63, 66 (2001).

purpose" of deterring individual federal officers from committing constitutional violations.[56] The Court reasoned that if a corporate defendant could be held liable under *Bivens*, claimants will pinpoint their remedy efforts on it rather than on "the individual directly responsible for the alleged injuries."[57] Accordingly, "on the logic of *Meyer*" implying a constitutional tort remedy against a private entity is "foreclosed."[58] Instead, as the Court noted, a federal prisoner in a Bureau of Prison facility alleging a constitutional violation may bring a *Bivens* action against the offending officer but not the officer's employer—his remedy issues only from the individual.[59]

2. Alternative Remedy

In *Bush v. Lucas*, the Supreme Court declined to recognize a new *Bivens* action under the First Amendment against individual federal officials in the context of federal employment.[60] The Court held that although the plaintiff was without opportunity to fully remedy the constitutional violation, he did not have a valid cause of action because the claims emerged out of a relationship governed by the Social Security Administration's substantive provisions and procedures, as well as the comprehensive regulatory scheme that applies to all federal civil service employees.[61] Accordingly, the Court declined to supplement that remedial scheme with a new judicial remedy.[62] Moreover, constitutional challenges such as the First Amendment claim at issue, were "fully cognizable within this system."[63] The Court acknowledged that the remedial scheme in place entailed expensive costs and significant time

56. *Id.* at 74. The individual officer was named in an amended complaint; however the complaint was dismissed on statute of limitation grounds, so that the lack of an alternative remedy "was due solely to a strategic choice." *Id.* at 64-65, 74.

57. *Id.* at 71 (O'Connor, J., dissenting) (plurality opinion) (citing TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 464 (1993)) (recognizing that corporations fare much worse before juries than individuals).

58. *Id.*

59. *Id.*; *see also* Minneci v. Pollard, 132 S. Ct. 617, 624-26 (2012) (The Court declined to extend a *Bivens* action to allow a prisoner to assert an Eighth Amendment *Bivens* claims against employees of a privately run prison because, unlike *Carlson*, the prisoner sought damages from personnel employed by a private firm, not personnel employed by the government, thereby making a "critical difference." Additionally, the conduct that took place allowed for the prisoner to seek a remedy under state tort law.).

60. Bush v. Lucas, 462 U.S. 367, 368 (1983).

61. *Id.*

62. *Id.* at 368, 388 (concluding that "it would be inappropriate for us to supplement [a] regulatory scheme with a new judicial remedy" when that scheme was "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations").

63. *Id.* at 386.

and energy but, nevertheless, asserted that Congress sits in a better position than a court to craft new types of litigation between federal employees for the efficiency of civil services remedies.[64] Similarly, in *Schweiker v. Chilicky*, the Supreme Court declined to recognize a *Bivens* remedy based on an alleged Due Process violation by federal employees in processing Social Security benefits in light of the carefully fashioned remedial scheme provided by the Social Security Act.[65]

3. Military Context

In *Chappell v. Wallace*, the Supreme Court declined to recognize a new *Bivens* action in the context of military service.[66] The Court held that enlisted military personnel could not recover damages from their direct superior officers for injuries sustained as a result of alleged racial discrimination.[67] The Court reasoned that, because of the distinctive relationship between a soldier and his superior, a judicially created remedy would subvert "the special nature of military life" by exposing superior officers to personal liability "at the hands of those they are charged to command."[68] Additionally, the Court determined that the military's internal discipline structure and Congress' express authority over the military justice system were special factors advising against a new *Bivens* action, holding that it would be "inappropriate" to award a *Bivens*-type of remedy in such context.[69]

In *United States v. Stanley*, the Supreme Court again declined to recognize a new *Bivens* action in the military service context.[70] The Court held that an Army serviceman could not recover damages from military and civilian personnel for injuries he sustained during service when the personnel allegedly exposed him to the psychedelic drug lysergic acid diethylamide (LSD) without his knowledge or consent during secret experiments performed by the Army.[71] The Court reasoned that because his injuries resulted from his military service, he could not

64. *Id.* at 386, 388-89.

65. Schweiker v. Chilicky, 487 U.S. 412, 420-21, 423-25 (1988).

66. Chappell v. Wallace, 462 U.S. 296, 297-98 (1983) (decided same day as *Lucas*).

67. *Id.* at 305. The military personnel alleged that "because of their minority race [the superior officers] failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity." *Id.* at 298.

68. *Id.* at 303-04 (Marshall, J., dissenting) (citing Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 676 (1977)) (internal quotation marks and citations omitted) ("[W]e must be concern[ed] with the disruption of [t]he peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court . . .").

69. *Id.* at 304 (citing Bush v. Lucas, 462 U.S. 367, 377-78 (1983)).

70. United States v. Stanley, 483 U.S. 669, 683-84 (1987).

71. *Id.* at 671, 683-84.

sue under *Bivens*, opining that an "uninvited intrusion into military affairs by the judiciary is inappropriate" in a *Bivens* case.[72] In both *Chappell* and *Stanley*, the plaintiffs' status as military servicemen amounted to a decisive factor counseling against granting a *Bivens* remedy.[73]

4. Novel Constitutional Claim

In *Wilkie v. Robbins*, the Supreme Court declined to recognize a new *Bivens* action in the context of property interests under the Takings Clause of the Fifth Amendment.[74] The Court held that a landowner did not have a valid cause of action against Bureau of Land Management officers who allegedly harassed and intimidated the landowner in order to extract an easement.[75] In declining to recognize a new *Bivens* action, the Court articulated a two-part test delineating when a *Bivens* action could be available to a plaintiff.[76] First, a court must determine whether any alternative remedy exists that protects the interests, which would persuade a court not to issue a "new and freestanding" remedy.[77] Second, even in the absence of an alternative, a court must still determine whether any special factors counsel hesitation in the creation of a new *Bivens* action by weighing factors for and against such authorization.[78]

Under this analysis, the Court determined that the plaintiff in *Wilkie* satisfied the first prong but failed to satisfy the second.[79] The Court believed that the difficulty in defining a feasible cause of action grounded in property rights was a special factor counseling hesitation against creating new *Bivens* action because such an action would potentially invite "claims in every sphere of legitimate governmental action affecting property interests . . . " where federal officers zealously bargain for valid government interests in property ownership.[80] Accordingly, the Court held that Congress sits in a better position than a

72. *Id.* at 684 (quoting Feres v. United States, 340 U.S. 135, 146 (1950)) ("We hold that no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service.'").

73. *See Chappell*, 462 U.S. at 303-04; *Stanley*, 483 U.S. at 683-84.

74. Wilkie v. Robbins, 551 U.S. 537, 548, 567 (2007).

75. *Id.*

76. *Id.* at 549-50.

77. *Id.* at 549.

78. *Id.* at 550.

79. *See id.* at 555. The Court noted that for each charge, plaintiff had some procedural device available to protect his property, but that "[h]e took advantage of some opportunities, and let others pass; although he had mixed success, he had the means to be heard." *Id.* at 552.

80. *Id.* at 561-62.

court to assess the impact of this new type of litigation against federal officials.[81]

III. THE COURT'S DECISION

In the noted case, the United States Court of Appeals for the District of Columbia held that the special factors of national security and extraterritoriality counseled against recognition of a valid *Bivens* action by a U.S. citizen who was allegedly detained, interrogated, and tortured by FBI agents while in Africa, thereby denying the plaintiff any civil remedy.[82] Before beginning its analysis, the court examined *Doe v. Rumsfeld*, *Lebron v. Rumsfeld*, and *Vance v. Rumsfeld*.[83] In acknowledging that three circuits, including the D.C. circuit, refrained from recognizing a *Bivens* cause of action where national security and military were involved, the court noted, "Meshal asks us to paddle upstream against the deep current of authority."[84] Following this discussion, the court began its *Bivens* analysis.[85]

The court first examined whether allowing this *Bivens* action to proceed would expand the existing remedial scheme to embrace a context not within the original purview contemplated by the Supreme Court.[86] A new context conceivably exists when a plaintiff invokes a constitutional amendment outside those previously approved by the Court, or when a claim involves a new category of defendant.[87] The court acknowledged that Meshal's claim neither involved a new constitutional provision nor a new category of defendant—that typically, in such a seemingly quintessential *Bivens*-style context, a remedy would be available.[88] Nevertheless, the court identified a new context in this case because Meshal's claim included new circumstances: a criminal terrorism investigation conducted abroad and an extraterritorial application of constitutional protections.[89]

After it identified that a new context existed, the court then applied the two-part *Wilkie* test in order to determine whether to recognize a

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81. *Id.* at 562.

82. *See* Meshal v. Higgenbotham, 804 F.3d 417, 418 (D.C. Cir. 2015).

83. *Id.* at 421-22; *see also* Doe v. Rumsfeld, 683 F.3d 390, 395-96 (D.C. Cir. 2012); Vance v. Rumsfeld, 701 F.3d 193, 200 (7th Cir. 2012) (en banc); Lebron v. Rumsfeld, 670 F.3d 540, 552 (4th Cir. 2012).

84. *Meshal*, 804 F.3d at 422; *see also Doe*, 683 F.3d at 695-96; *Vance*, 701 F.3d at 200; *Lebron*, 670 F.3d 522.

85. *Meshal*, 804 F.3d at 422.

86. *Id.* at 423.

87. *Id.* at 424.

88. *Id.*

89. *Id.*

Bivens action.[90] It first considered whether an alternate remedy was available, and second, whether any special factors counseled hesitation in extending a *Bivens* remedy.[91] The court, and the government, acknowledged that no alternative remedy existed—that for Meshal, it was damages or nothing.[92] However, the court noted that even if the answer was nothing, if certain special factors existed, the answer ought to remain nothing.[93] Accordingly, the court then evaluated whether any special factors counseled hesitation in recognizing a *Bivens* action in this context.[94] The court concluded the confluence of two factors—extraterritoriality and national security—counseled enough hesitation to preclude any remedy.[95] In its conclusion, after identifying these factors, the court pressed that if individuals, like Meshal, are to have a civil remedy for alleged constitutional violations during a counter-terrorism investigation abroad, either Congress or the Supreme Court must define the reality and extent of the remedy.[96]

In his concurring opinion, Judge Kavanaugh speculated about the impact judicial expansion of *Bivens* could have on the United States' effort in the ongoing war against terrorism.[97] For him, the deciding factor rested on the "bedrock separation of powers principle"—that it is ordinarily Congress' role to create and define the scope of federal tort actions, not the role of the judiciary.[98] Judge Kavanaugh agreed with the majority that Meshal's case decidedly presented a new context based on the two special factors the majority identified as counseling hesitation in creating a new *Bivens* action.[99]

In her dissenting opinion, Judge Pillard offered two reasons for her position.[100] First, she reasoned that Congress' actions did in fact support recognizing a *Bivens* action in this case because it would not impinge on military affairs and no comprehensive regulation or alternate remedy exists.[101] Second, she argued that the government's mere recitation of "national security" and "foreign policy" interests as special factors should not immediately bar constitutional damage relief without a

90. *Id.* at 425.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 425-26.
96. *Id.* at 429.
97. *Id.*
98. *Id.* at 429-30.
99. *Id.* at 430-31.
100. *Id.* at 432.
101. *Id.*

sufficient showing of an interference with those interests.[102] For her, the government failed to carry its burden of showing that allowing a *Bivens* action to go forward in this context would, in some way, actually interfere with foreign affairs or threaten national security.[103] To Judge Pillard, this case was not one where an Article III court should "cede [its] rights-protective role."[104]

IV. ANALYSIS

By holding that Meshal, who had *Bivens* or nothing, had nothing, the D.C. Court of Appeals, under the cloak of national security, effectively eviscerated the "very essence of civil liberty"—to seek protection from the courts when Meshal sustained an injury.[105]

A. The "New" Context

Meshal's case is unlike previous cases where the Supreme Court declined to recognize a *Bivens* action. Rather, Meshal's case is a prototypical *Bivens* action—a constitutional tort claim seeking civil remedies against federal agents in their individual capacity who, acting under the color of federal law, allegedly violated his Fourth Amendment rights.[106] Yet, the majority determined that Meshal's case presented a "different context" that compelled a different examination.[107] The court's categorical holding preventing any civil remedy for Meshal's injuries lacks the fundamental underpinnings of Supreme Court *Bivens*' jurisprudence.

First, Meshal's claims against defendants, four federal agents, are not outside the purview of *Bivens*.[108] Unlike the defendants in *Meyer*, the defendants here are not a federal government agency.[109] Additionally, unlike the defendants in *Malesko*, the defendants here are not a private

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102. *Id.*

103. *See id.* at 433-35.

104. *Id.* at 445.

105. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

106. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389-90 (1971); *see also Meshal*, 804 F.3d at 435 (Pillard, N., dissenting) ("[T]he Supreme Court's holding in *Bivens* that damages are an appropriate remedy for a Fourth Amendment violation remains the law of the land.").

107. *Meshal*, 804 F.3d at 424-25.

108. *Bivens*, 403 U.S. at 389 (recognizing an implied action against Federal Bureau of Narcotics agents).

109. F.D.I.C. v. Meyer, 510 U.S. 471, 486 (1994) (declining to extend *Bivens* to include federal agencies as a defendant).

corporation.[110] Nor are the defendants here employees of a private corporation as the defendants in *Minneci* were.[111] In fact, the defendants in Meshal's case were the quintessential *Bivens* defendants: federal law enforcement agents acting under the color of federal law.[112] Second, Meshal's claims against the defendants neither circumvent any other existing remedial scheme nor qualify for any alternative.[113] Unlike the plaintiff in *Lucas*, Meshal cannot pursue a civil service remedy.[114] Unlike the plaintiff in *Schweiker*, Meshal cannot rely on an elaborate and comprehensive congressional remedial scheme.[115] And, unlike the plaintiff in *Wilkie*, Meshal lacks a procedural device to protect his interests.[116] In fact, the court and the government acknowledged that no alternative exists to protect Meshal's constitutional rights.[117] Finally, Meshal's claims against the defendants did not arise within a military context. Meshal is neither a military soldier nor a military contractor; Meshal's alleged wrongs did not transpire in the sphere of war, and Meshal does not question distinct military interests, like its internal disciplinary system or command hierarchy.[118]

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110. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70-71 (2001) (declining to extend *Bivens* to include private corporations as a defendant).

111. Minneci v. Pollard, 132 S. Ct. 617, 624-26 (2012) (declining to extend *Bivens* to include employees of a privately run prison as a defendant).

112. *Compare Bivens*, 403 U.S. at 389-90, *with Meshal*, 804 F.3d at 418, 424.

113. *Meshal*, 804 F.3d at 425 ("Meshal has no alternative remedy; the government does not claim otherwise.").

114. Bush v. Lucas, 462 U.S. 367, 385-86 (1983) ("Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed.").

115. Schweiker v. Chilicky, 487 U.S. 412, 429 (1988) ("Congress, however, has addressed the problems created by state agencies' wrongful termination of disability benefits. Whether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program [of the Social Security Act].").

116. Wilkie v. Robbins, 551 U.S. 537, 552 (2007) ("For each charge . . . Robbins has some procedure to defend and make good on his position."); *see also* Stephen I. Vladeck, Essay, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1313 (2012) ("[T]he Court seized on the likelihood each of [the plaintiff's] claims likely had an adequate remedy under federal or state law.").

117. *Meshal*, 804 F.3d at 425.

118. *Cf.* United States v. Stanley, 483 U.S. 669, 683-84 (1987); Chappell v. Wallace, 462 U.S. 296, 303-04 (1983); Doe v. Rumsfeld, 683 F.3d 390, 394-96 (D.C. Cir. 2012); Lebron v. Rumsfeld, 670 F.3d 540, 549-51, 553 (4th Cir. 2012); Vance v. Rumsfeld, 701 F.3d 193, 203 (7th Cir. 2012) (en banc).

While it is true that the Supreme Court has extended *Bivens* beyond its original context only twice, Meshal did not endeavor to create a third.[119] Instead, Meshal sought only recognition of an already existing *Bivens* claim—the pursuit of retrospective relief by a U.S. citizen under the Constitution against federal agents who allegedly violated his Fourth Amendment rights.[120] Nevertheless, the majority concluded that Meshal's claim introduced a "new context," prompting the "near-insurmountable" *Wilkie* test, which resulted in denying a *Bivens* remedy.[121]

B. Special Factors?

1. Extraterritoriality

After determining whether an alternate remedy exists, the second question under *Wilkie* requires a court to fashion an appropriate remedy for a common law court, "paying particular heed, however, to any special factors counseling hesitation" before recognizing an implied action under *Bivens*.[122] The majority concluded that the confluence of two special factors—extraterritoriality and national security—counseled conclusively against recognizing any remedy for Meshal's claims.[123] In denying Meshal a remedy under *Bivens*, the court used the fact that Meshal's mistreatment occurred abroad as a "special factor" to preclude a civil remedy for a constitutional tort claim.[124] However, that reasoning conflicts with settled Supreme Court precedent establishing that when a U.S. citizen goes outside of the United States, he takes with him the constitutional rights that protect him from the government.[125]

> 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

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119. Vásquez & Vladeck, *supra* note at 39, at 549-50.

120. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

121. *See* Harvard Law Review Association, Recent Case, *National Security—Bivens Remedies—D.C. Circuit Holds that U.S. Citizen Detained and Interrogated Abroad Cannot Hold FBI Agents Individually Liable for Violations of His Constitutional Rights*—Meshal v. Higgenbotham, *804 F.3d 417 (D.C. Cir. 2015), reh'g en banc denied, No. 14-5194, 2016 BL 29006 (D.C. Cir. Feb. 2, 2016),* 129 HARV. L. REV. 1795, 1801 (2016).

122. Wilkie v. Robbins, 551 U.S. 537, 550 (2007).

123. Meshal v. Higgenbotham, 804 F.3d 417, 425 (D.C. Cir. 2015).

124. *Id.* at 424-25.

125. Reid v. Covert, 354 U.S. 1, 5 (1957) ("At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights."); *see also* Boumediene v. Bush, 553 U.S. 723, 765 (2008) (internal quotation marks and citation omitted) (reaffirming *Reid* that "[e]ven when the United States acts outside its borders, its powers are not absolute and unlimited but are subject to such restrictions as are expressed in the Constitution").

> 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 not a novel concept. To the contrary, it is as old as government.[126]

To support the extraterritorial aspect of Meshal's case as a special factor, the majority relied on the presumption against the extraterritorial application of statutes.[127] However, the Supreme Court designed that presumption regarding statutory construction to help courts determine whether Congress intended to legislate on the subject of foreign occurrences in order to prevent an unnecessary clash between U.S. law and foreign law.[128] In light of its function, the presumption was immaterial to Meshal's *Bivens* action, as his claims sought to enforce constitutional provisions that arguably apply abroad.[129] Moreover, the very purpose of *Bivens* rests on the acknowledged inactivity of Congress, therefore providing an avenue for relief for an otherwise unactionable claim.[130] Additionally, Meshal's suit did not create a risk of urging the will of U.S. law onto foreign officials in a foreign land because Meshal's claims sufficiently touched and concerned the United States—his case "involve[d] pursuit of purely retrospective relief by *our* citizen under *our* Constitution against *our* government's criminal investigators."[131] Furthermore, as the D.C. Circuit has recognized, simply because the United States collaborated with foreign authorities does not render a case, like Meshal's, "too sensitive to adjudicate."[132]

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126. *Reid*, 354 U.S. at 5-6.

127. *Meshal*, 804 F.3d at 425 (citing Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2012)) ("[E]xtraterritoriality dictates constraint in the absence of clear congressional actions."); Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 255 (2010).

128. *Id.* at 441 (Pillard, N., dissenting) (citing Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1665 (2012) *and* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010)).

129. *Id.*; *see also Reid*, 354 U.S. at 6.

130. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390-92 (1971).

131. *Meshal*, 804 F.3d at 441 (Pillard, N., dissenting) (citing Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2012)) (holding that the presumption against extraterritoriality is inapplicable when conduct abroad touches and concerns the United States with sufficient force).

132. *Id.* at 441-42 (citing 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)) (other citations omitted) ("[T]eaming up with foreign agents cannot exculpate officials of the United States citizens from liability to United States citizens officials' unlawful acts.").

2. National Security

The majority also used national security as a "special factor" that counseled against granting Meshal a *Bivens* remedy.[133] The majority's easy acceptance of national security concerns to evade a *Bivens* remedy neglects the proper care such a serious assertion deserves—as the Supreme Court warned, the "label of 'national' security may cover a multitude of sins."[134] To support the application of national security concerns as a special factor counseling hesitation, the majority relied upon cases that are easily distinguished from Meshal's claims.[135] In both *Doe* and *Vance*, the plaintiffs challenged military decisions during wartime, alleging injuries sustained by military officials.[136] In both cases, the courts reached their decisions, in part, because the plaintiffs were practically members of the armed services. For example, plaintiff Doe was a government contractor assigned to a Marine unit on the Iraqi-Syrian border when the military detained him and the Detainee Status Board determined him to be a threat to the Multi-National Forces in Iraq.[137] The D.C. Court of Appeals acknowledged that Doe was not an actual member of the military, but that it saw "no way in which this [absence of formal military membership] affects the special factors analysis" under *Stanley* and *Chappell*, decisions based on the military's system of justice.[138] Notably, as Judge Pillard mentioned in her dissent in Meshal's case, the *Doe* court only referred to national security in conjunction with military intelligence, not national security alone or in relation to a criminal investigation.[139] Additionally, in *Vance*, the United States Court of Appeals for the Seventh Circuit also refused to recognize a *Bivens* remedy for military contractors who "perform[ed] much the same role as soldiers" when military personnel detained them in a combat zone, suspecting that they supplied weapons to groups hostile towards the United States.[140] The court reasoned that the "Supreme

133. *Id.* at 425 (majority opinion).

134. *Id.* at 443 (Pillard, N., dissenting) (quoting Mitchell v. Forsyth, 472 U.S. 511, 524 (1985)).

135. *Id.* at 421-22 (majority opinion).

136. *See* Doe v. Rumsfeld, 683 F.3d 390, 395 (D.C. Cir. 2012) ("Doe challenges the development and implementation of numerous military policies and decisions."); Vance v. Rumsfeld, 701 F.3d 193, 195, 203 (7th Cir. 2012) (en banc).

137. *Doe*, 683 F.3d at 391-92.

138. *Id.* at 394.

139. *See id.*; *see also Meshal*, 804 F.3d at 444 (Pillard, N., dissenting).

140. *Vance*, 701 F.3d at 196, 198-99.

Court's principal point was that civilian courts should not interfere with the military chain of command."[141]

In *Lebron*, the United States Court of Appeals for the Fourth Circuit declined to recognize a *Bivens* action for Jose Padilla, an active member of al-Qaeda who was detained as an enemy combatant by order of the President during wartime.[142] Padilla sued military policymakers and military officers for his military detention only after he was "convicted of conspiring with others within the United States to support al-Qaeda's global campaign of terror."[143] Padilla is presently serving his sentence for those crimes.[144] Despite the fact that Padilla was neither a service member nor military contractor, his suit included a two-fold blemish: he sued the military for claims regarding the military chain of command and for military policymaking, whose proposed litigation risked "interference with military operations on a wide scale."[145]

Meshal's suit did not result from military service or activity, Meshal's claims did not question military conduct or policy, and Meshal is neither a military service member nor a military contractor. He was simply a civilian tourist when the FBI detained him during a national-security related operation. If Meshal's case had persevered, perhaps issues related to national security might have emerged, but there was not sufficient reason to "halt his suit at the threshold."[146] Moreover, if a national security issue had surfaced, federal courts frequently handle and are well suited to handle sensitive issues with their "wide range of tools to address national security concerns" as they appear during litigation.[147] For example, classified or secret evidence may be submitted to a court under seal, courts may issue opinions without disclosing classified

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141. *Id.* at 199.

142. Lebron v. Rumsfeld, 670 F.3d 540, 545 (4th Cir. 2012) ("President George W. Bush issued an order to defendant Donald Rumsfeld, then Secretary of Defense, to detain Padilla as an enemy combatant.").

143. *Id.* at 544.

144. *Id.* at 545.

145. *Id.* at 553 ("Padilla's complaint is replete with references to the hierarchy of the Defense Department and its responsibility for overseeing the nation's armed services." "Padilla's very theory of liability thus depends upon a probe of the command structure of our military establishment, a hierarchy that the federal courts have heretofore been reluctant to disrupt." "Any defense to Padilla's claims—which effectively challenge the whole government's detainee policy—could require current and former officials, both military and civilian, to testify as to the rationale for that policy . . .").

146. Meshal v. Higgenbotham, 804 F.3d 417, 446 (D.C. Cir. 2015) (Pillard, N., dissenting).

147. *Id.* at 446.

material on the record, and court personnel may obtain security clearance in order to view classified information.[148]

The core essence of *Bivens* is to deter individual federal officers from committing unconstitutional acts.[149] In practicing that purpose, the Supreme Court has declined to recognize a *Bivens* claim arising from military service and challenging military actions; however, it has not hesitated to recognize an implied action against federal agents participating in federal law enforcement or in control of federal prisoners when they willfully violate the law.[150] The majority's decision to decline Meshal a *Bivens* remedy fails to clarify how or why such a claim by a U.S. citizen—who has no connection to the military—would obstruct military affairs or national security, as contemplated in *Chappell*, *Stanley*, *Doe*, *Vance*, or *Lebron*.

C. Policy Implications

In reviewing a motion to dismiss, a court must accept all well-pleaded facts as true.[151] Meaning, in deciding Meshal's case, the court had to accept that members of the U.S. government tortured a U.S. citizen. The majority's holding produces an unfathomable result: that a civil remedy is available to most torture victims and not a U.S. citizen tortured abroad at the hands of his own government.[152] Under the Torture Victim Protection Act, a U.S. citizen tortured by foreign officials could seek civil redress in U.S. courts against his torturer.[153] If that torture resulted in death, the same law allows his survivors to seek a civil remedy.[154] Under the Federal Tort Claims Act and the Alien Tort Statute,

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148. *Id.* at 446-47.

149. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 71 (2001).

150. *Compare* Chappell v. Wallace, 462 U.S. 296, 300 (1983), *and* United States v. Stanley, 483 U.S. 669, 683-84 (1987), *with* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971), *and* Carlson v. Green, 446 U.S. 14, 17-19 (1980).

151. Edward D. Johnson, Ashcroft v. Iqbal*: New Pleading Standards and Motions To Dismiss*, PRETRIAL PRAC. & DISCOVERY (Am. Bar Ass'n, Chicago, Ill.), Fall 2009, at 22-23.

152. Of course national security is an important context for courts to acknowledge when deciding sensitive cases, and under the court's holding, it reached its decision based on the convergence of two factors: the conduct occurred abroad and in the context of a national security concern. But I would add the caveat that when it comes to the mistreatment of individuals, it seems unlikely that such mistreatment would occur without those factors present. Given that, there is an argument to counter the national security concerns, as mentioned in Judge Pillard's dissent—that courts can and do use specialized procedures and mechanisms to adjudicate sensitive issues, like national security concerns.

153. *See* 28 U.S.C. § 1350 Note (1948); *see also* Vance v. Rumsfeld, 701 F.3d 193, 211 (7th Cir. 2012) (en banc) (Hamilton, J., dissenting) ("If a victim of torture by the Syrian military can find his torturer in the United States, U.S. law provides a civil remedy against the torturer.").

154. *See* 28 U.S.C. § 1350 Note.

a foreign citizen tortured by U.S. States officials inside the United States could seek civil redress in U.S. courts.[155] A foreign citizen tortured by U.S. federal agents abroad could seek civil redress under the Alien Tort Statute or in his own nation's courts.[156] In spite of the availability of recourse to other torture victims, the majority closed the doors of the U.S. courts to Meshal, even when his case "involve[d] pursuit of purely retrospective relief by *our* citizen under *our* Constitution against *our* government's [agents]."[157] As the *Vance* dissent accurately and candidly described it, this "disparity attributes to our government and to our legal system a degree of hypocrisy that is breathtaking."[158]

The majority's holding implies that Congress specifically devised a gap in legislation to deny a remedy to U.S. citizens mistreated by U.S. agents abroad. Under the court's reasoning, foreigners tortured by U.S. officials in violation of international law could have a greater right to seek a U.S. court's protection under *Bivens* (or otherwise) than a U.S. citizen who suffers the same fate in violation of constitutional law. Such a conclusion is deficient of reason, and a more viable interpretation is that Congress is aware that such U.S. citizens already have an existing remedy under *Bivens* for such injuries. The framers included the Bill of Rights with the particular intent to vindicate individual personal interests, and "the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment."[159] The court, by denying Meshal any civil remedy, failed to serve its rights-protective function and removed all legal consequence for a constitutional violation, treating the Constitution as "merely a precatory document."[160]

V. CONCLUSION

Undoubtedly, Meshal's case presented the court with a difficult question: to choose the utmost protection of national security or of individual rights. But, even in difficult cases, the judiciary's obligation is to the latter—to protect an individual's constitutional rights, including the basic right not to be tortured by our own government. The court's

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155. *See* 28 U.S.C. § 1346(b)(1) (2013); *see also* 28 U.S.C. § 1350 Note.

156. *See* 28 U.S.C. § 1346(b)(1).

157. Meshal v. Higgenbotham, 804 F.3d 417, 441 (D.C. Cir. 2015) (Pillard, N., dissenting).

158. *Vance*, 701 F.3d at 211 (Hamilton, J., dissenting) (en banc).

159. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 407 (1971) (Harland, J., concurring).

160. *Meshal*, 804 F.3d at 433 (Pillard, N., dissenting) (quoting Davis v. Passman, 442 U.S. 228, 249 (1979)).

holding creates a scenario where the U.S. government may violate its own citizens' constitutional interests without providing any civil remedy, effectively dimming the light of justice for national security allegations at the expense of our personal liberty realities. Such a holding trivializes the Constitution and allows private actions "only if they cannot possibly offend anyone anywhere."[161]

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161. Meshal v. Higgenbotham, 47 F. Supp. 3d 115, 130 (D.D.C. 2014) (citations omitted) ("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 offend anyone anywhere.' That approach undermines our essential constitutional protections in the circumstances when they are most often necessary. In issuing today's opinion, the Court fears that this prediction is arguably correct.").

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