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).

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[1] the Supreme Court held that federal officers could be sued for damages based on violations of Fourth Amendment rights, even in the absence of a statutory cause of action.[2] The Court subsequently extended the availability of *Bivens* remedies to plaintiffs seeking damages for a variety of constitutional violations.[3] However, the Court has not expanded the availability of *Bivens* suits at any time during the past two decades,[4] and circuit courts have responded by proceeding cautiously when determining whether to allow *Bivens* claims to go forward.[5] Recently, in *Meshal v. Higgenbotham*,[6] the D.C. Circuit held that Amir Meshal, a U.S. citizen who was allegedly unconstitutionally detained, interrogated, and tortured by FBI agents abroad, could not seek damages under *Bivens*. The outcome in *Meshal* was consistent with the long line of cases disfavoring *Bivens* remedies, but the court's analysis has interesting implications for future *Bivens* suits. The D.C. Circuit inquired into whether Meshal's claims implicated a new *Bivens* context and clearly separated the analysis of that "predicate" question from the subsequent discussion of whether to extend the remedy. This approach avoided methodological ambiguity and provided plaintiffs with a potential route to victory that the district court's approach had rendered uncertain. However, the court's assertion that "national security" and "extraterritoriality" are indicative of a "new context" limits the utility of this approach for plaintiffs and could foreshadow further erosion of plaintiffs' ability to secure damages under *Bivens*.

Amir Meshal is a Muslim U.S. citizen.[7] According to Meshal's complaint, in 2006, he traveled to Somalia in order to gain a broader

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[1] 403 U.S. 388 (1971).

[2] *See id.* at 397.

[3] *See* Carlson v. Green, 446 U.S. 14, 23 (1980) (Eighth Amendment); Davis v. Passman, 442 U.S. 228, 234 (1979) (Fifth Amendment).

[4] ERWIN CHEMERINSKY, FEDERAL JURISDICTION 639 (6th ed. 2012).

[5] *See, e.g.*, Stephen I. Vladeck, Essay, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1313–17 (2012).

[6] 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).

[7] *See* Complaint for Damages & Declaratory Relief at 1, Meshal v. Higgenbotham, 47 F. Supp. 3d 115 (D.D.C. 2014) (No. 1:09-cv-02178). Meshal's claims were adjudicated on a motion

understanding of Islam.[8] Shortly after Meshal's arrival, hostilities erupted between two opposing factions.[9] Meshal, fearing for his safety, fled to the Kenyan border,[10] where he was apprehended by Kenyan soldiers and then imprisoned in Nairobi.[11] U.S. government officials became aware of Meshal's location shortly thereafter.[12] In February 2007, three of the defendants — FBI Agents Chris Higgenbotham and Steve Hershem, and John Doe 1 — made contact with Meshal.[13] Over the next four months, the defendants detained and interrogated Meshal, seeking to uncover a connection with al Qaeda.[14] During the interrogations, the defendants threatened to "make [Meshal] disappear," told him that "even your grandkids are going to be affected by what you did," and threatened to hand Meshal over to Egyptian interrogators, who "had ways of making [him] talk."[15] During this period, Meshal was transferred among several African countries and subjected to extremely harsh conditions of confinement.[16] Following mounting media scrutiny and the involvement of Meshal's congressman, Meshal was returned to the United States in May 2007.[17] During his period of detention, he lost approximately eighty pounds.[18]

Meshal commenced a *Bivens* suit in the U.S. District Court for the District of Columbia in November 2009.[19] He argued that the defendants' conduct had violated his substantive and procedural due process rights under the Fifth Amendment and his right not to be subjected to unreasonable seizure under the Fourth Amendment.[20] Judge Sullivan granted the defendants' motion to dismiss.[21] The court first concluded that Meshal had "stated a plausible violation" of his constitutional rights.[22] It next applied the "two-step process to determine whether a *Bivens* remedy is available"[23] that the Supreme Court artic-

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to dismiss. *See Meshal*, 47 F. Supp. 3d at 117. Accordingly, for the purposes of this discussion, Meshal's allegations are accepted as true. *See id.*

8 Complaint for Damages & Declaratory Relief, *supra* note 7, at 8. At the time, an Islamic governing body controlled Mogadishu and its surrounding areas. *See id.* at 7–8.

9 *Id.* at 10.

10 *See id.* at 10–11.

11 *Id.* at 12–13.

12 *Id.* at 14.

13 *Id.* at 15–16.

14 *Id.* at 22, 40–41. John Doe 2 was also involved in the interrogations. *See id.* at 35–37.

15 *See id.* at 22–23.

16 *Id.* at 28.

17 *Id.* at 39–41.

18 *Id.* at 41.

19 *See id.* at 1, 4, 51.

20 *Id.* at 43, 45, 47; *see also* U.S. CONST. amends. IV, V.

21 Meshal v. Higgenbotham, 47 F. Supp. 3d 115, 120 (D.D.C. 2014). The court also dismissed a separate claim brought under the Torture Victim Protection Act. *Id.* at 123 n.5.

22 *Id.* at 120.

23 *Id.* at 122.

ulated in *Wilkie v. Robbins*.[24] Under this analysis, a court first determines whether an existing alternative process for protecting the interest in question "amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages."[25] If it does not, the court next makes "the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation."[26] Applying this analysis, the court determined that there was no alternative remedy available; in Meshal's case, the remedy had to be "damages or nothing."[27] Yet the court concluded that Meshal's claim failed at the second step: special factors counseled against applying a *Bivens* remedy. Three circuits, including the D.C. Circuit, had established that "when a citizen's rights are violated in the context of military affairs, national security, or intelligence gathering, *Bivens* is powerless to protect him."[28] While Judge Sullivan expressed dismay at this outcome, he concluded that binding precedent compelled dismissal.[29]

The U.S. Court of Appeals for the District of Columbia Circuit affirmed. Writing for the panel, Judge Brown[30] asserted that in order to determine whether a *Bivens* action should proceed, a court must first determine whether the action would "extend the remedy to a new context."[31] While acknowledging that Meshal's claim involved neither a new constitutional right nor a new category of defendants, the court nevertheless concluded that the claim presented a new context for two reasons: First, it "involve[d] . . . a criminal terrorism investigation conducted abroad."[32] Second, it "involve[d] . . . the extraterritorial application of constitutional protections."[33] Next, Judge Brown applied the two-part *Wilkie* test. While acknowledging that Meshal had no alternative remedy, the court concluded that the "special factors" of national security and extraterritoriality counseled against extending a *Bivens*

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[24] 551 U.S. 537 (2007).

[25] *Id.* at 550 (citing Bush v. Lucas, 462 U.S. 367, 378 (1983)).

[26] *Id.* (quoting *Bush*, 462 U.S. at 378).

[27] *Meshal*, 47 F. Supp. 3d at 123 (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring)).

[28] *Id.* at 130; *see also* Vance v. Rumsfeld, 701 F.3d 193, 200 (7th Cir. 2012) (en banc); Doe v. Rumsfeld, 683 F.3d 390, 395–96 (D.C. Cir. 2012); Lebron v. Rumsfeld, 670 F.3d 540, 552 (4th Cir. 2012).

[29] *Meshal*, 47 F. Supp. 3d at 130 (characterizing Meshal's claims as "candidly[] embarrassing" for the U.S. government (quoting Doe v. Rumsfeld, No. 1:08-CV-1902, 2012 WL 3890944, at *2 (D.D.C. Sept. 7, 2012))).

[30] Judge Brown was joined by Judge Kavanaugh.

[31] *Meshal*, 804 F.3d at 423.

[32] *Id.* at 424.

[33] *Id.*

remedy to this new context.[34] Noting that the special factors analysis is meant to answer "the question of who should decide whether . . . a remedy should be provided,"[35] Judge Brown concluded that the confluence of these two factors strongly suggested that Congress should decide whether a remedy is appropriate.[36]

Judge Kavanaugh concurred. He emphasized the impact of judicial conclusions regarding the scope of *Bivens* remedies on the United States' ability to conduct the ongoing war against terrorism.[37] Framing the core point of contention between the majority and the dissent as whether Congress or the judiciary should decide "whether to recognize a cause of action against U.S. officials for torts they allegedly committed abroad in connection with the war" against terrorism,[38] Judge Kavanaugh agreed that the two special factors identified by the majority strongly suggested that the task was better suited to Congress.[39]

Judge Pillard dissented. She drew attention to the absence of factors used as indicia of a "new context" in past cases.[40] She also argued that past congressional tort-claims legislation indicated that Congress had already evinced an intent to ratify *Bivens* in certain contexts, and that courts should thus avoid excessive caution when determining whether to extend the doctrine.[41] Finally, Judge Pillard rejected the claim that the "special factors" identified by the majority formed a sufficient basis for declining to extend a *Bivens* remedy.[42] She stated that state-secrets privilege and other procedures ensure that federal courts are "well equipped" to manage sensitive cases.[43] Judge Pillard cautioned that judges should not "cede [their] rights-protective role" without a truly compelling reason to do so, and she concluded that no such reason was present in Meshal's suit.[44]

Judge Kavanaugh characterized the "fundamental divide between the majority . . . and the dissent" as a question of "Who Decides" — that is, whether Congress or the judiciary should provide for any tort

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[34] *Id.* at 425–26.

[35] *Id.* at 425 (quoting Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208 (D.C. Cir. 1985)).

[36] *See id.* at 426–27.

[37] *See id.* at 429, 431 (Kavanaugh, J., concurring).

[38] *Id.* at 430.

[39] *See id.* at 430–31.

[40] *See id.* at 434–35 (Pillard, J., dissenting). These factors included ineligible defendants, the existence of alternative remedies, improper intrusions into "the unique demands of military discipline," and the foreign affairs implications of a suit brought by an alien against the United States. *Id.* at 434.

[41] *See id.* at 436–39. Multiple scholars endorse this interpretation of Congress's treatment of *Bivens*. *See, e.g.*, Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 580 (2013).

[42] *Meshal*, 804 F.3d at 440.

[43] *Id.* at 446.

[44] *Id.* at 445.

cause of action under these circumstances.[45] However, an equally important consideration for both Judge Brown and Judge Pillard was whether this "fundamental" question had already been answered.[46] As a first step in discussing whether the court should recognize a *Bivens* cause of action, the majority inquired into the "predicate" issue of whether the Supreme Court had already extended *Bivens* to apply to claims like Meshal's.[47] It was only after concluding that Meshal's claim presented a "new context" that the court declined to extend a *Bivens* remedy.[48] In conducting its analysis, the court appropriately differentiated the predicate issue of whether the case presented a new context from the analysis of whether to extend *Bivens*, indicating that plaintiffs could, at least theoretically, prevail at this initial step. However, the court's identification of "national security" and "extraterritoriality" as indicia of a new *Bivens* context laid the groundwork for restricted availability of *Bivens* relief in the future.

The question of what constitutes a "new context" for the purposes of *Bivens* remedies is critical, yet it has no concrete answer. The Supreme Court has consistently expressed a reluctance to extend the availability of *Bivens* remedies to contexts in which *Bivens* relief has not yet been established.[49] *Wilkie* articulated a two-step test for determining whether to extend *Bivens* remedies,[50] but in practice circuit courts invariably follow the Court's lead in refusing to do so.[51] Courts' unwillingness to extend *Bivens* to new contexts strongly suggests that plaintiffs would be best served by arguing that their claims do not implicate a "new context," but rather fit into a context to which *Bivens* remedies have already been extended. However, despite the critical role that the concept of a "new context" plays in *Bivens* suits, "[c]ontext is not defined in the case law."[52] Complicating matters fur-

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[45] *Id.* at 430 (Kavanaugh, J., concurring).

[46] While Judge Pillard did not explicitly address the majority's "predicate" question analysis, she indirectly drew attention to the fact that factors frequently associated with a new *Bivens* context were absent in Meshal's case. *Id.* at 434 (Pillard, J., dissenting).

[47] *Id.* at 424–25 (majority opinion).

[48] *Id.* at 425–26.

[49] *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001); Schweiker v. Chilicky, 487 U.S. 412, 421–22 (1988). At least one sitting Justice, Justice Thomas, has joined an opinion indicating willingness to reject any expansion of *Bivens*-remedy availability. *See Malesko*, 534 U.S. at 75 (Scalia, J., concurring).

[50] *See* Wilkie v. Robbins, 551 U.S. 537, 550 (2007).

[51] *See* Vladeck, *supra* note 5, at 1313–17.

[52] Arar v. Ashcroft, 585 F.3d 559, 572 (2d Cir. 2009) (en banc) (internal quotation marks omitted). In *Malesko*, the Justices disagreed over whether a *Bivens* claim implicated a new context but did not indicate how such questions are to be resolved. *Compare Malesko*, 534 U.S. at 74 ("Respondent . . . seeks a marked extension of *Bivens* . . . ."), *with id.* at 76–77 (Stevens, J., dissenting) ("[T]he question presented by this case is whether the Court should create an exception to the straightforward application of *Bivens* . . . not whether it should extend our cases beyond their 'core premise.'" (quoting *id.* at 71 (majority opinion))).

ther, the Court's recent analysis of the *Bivens* claim at issue in *Minneci v. Pollard*[53] seemed to conflate the inquiry into whether the case implicated a "new context" with the discussion of whether an extension was appropriate under the *Wilkie* test.[54] This approach has raised concerns about whether the Court is adhering to its established methodology for analyzing *Bivens* cases.[55]

In this environment of uncertainty, lower courts have adopted disparate strategies for determining when a claim implicates a new context. In *Arar v. Ashcroft*,[56] the Second Circuit defined "context" as "a potentially recurring scenario that has similar legal and factual components" and affirmed that courts must conclude that an extension is necessary before determining whether it is appropriate.[57] This approach has proved influential across several circuits.[58] However, the Second Circuit's recent analysis in *Turkmen v. Hasty*[59] seemed to constitute a modification of the *Arar* "context" inquiry.[60] Furthermore, even courts in circuits that endorse the *Arar* formulation often conclude that a claim presents a "new context" after minimal inquiry.[61]

The *Meshal* majority responded to the uncertainty surrounding the "new context" analysis by outlining a clear theoretical framework for examining the availability of *Bivens* remedies. The court endorsed the *Arar* approach, stating that any analysis of a *Bivens* claim first "requires [a court] to examine whether allowing a *Bivens* action to proceed would extend the remedy to a new context."[62] Only after finding such expansion did the court apply the two-part *Wilkie* test and conclude that "special factors" precluded an extension of *Bivens*.[63] The court's careful differentiation between these two steps preserved the critical predicate question, a result that reflected the Supreme Court's concern regarding "new contexts" while also drawing attention to the

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53 132 S. Ct. 617 (2012).

54 *See id.* at 623–24.

55 *See* Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing* Bivens *After* Minneci, 90 WASH. U. L. REV. 1473, 1479 (2013) ("The *Minneci* Court . . . elided [the] analytically prior question of when a plaintiff seeks to extend *Bivens* with the distinct question of when alternative remedies, be they state or federal, should prohibit such an extension.").

56 585 F.3d 559 (2d Cir. 2009) (en banc).

57 *Id.* at 572.

58 *See, e.g.*, Hernandez v. United States, 757 F.3d 249, 272 (5th Cir. 2014), *adhered to in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015); Mirmehdi v. United States, 689 F.3d 975, 981 (9th Cir. 2012).

59 789 F.3d 218 (2d Cir. 2015).

60 *See id.* at 234 (analyzing "both the rights injured and the mechanism of the injury" to determine whether a case implicates a new context); *see also id.* at 268 (Raggi, J., dissenting) (arguing that the majority's approach "cannot be reconciled with controlling precedent").

61 *See, e.g.*, M.E.S., Inc. v. Snell, 712 F.3d 666, 671 (2d Cir. 2013); Vance v. Rumsfeld, 701 F.3d 193, 198–99 (7th Cir. 2012) (en banc).

62 *Meshal*, 804 F.3d at 423.

63 *See id.* at 424–26.

fact that plaintiffs could, at least theoretically, establish the viability of a *Bivens* claim without being subjected to the near-insurmountable *Wilkie* test.

In addition to differentiating the predicate question of what constitutes a "new context" from the question of whether to extend the *Bivens* remedy, the majority asserted that a lack of precedent extending *Bivens* in national security and extraterritoriality cases "signal[s] that [the] context is a novel one."[64] While courts in past cases had cited both national security and extraterritoriality as "special factors" precluding an extension of a *Bivens* remedy,[65] the majority's consideration of these indicia at the predicate step constituted a departure from approaches articulated in other circuits and added to the indicia of a new *Bivens* context identified in past Supreme Court cases.[66]

The *Meshal* majority's use of national security and extraterritoriality at the predicate step provides additional guidance for determining what constitutes a "new context" for *Bivens* remedies, but it also lays the groundwork for potential future restrictions on the availability of *Bivens* relief. The court was careful to indicate that it decided only that the confluence of both national security and extraterritoriality concerns sufficed to establish a "new context" in Meshal's case.[67] However, a claim that implicates only one of the two indicia is likely to occur in the future. In that case, the defendant will certainly argue that the single indicator alone establishes a new context, and the judge may well agree. Thus, the *Meshal* majority's use of these indicia renders the outcome uncertain in such a situation.

The ambiguous, potentially far-reaching scope of "national security" as an indicator of a new context could significantly restrict the future availability of *Bivens* remedies. Meshal's claim, which involved a criminal investigation into terrorist activities, accorded with standard conceptions of what constitutes a national security issue. However, the scope of "national security" as a legal concept is undefined, and legislators invoke national security concerns in a broad variety of contexts.[68] As a result, the use of national security as an indicator of a new *Bivens* context could lay the groundwork for denying relief in cases that

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[64] *Id.* at 424–25.

[65] *See, e.g.*, Vance v. Rumsfeld, 701 F.3d 193, 199 (7th Cir. 2012) (en banc) (national security and extraterritoriality); Doe v. Rumsfeld, 683 F.3d 390, 394–96 (D.C. Cir. 2012) (national security); Lebron v. Rumsfeld, 670 F.3d 540, 547–52 (4th Cir. 2012) (same).

[66] *See Meshal*, 804 F.3d at 434, 443–44 (Pillard, J., dissenting). The dissent contrasted the majority's analysis with the Second Circuit's "new context" test articulated in *Turkmen v. Hasty*, 789 F.3d 218, 234 (2d Cir. 2015). *See Meshal*, 804 F.3d at 443.

[67] *Meshal*, 804 F.3d at 425 (majority opinion).

[68] *See generally* Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573 (2011) (tracing the evolution of the concept of "national security," and discussing the expansion of the idea to incorporate issues ranging from drug trafficking to climate change).

would otherwise seem to fall within the *Bivens* realm. For instance, the dissent argued that "no one disputes that a Fifth Amendment claim for arbitrary detention and coercive interrogation . . . would be cognizable under *Bivens* if it occurred in the United States."[69] However, the majority did not conclude that extraterritoriality is a necessary condition for the existence of a new *Bivens* context.[70] Thus, it is at least conceivable that the majority's national security indicator could be invoked in isolation to remove such a claim from the *Bivens* heartland and place it into a "new context."

Similarly, the court's use of extraterritoriality as an indicator of a new *Bivens* context could curtail the benefits of the predicate-question step for plaintiffs if, applying this indicator in isolation, a court concludes that claims resulting from conduct abroad automatically present a "new context." The majority established that "extraterritoriality dictates constraint" without settling upon any specific rationale for the court's "reticence."[71] The broad conceptualization of the extraterritoriality indicator means that it could impact any claim originating from conduct that occurred abroad, regardless of factual differences from Meshal's claim. Furthermore, as Judge Pillard noted, "[t]he majority leaves open whether a United States citizen abused by federal agents abroad as part of an investigation *not* implicating national security would be able to bring a *Bivens* action."[72] The majority "offers no reason why such a suit would be barred,"[73] but as with the court's analysis of national security, this ambiguity cuts both ways. The majority's lack of discussion regarding the effect of the indicia in isolation invites defendants to invoke extraterritoriality to demonstrate the existence of a "new context," even absent national security concerns.

Prior to the court's opinion in *Meshal v. Higgenbotham*, key portions of the "new context" analysis resided in the realm of uncertainty. The predicate question of what constitutes a "new context" was vulnerable to being minimized or discarded, but also held the potential to be employed in a way that would increase plaintiffs' chance of securing relief under *Bivens*. While the *Meshal* majority opinion reflected the established pattern of courts disfavoring *Bivens* remedies, it also definitively affirmed the importance of the predicate question in *Bivens* analyses. However, its use of national security and extraterritoriality as indicia of a new *Bivens* context sharply restricted the utility of the court's reasoning for plaintiffs and could foreshadow a further narrowing of *Bivens* relief in the future.

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69 *Meshal*, 804 F.3d at 435 (Pillard, J., dissenting).

70 *See id.* at 422 (majority opinion) ("Our holding is context specific.").

71 *Id.* at 425; *see also id.* at 441 (Pillard, J., dissenting).

72 *Id.* at 439 (Pillard, J., dissenting).

73 *Id.*