

Legal Sidebar

Bivens Does Not Apply to Overseas Fourth Amendment Violations With National Security Overtones

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The U.S. Supreme Court decision in [Bivens](#) permits the victims of a Fourth Amendment violation to sue for damages, as a general rule. In [Meshal v. Higgenbotham](#), the U.S. Court of Appeals for the District of Columbia Circuit recently declined to apply the rule to alleged violations occurring overseas that arose in a national security context.

The plaintiff, Amir Meshal, is a U.S. citizen whose troubles began after he fled Somalia to escape the violence there. He contends he was detained as part of a joint U.S.-Kenyan-Ethiopian operation and told that he was being held until it could be determined “‘what the United States wanted to do with him’ before sending him ‘back to the United States.’” During the next four months, he was imprisoned, sometimes in solitary confinement and in unsanitary conditions; repeatedly interrogated and threatened by agents of the Federal Bureau of Investigation (FBI); denied requested access to an attorney; and lost 80 pounds. He was released and never charged. Upon his return to the U.S., he sued under *Bivens* claiming violations of his Fourth (detention) and Fifth Amendment rights (threats). The U.S. [district court](#) found the allegations “outrageous,” but dismissed Meshal’s suit on the basis of precedent. The [D.C. Circuit](#) found the allegations “troubling,” but affirmed.

Neither court found it necessary to consider whether a Fourth Amendment violation had occurred even if the allegations were true. The Fourth Amendment declares in part that “[t]he right of the people [of the United States] to be secure in their persons. . . against unreasonable seizures, shall not be violated” The [Supreme Court](#) has “reject[ed] the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights.” The lower [courts](#) have been more specific: the Fourth Amendment’s reasonableness requirements apply to the federal searches and seizures of U.S. citizens abroad. However, the [Supreme Court](#) has also suggested that what is reasonable may differ when national security aspects are involved. Moreover, it has been extremely [reluctant](#) to recognize the overseas reach of statutes creating a civil cause of action. The very factors that color the assessment of Fourth Amendment reasonableness and statutory construction induced the D.C. Circuit to limit the application of the *Bivens* rule: extraterritoriality and national security concerns.

The [D.C. Circuit](#)’s conclusion was also influenced by the Supreme Court’s lukewarm acceptance of *Bivens* since its announcement. The D.C. Circuit noted that the Justices have extended its application to some Eighth Amendment cruel and unusual punishment violations and due process violations, but not to others. Its own earlier cases and those of other circuits, which had declined to expand *Bivens* into areas with national security implications, further buttressed the D.C. Circuit’s reticence to expand. In the end, the court declared, “[T]wo special factors are present in this case. We do not here decide whether either factor alone would preclude a *Bivens* remedy, but both factors together do so. First, special factors counseling hesitation have foreclosed *Bivens* remedies in cases involving the military, national security, or intelligence. Second, the Supreme Court has never created or even favorably mentioned a non-statutory right of action for damages on account of conduct that occurred outside the borders of the United States.”

A member of the [D.C. Circuit](#) panel wrote a vigorous dissent in which he observed that the majority opinion left Meshal and other U.S. citizens, similarly situated in the future, with no remedy for serious misconduct committed in the name of the U.S. government. “Had Meshal suffered these injuries in the United States, there is no dispute that he could have sought redress under *Bivens*,” the dissent declared. Yet because the violations occurred overseas and under the shadow

of national security concerns, there is no remedy. The Federal Tort Claims Act excludes torts committed abroad. The Torture Victim Protection Act supplies a remedy against foreign officials but not their U.S. counterparts. Habeas corpus relief was theoretically available to Meshal, but hollow relief in fact. Meshal was denied access to counsel, and secretly spirited from the prisons of one country to those of another without even affording U.S. consular officials access until media reports disclosed the scheme. The response of the majority was straight forward. Relief in cases with such policy implications must come from the hand of the Congress, not the hand of the courts.

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