

**United States Court of Appeals  
for the District of Columbia Circuit**

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**No. 16-5093**

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AHMED SALEM BIN ALI JABER, Personal representative of the estate of Salem Bin Ali Jaber, by his next friend Faisal Bin Ali Jaber; ESAM ABDULLAH ABDULMAHMOUD BIN ALI JABER, Personal representative of the estate of Waleed Bin Ali Jaber, by his next friend Faisal Bin Ali Jaber,

*Plaintiffs – Appellants,*

v.

UNITED STATES OF AMERICA; BARACK OBAMA, President; LEON E. PANETTA, Former Secretary of Defense; DAVID PETRAEUS, Former Director, Central Intelligence Agency; UNKNOWN DEFENDANT ONE,

A person employed by or under the authority of the United States; UNKNOWN DEFENDANT TWO, A person employed by or under the authority of the United States; UNKNOWN DEFENDANT THREE, A person employed by or under the authority of the United States,

*Defendants – Appellees.*

*On Appeal from the United States District Court for the District of Columbia in Case No. 1:15-cv-00840-ESH, Ellen Segal Huvelle, U.S. Senior District Judge*

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**BRIEF OF AMICUS CURIAE BRANDON BRYANT, LISA LING,  
AND CIAN WESTMORELAND IN SUPPORT OF APPELLANTS**

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August 29, 2016

## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Amici certify as follows:

### **PARTIES**

The Appellants (Plaintiffs below) are Ahmed Salem Bin Ali Jaber and Esam Abdullah Abdulmahmoud Bin Ali Jaber, through their Next Friend Faisal Bin Ali Jaber.

The Appellees (Defendants below) are the United States of America, President Barack Obama, Leon Panetta, David Petraeus, and Unknown Defendants 1-3.

### **RULINGS UNDER REVIEW**

The ruling under review is United States District Court Judge Ellen H. Huvelle's February 22, 2016 Order and Memorandum, reported at, *Ahmed Salem Bin Ali Jaber v. United States*, No. 15-cv-840, 2016 U.S. Dist. LEXIS 21301 (D.D.C. Feb. 22, 2016).

### **RELATED CASES**

The case on review has not previously been before this Court or any other court. There is a Freedom of Information Act lawsuit filed seeking information about the drone strike at issue in this matter. *Jaber et al., v. Dep't of Defense*, No. 16-cv-742(KBJ). Amici are unaware of any other related cases currently pending in this Court or any other court.

## TABLE OF CONTENTS

	<i>Page</i>
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES .....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES .....	iii
STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE .....	1
STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS .....	1
CERTIFICATION FOR SEPARATE BRIEF .....	2
BACKGROUND .....	3
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	5
CONCLUSION .....	10
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS .....	11
CERTIFICATE OF SERVICE .....	12

## TABLE OF AUTHORITIES

	<i>Page(s)</i>
<b>Cases</b>	
* <i>Boumediene v. Bush</i> , 553 U.S. 723 (2008).....	9
* <i>Gilligan v. Morgan</i> , 413 U.S. 1 (1973).....	9
* <i>Nguyen Thang Loi v. Dow Chem. Co.</i> ( <i>In re Agent Orange Prod. Liab. Litig.</i> ), 373 F. Supp. 2d 7 (E.D.N.Y. 2005) .....	9
<b>Rules</b>	
Circuit Rule 29(b) .....	1
Fed. R. App. P. 29(c)(5).....	1
<b>Other Authorities</b>	
Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State, Speech at the Annual Meeting of Am. Soc’y of Int’l Law (March 25, 2010), <i>available at</i> <a href="http://www.state.gov/s/l/releases/remarks/139119.htm">http://www.state.gov/s/l/releases/remarks/139119.htm</a> .....	5
John Brennan, Assistant to the President for Homeland Security and Counterterrorism, Address at The Wilson Center, “The Ethics and Efficacy of the President’s Counterterrorism Strategy,” <i>available at</i> <a href="https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy">https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy</a> .....	6
Press Release, Director of National Intelligence, Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities (Jul. 1, 2016) <i>available at</i> , <a href="https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF">https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+ Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF</a> .....	8

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\*Authorities upon which we chiefly rely are marked with asterisks.

Pursuant to Circuit Rule 29(b), Brandon Bryant, Lisa Ling, and Cian Westmoreland respectfully submit this brief of *amicus curae* in support of the Plaintiffs-Appellants.

**STATEMENT OF IDENTITY, INTEREST IN CASE,  
AND SOURCE OF AUTHORITY TO FILE**

Amici Brandon Bryant, Lisa Ling, and Cian Westmoreland are former U.S. Air Force Service Members whose service included work supporting the U.S. Unmanned Aerial Vehicle (“Drone”) Program. As veterans who worked on the drone program and/or on drone systems, amici have an interest in promoting transparency in U.S. conduct in the drone program and facilitating oversight and accountability for any U.S. drone strikes taken in violation of domestic and/or international law. Amici filed a “Notice of Intent to File an Amicus” on August 15, 2016, indicating that all parties consented to filing of this Amicus.

**STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS**

Pursuant to Fed. R. App. P. 29(c)(5), Amici represent that neither party’s counsel authored this brief, and neither party in this matter contributed money intended to fund this brief.

## **CERTIFICATION FOR SEPARATE BRIEF**

Having consulted with other amici who support plaintiffs-appellants on this appeal, the undersigned certifies that in her judgment, this separate amicus brief is necessary because it addresses issues distinct from those addressed by other amici.

/s/ Kathleen McClellan

Kathleen McClellan

Bar No. 59844

Counsel for Amici Curiae

Brandon Bryant, Lisa Ling, and

Cian Westmoreland.

## **BACKGROUND**

Brandon Bryant, Lisa Ling, and Cian Westmoreland all have a record of honorable service in the United States Armed Forces.

Brandon Bryant served in the United States Air Force Active Duty as an MQ1B Predator Sensor Operator and Reserves SERE Instructor Trainee. From 2005-2011 he was trained as an Imagery Intelligence Analyst, was drafted into flying MQ-1B Predator Drones and flew for Air Combat Command's 15th Reconnaissance Squadron and the Joint Special Operations Command's 3rd Special Operations Squadron. Mr. Bryant was Honorably Discharged as an E-5 Staff Sergeant and has had missions in Iraq, Afghanistan, Yemen, Pakistan, and Somalia.

Lisa Ling joined the military in 1991, serving as an army medic and nurse before transferring to the Air National Guard (ANG). In the ANG, she became a communications technician working on various types of electronic equipment. Besides her overseas deployments, Ms. Ling was mobilized, during a partial unit mobilization of the 234th intelligence Squadron to the 48<sup>th</sup> Intelligence Squadron at Beale Air Force Base from Oct 2007-Sep 2009. The 48<sup>th</sup> Intelligence Squadron provides in-garrison and deployed communications and logistics maintenance for the DCGS (Distributed Common Ground System). She served 6 years on active duty and over 14 years as both active and inactive guard. She has served during

peacetime and supported operations from the first Gulf War through the Global War on Terror. She was honorably discharged in September 2012.

Cian Westmoreland is a former Air Force RF/SATCOM Technician who served in Kandahar Air Field, Afghanistan at the 73rd Expeditionary Air Control Squadron. While there, he assisted in building a signal relay station that was used for transmitting and receiving data, radio, and radar picture for unmanned and manned missions for approximately 250,000 square miles over Afghanistan.

Mr. Westmorland was honorably discharged in 2010.

Mr. Bryant, Ms. Ling, and Mr. Westmoreland feel compelled by the oaths they took to support and defend the Constitution to participate in this matter as amici.

### **SUMMARY OF ARGUMENT**

Amici are former U.S. Air Force Service Members whose service included work supporting the U.S. Unmanned Aerial Vehicle (“Drone”) Program. The District Court’s decision necessarily and erroneously assumed that the U.S. drone program operates consistent with uniform domestic polices and international law. In the collective experience of amici, the drone program does not consistently operate with adherence to internal domestic and international legal standards. The District Court found Appellants' case constituted a political question not reviewable by the courts. However, a political question requires an informed



public, and in the experience of amici, the public is not adequately or accurately informed about the drone program. Therefore, amici urge this Court to reverse the District Court's decision and allow Appellants' case to proceed.

### **ARGUMENT**

The District Court found that Appellants' complaint presented "precisely the type of 'complex policy questions' that courts are ill-equipped to answer." Op. at 12. The District Court also assumed that "heinous war crimes" would not occur "within the scope of official duties." *See* Op. at 15.

The District Court's decision necessarily and erroneously presumes that the drone program reflects consistent application of a uniform policy, and that strikes do not violate U.S. or international law and cannot constitute war crimes. U.S. Executive Branch officials regularly and publicly describe the alleged "policy decisions" behind drone strikes, emphasizing both the accuracy and effectiveness of drone strikes. *See, e.g.*, Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Speech at the Annual Meeting of Am. Soc'y of Int'l Law (March 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> ("In U.S. operations against al-Qaeda and its associated forces-- including lethal operations conducted with the use of unmanned aerial vehicles-- great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.").

President Obama has assured the public that “before any strike is taken, there must be near-certainty that no civilians will be killed or injured -- the highest standard we can set.” President Barack Obama, Remarks at the Nat’l Def. Univ. (May 23, 2013), *available at* <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university/>. The Executive Branch recognizes that laws are applicable to drones strikes, and publicly claims that strikes adhere to laws – including international laws – and including limits on where, geographically, strikes are permitted. *See, e.g.* John Brennan, Assistant to the President for Homeland Security and Counterterrorism, Address at The Wilson Center, “The Ethics and Efficacy of the President’s Counterterrorism Strategy,” *available at* <https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy> (“Finally, when considering lethal force we are of course mindful that there are important checks on our ability to act unilaterally in foreign territories. We do not use force whenever we want, wherever we want. International legal principles, including respect for a state’s sovereignty and the laws of war, impose constraints. The United States of America respects national sovereignty and international law.”).

In the collective experience of Mr. Byrant, Ms. Ling, and Mr. Westmoreland, the U.S. drone program does not consistently adhere to these internal domestic or international legal standards. Far from the grave consideration

the Executive Branch purports to give each strike, amici witnessed a culture that often encouraged and celebrated strikes. After Mr. Bryant's first strike, his squadron celebrated that he had "popped his cherry" by engaging in his first drone killing. Mr. Westmoreland's supervisor excitedly told the unit one day: "We are killing bad guys now, boys." They experienced palpable pressure to fly more missions and conduct more strikes as the drone program expanded.

Contrary to the Executive Branch claims that the program operates with strict adherence to international legal principles and state sovereignty, amici witnessed a secret, global system without regard for borders, conducting widespread surveillance with the ability to conduct deadly targeted killing operations. Mr. Bryant describes drone operators as the "ultimate voyeurs, the ultimate peeping Toms," observing unknowing targets for hours before receiving orders to kill them.

Serving in the Air Force, amici witnessed widespread and deliberate misclassification of deaths as "enemy kills." In situations where targets were unknown, they were often classified as "enemy kills." Ms. Ling received a commendation for having helped identify 121,000 insurgent targets over a two-year period. At the end of his tour of duty Mr. Westmoreland was given a report that indicted he assisted in 200-plus "enemy kills," a number that overstates the number of actual enemies. Mr. Bryant's report stated he assisted in over 1,600

“enemy kills.” Of over a dozen people killed with five missile shots one amici witnessed, only three were actual combatants. In one incident, one amici saw a child run into a missile shot. The military’s post-action report classified the child as a dog. The internal culture favored classifying individuals as combatants rather than “non-combatants” and deaths as “enemy kills” rather than civilian casualties.

In July 2016, at the President’s direction, the Director of National Intelligence released numbers of civilian casualties in drone strikes taken outside of Afghanistan, Iraq, and Syria. Press Release, Director of National Intelligence, Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities (Jul. 1, 2016) *available at*, <https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF>. However, the Bureau of Investigative Journalism reported significantly higher numbers of civilian casualties as a result of U.S. drone strikes. Get the Data, Drone Wars, The Bureau of Investigative Journalism, <https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> (last visited Aug. 24, 2016). When Mr. Westmoreland requested civilian casualty numbers during his service, the military refused to provide them.

The District Court held that courts’ inability to review Executive policy decisions “underlies our entire constitutional system.” Op. at 24 (citing *Gilligan*

*v. Morgan*, 413 U.S. 1, 10 (1973)). Relying on *Gilligan*, the District Court’s holding is dependent upon an electorate that is informed of the Executive’s decision. *See Gilligan*, 413 U.S. at 10 (“The ultimate responsibility for these decisions is appropriately vested in branches of the government *which are periodically subject to electoral accountability.*” (emphasis added)). There can be no “electoral accountability” if the Executive is carrying out actions in secret, keeping its legal reasoning secret, and keeping secret any negative impact of its actions. From their collective experience working on the drone program or on drone systems, amici believe the public has been misinformed about the effectiveness of drone strikes and the way they are conducted. There can be no “electoral accountability” if the public is misinformed about the effectiveness and legality of Executive actions.

Executive power is limited even in wartime. *See, e.g. Nguyen Thang Loi v. Dow Chem. Co. (In re Agent Orange Prod. Liab. Litig.)*, 373 F. Supp. 2d 7, 64 (E.D.N.Y. 2005). The Executive cannot ignore laws respecting individual human rights, even when acting to protect national security. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (Aliens designated as enemy combatants and detained by the United States have Habeas Corpus rights). In the collective experience of amici, the drone program operated without respect for geographic

limits and without the purported strict adherence to internal domestic and international legal standards.

## CONCLUSION

For the reasons stated herein, amici urge this Court to reverse the District Court's decision and allow Plaintiffs' case to proceed.

Dated: August 29, 2016

Respectfully Submitted,

/s/ Kathleen McClellan

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE  
REQUIREMENTS**

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(a).

  X   The brief contains 1,804 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), or

       The brief uses a monospaced typeface and contains        lines of text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

  X   The brief has been prepared in a proportionally spaced typeface using MS Word 2013 in a 14 point Times New Roman font or

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July 21, 2016

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**United States Court of Appeals  
for the District of Columbia Circuit**  
*Ahmed Salem Bin Ali Jaber, et al v. USA, et al ., No. 16-5093*

**CERTIFICATE OF SERVICE**

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by Whistleblower & Source Protection Program, Attorneys for *Amici Curiae* to print this document. I am an employee of Counsel Press.

On **August 29, 2016**, counsel has authorized me to electronically file the foregoing **Brief of Amici Curiae Brandon Bryant, Lisa Ling, and Cian Westmoreland** with the Clerk of Court using the CM/ECF System, which will serve, via e-mail notice of such filing, to any of the following counsel registered as CM/ECF users:

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A courtesy copy has also been mailed, via Express Mail to the above listed counsel. All counsel for Amicus Curiae, appearing at the time of this filing, will be served via CM/ECM notice only.

Unless otherwise noted, 8 paper copies have been filed with the Court on the same date via hand delivery before noon.

August 29, 2016

/s/ Robyn Cocho  
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