[ORAL ARGUMENT NOT YET SCHEDULED]

No. 16-5093

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AHMED SALEM BIN ALI JABER *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

On Appeal from the
United States District Court
for the District of Columbia
1:15-cv-00840 (ESH)

BRIEF OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Plaintiffs-Appellants Ahmed Salem Bin Ali Jaber and Waleed Bin Ali Jaber, by their next friend Faisal Bin Ali Jaber 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 in this case 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. On April 20, 2016, Faisal bin Ali Jaber and Edward Pilkington filed a lawsuit under the Freedom of Information Act in the District Court for the District of Columbia seeking information about the August 29, 2012 strike at issue in the

instant case. *See Jaber et al., v. Dep't of Defense*, No. 16-cv-742(KBJ). Appellant is unaware of any other related cases currently pending in this Court or in any other court.

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GLOSSARY OF ABBREVIATIONS

ATS: Alien Tort Statute

IHL: International Humanitarian Law

IHRL: International Human Rights Law

FOIA: Freedom of Information Act

TVPA: Torture Victim Protection Act

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1350 (Alien Tort Statute), 1331 (federal question) and 2201 (Declaratory Judgment Act). This Court has jurisdiction under 28 U.S.C. § 1291 because this appeal is from a final judgment that disposed of all parties' claims. The notice of appeal was filed on April 20, 2016, within 60 days of the district court's decision. Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF ISSUES

1. Whether the political question doctrine categorically bars courts from ever reviewing a decision by the Executive to use lethal force abroad.
2. Whether the district court prematurely invoked the political question doctrine in the absence of any showing by the Executive that it would raise defenses implicating the *Baker* factors. *See Baker v. Carr*, 369 U.S. 186, 217 (1962).

RELEVANT STATUTES

The Alien Tort Statute (ATS) (also known as the Alien Tort Claims Act) provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

The Torture Victim Protection Act (TVPA) provides: "An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death." 28 U.S.C. § 1350 (note).

STATEMENT OF THE CASE

On August 29, 2012, Hellfire missiles fired from a United States drone struck near the local mosque in Hadramout, Yemen, killing three unknown youths and two innocent members of a prominent local family. The three youths—the presumed intended targets of the strike—were not high-ranking members of a terrorist organization, nor did they pose a threat—imminent or otherwise—to the lives of any Americans. Appellees had multiple opportunities to capture the youths. Nonetheless, they opted to use remotely-delivered, lethal force killing innocent people without justification.

On June 7, 2015, Appellants filed the instant lawsuit alleging that the drone strike constituted an extrajudicial killing in violation of customary international law, as made enforceable by the Alien Tort Statute, and in violation of the Torture Victim Protection Act.

Appellees moved pursuant to Rule 12(b)(1) and (6) to dismiss the complaint arguing: (1) that Appellants lacked "next friend" standing to bring the lawsuit; (2)

that Appellants' claims were barred by the political question doctrine; (3) that the TVPA claims failed because that provision does not authorize declaratory relief, because Appellees did not act under the color of foreign law, and because the TVPA does not waive sovereign immunity; and (4) that the ATS claims could only be brought under the Foreign Tort Claims Act, for which jurisdiction was lacking.

The District Court rejected Appellees' contention that Appellants lacked "next friend" standing. However, it granted the motion to dismiss on political question grounds. In a footnote, the court also held that the case did not present a live case or controversy and that the TVPA claims were not viable because the TVPA does not authorize suits against U.S. officials.

STATEMENT OF FACTS

On August 29, 2012, in the middle of a week-long wedding celebration for Faisal bin Ali Jaber's eldest son, three unidentified youth arrived at a peaceful village in Hadramout, Yemen, and sought an audience with Salem bin Ali Jaber, a local preacher. The Friday prior, Salem, who was the groom's uncle, had given a sermon criticizing al Qaeda's theological justification for violence. Fearful that the men had come seeking a reprisal, Salem asked his nephew, Waleed bin Ali Jaber, a local policeman, to accompany him to the meeting. Salem, Waleed, and two of the men then sat down together under a palm tree, while the third watched from a short distance away. Soon after, members of the Ali Jaber family allegedly heard the

buzzing of the drone, followed by the orange and yellow flash of a tremendous explosion. A fusillade of missiles killed Salem, Waleed, and the three youths.

Neither Waleed nor Salem had any ties to terrorist organizations. The intended targets of the strike—the three youths—were not high-ranking members of al-Qaeda or any other terrorist organization. None showed any signs of posing an imminent threat to any or any U.S. citizen. The strikes that killed Appellants' family members were "signature strikes"—strikes in which an unidentified person is targeted based upon a pattern of suspicious behavior.

Should they have had an actual basis to do so, Appellees had ample opportunity to capture the three youths, or strike while the youths were in unpopulated areas. U.S. drone operators tracked the youths long before they arrived in the village. The operators observed the three youths driving in and out of Khashamir, through multiple military checkpoints. Appellees were aware that a Yemeni military base was a mere three kilometers away from the village. Nonetheless, they waited until these unknown individuals were mingling with innocent civilians before taking the strike. Indeed, the anxiety of the innocent civilians was precisely because they had denounced Al-Qaeda and that these youths may have been coming for this reason. Yet their very antipathy toward Al Qaeda put them in the line of fire and led directly to their deaths.

In the hours after the strike, Faisal bin Ali Jaber—the uncle of Waleed and brother-in-law of Salem—received a phone call from a purported representative of Yemen's security services named "Mohammed" who apologized and stated that Salem and Waleed were "not the targets." However, neither the U.S. nor Yemeni governments would admit as much. The Jaber family never received a formal acknowledgement from the United States that the strike was a mistake. This stands in stark contrast to President Obama's public apology and promise of accountability after a U.S. drone strike in Pakistan inadvertently killed an American and an Italian.

On June 7, 2015, Faisal bin Ali Jaber filed suit as Next Friend of the representatives of Salem and Waleed's estates, alleging that the strike constituted an extrajudicial killing in violation of customary international law, the ATS, and the TVPA. Appellees moved to dismiss on several grounds, primary among them that the political question doctrine barred the court from entertaining Appellants' claims.

On February 22, 2016, the District Court granted the motion to dismiss, holding that the lawsuit "present[ed] non-justiciable political questions, which would require the Court to second-guess the Executive's policy determinations in matters that fall outside of judicial capabilities." Op. at 9 (Joint Appendix ["JA"] 56). In particular, the court found that Appellants' claims were foreclosed by *El-*

Shifa Pharmaceutical Industries Company v. United States, 607 F.3d 836, 841 (D.C. Cir. 2010), which the court construed as barring judicial review of any Executive decision to use military force abroad. According to *El-Shifa*, there are no "judicially manageable standards" to assess the lawfulness of the Executive's use of lethal force; adjudicating Appellants' claims would require the court to invent new standards "out of whole cloth." Op. at 11 (JA 58).

The court acknowledged Appellants' contention that applying the political question doctrine to these facts would effectively shield the Executive from judicial review of the most heinous war crimes, but countered only that this was "not entirely true." *Id.* at 14 (JA 61). The court averred that it could still theoretically review constitutional claims (but the Court did not suggest that Appellants as non-U.S. nationals whose only connection to the United States was as victims of a U.S. drone strike, had any such constitutional claims) and the Attorney General hopefully would refuse to certify that any war crime was undertaken within the scope of an executive officer's official duties. *Id.* at 15 (JA 62).

SUMMARY OF THE ARGUMENT

The District Court opinion represents a radical and dangerous expansion of the political question doctrine, one that would effectively bar courts from reviewing the most heinous crimes committed by the Executive abroad, including

the killing of innocent civilians as disproportionate "collateral damage" in the context of a so-called "signature strike" where even the targets of the attack are not selected based on specific tangible evidence of their identities and terrorist acts. The political question doctrine bars courts from considering challenges to actions that fall within the political branches' discretion, or where there exist no judicially manageable standards to evaluate a legal claim. Yet the political branches do not have untrammeled discretion to commit war crimes. Not only can the judicial branch apply manageable standards to prevent the killing of wholly innocent people in "signature strikes," but it has an obligation to do so.

Appellants never sought to challenge a discretionary targeting decision by the Executive; rather, they challenge an unlawful, extrajudicial execution in violation of *jus cogens* norms and multiple U.S. statutes. To be sure, the Constitution accords the Executive wide discretion in deploying military force abroad. But that discretion is not and has never has been limitless, as the opinion below suggests. By enacting the ATS, which makes *jus cogens* norms enforceable in U.S. courts, and the TVPA, Congress imposed certain clear limits on the Executive's ability to deploy lethal force abroad. The District Court's refusal to enforce those limits does not respect our system of separation of powers; it inverts it by giving the Executive unlimited power to disregard binding congressional limitations.

Nor does this case require the judiciary to manufacture new standards "out of whole cloth," as the opinion below claims. The legal standard governing the use of lethal force in non-war zones—which the site of the attack concededly was—is clear: there must be an imminent threat to U.S. life that cannot be neutralized through non-lethal means. There is nothing elusive or vague about the "imminence" and "non-lethal alternative" requirements. The District Court never attempted to apply these familiar standards. Foreign and international tribunals analyze these factors in contexts virtually identical to the one presented by this case without difficulty. U.S. courts routinely undertake this very analysis in the context of Fourth Amendment excessive use of force claims. Moreover, U.S. courts have repeatedly proven themselves capable of assessing the lawfulness of Executive behavior in the national security and War on Terror context. Having repeatedly prosecuted individuals for war crimes, the Executive cannot now claim that courts are incompetent to assess whether an action violates international law governing the use of force: if courts are equipped to evaluate that body of law when a private individual is defendant, they are equipped to do so when the defendant is the Executive.

The District Court's conclusion that it could not assess the propriety of force in this instance was both incorrect and premature as it ignored its obligation to treat all well-pleaded factual allegations as true and draw all reasonable inferences in

the plaintiffs' favor. The facts as pleaded were as follows: Appellees stalked for hours three youths who posed no threat to U.S. lives, forewent without justification multiple opportunities to capture them, waited until they mingled with civilians, and then deliberately disregarded the principles of proportionality and distinction by firing a barrage of missiles into a crowd. The District Court held that there were no judicially manageable standards to resolve a dispute about imminence or feasibility of capture—but at this stage *there are no disputes*. Appellees have given no cause to believe that the Executive, if forced to file a responsive pleading, would even be able to create an evidentiary dispute about any of these factors. Indeed, it is not merely possible that the Executive's own internal review (which the newly released Presidential Policy Guidance outlines) concluded that the strike was a blatantly unlawful misuse of force—the Court is, at this procedural juncture, legally bound to assume that this is the case. Of course, Appellees may yet defend the strikes' lawfulness. And the District Court can accord significant discretion to the judgments made by the Executive. But the hypothetical *possibility* that a court may be required to settle a factual dispute cannot justify the categorical abandonment of the judiciary's role to ensure Executive compliance with the laws of war and the statutes that implement them.

STANDARD OF REVIEW

The standard for review of a district court decision dismissing a complaint for lack of subject matter jurisdiction, as the court did here, is *de novo*. *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1432 (D.C. Cir. 1995).

ARGUMENT

I. The Political Question Doctrine Does Not Bar Consideration of Appellants' Lawsuit

Appellees did not challenge that Appellants' allegations[1]—which must be credited as true at this stage—state a claim of extrajudicial killing in violation of binding international laws governing the use of force, the TVPA, and ATS. Instead, they urged upon the District Court, and the District Court ultimately embraced, an incorrect, overbroad version of the political question doctrine which would categorically disqualify courts from *ever* evaluating the Executive's decision to employ lethal force abroad. The District Court concluded that this

[1] Appellees never disputed that the conduct alleged in the complaint constitutes an extrajudicial killing in violation of the laws of war, the TVPA, and ATS. Nor could they: Appellants allege that Khashamir was far from any battlefield, Compl. ¶¶ 12, 97 (JA 10-11, 34); that the three targeted individuals were not valid targets insofar as they did not pose an imminent threat, Compl. ¶¶ 9, 104 (JA 10, 37); that their arrest was feasible, ¶¶ 10, 104, 113 (JA 10, 37, 39) (explaining that the three men drove through armed checkpoints on their way to Khashamir, and that a Yemeni military base was approximately 3 kilometers from where the missiles hit); that drone operators observed them for a significant amount of time, ¶ 66 (JA 23), and that despite having ample opportunity to strike as the men loitered outside populated areas, waited until they were in the presence of civilians to launch an attack, ¶¶ 10, 51-52, 66 (JA 10, 20-21, 23).

result was required by *El-Shifa*. Appellants respectfully submit that this constitutes a dramatic and dangerous expansion of *El-Shifa*; one that, if accepted, would bar judicial review of the most heinous war crimes.

It is, of course, the role of the judiciary to construe and safeguard the rights afforded by international law and domestic statutes. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Ex parte Quirin*, 317 U.S. 1, 27 (1942) ("From the very beginning of its history this Court has recognized and applied the law of war. . . ."). While separation of powers commands deference in areas of the particular competence of another branch of government, it does not preclude meaningful judicial review in construing the scope and application of international law and statutes governing the law of war. *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs and Trainmen*, 558 U.S. 67, 71 (2009) ("'We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'") (quoting *Cohens v. Virginia*, 19 U.S. 264, 404(1821)); *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.").

In its most recent political question opinion, the Supreme Court reaffirmed that "the Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (quotation marks omitted). The Court emphasized that where, as here, a plaintiff asserts rights secured by statute or international law, evaluation of such claims are committed to the Judiciary, even if they directly implicate national security and foreign policy. *Id*. at 1427–28. In rejecting the Executive's political question argument, the Court underscored that the doctrine is a "narrow exception" to judicial review. *Id.* at 1427.[2] That narrow exception does not apply here.

a. The District Court Erred In Holding That Lethal Targeting Decisions Are Entrusted Exclusively to the Political Branches.

Appellants do not dispute that the Executive enjoys broad discretion in using military force abroad. But that discretion is not limitless. By enacting the ATS and the TVPA, Congress imposed specific, judicially manageable legal constraints on the Executive's use of force. The effect of those statutes is clear: whatever freedoms the Executive may enjoy in matters of foreign and military policy, it

[2] Indeed, the Court has declined jurisdiction on political question grounds only twice since *Baker v. Carr*, 369 U.S. 186 (1962). *See Nixon v. United States*, 506 U.S. 224 (1993) (power to adjudicate merits of impeachment proceedings against federal judges is textually committed to the Senate in art. I, § 3, cl. 6); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (surveillance over the weaponry, training, and standing orders of the National Guard are vested exclusively in the Executive and Legislative Branches).

lacks the discretion to commit the type of extrajudicial murder of innocent civilians that killed Appellants' relatives.

To call the instant lawsuit an attack on the "wisdom" of drone strikes, as the District Court did, thus misses the legal basis for this lawsuit. As this Court explained in *El-Shifa*, there is a crucial difference "between claims requiring [a court] to decide whether taking military action was wise—a policy choice[] and value determination[] constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch—and claims [p]resenting purely legal issues such as whether the government had legal authority to act." 607 F.3d at 843 (internal quotation marks omitted). To be sure, there are many arguments to be made against the wisdom of the Executive's policy choices with respect to drones. *See, e.g.*, Andrew Callam, *Drone Wars: Armed Unmanned Aerial Vehicles*, 18 Int'l Affairs Rev. (2010)[3] (drones policy's prioritizing kill over capture harms ability to gain valuable intelligence); Int'l Human Rights & Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School of Law, *Living Under Drones: Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan* (2012)[4](arguing that drone strikes radicalize the local population). But that is not the gravamen of this lawsuit—it does not

[3] http://www.iar-gwu.org/node/144
[4] https://law.stanford.edu/wp-content/uploads/sites/default/files/organization/149662/doc/slspublic/Stanford-NYU-LIVING-UNDER-DRONES.pdf

seek relief based on the policy failings of the drone program, nor does it contend that the President used his discretion imprudently. Rather, Appellants argue that the Executive acted outside the bounds of its discretion by launching a strike in violation of non-derogable *jus cogens* norms, the TVPA, and ATS. These are legal questions over which this Court unquestionably has jurisdiction and measurable standards to apply.

As the Supreme Court recently reiterated in *Zivotofsky*, the political question doctrine cannot be invoked to bar a lawsuit where, as here, the action seeks to vindicate statutory rights. In *Zivotofsky*, the plaintiff sought to record his birthplace as "Jerusalem, Israel" (rather than "Jerusalem") on his U.S. passport pursuant to a federal statute authorizing such a request. 132 S. Ct. at 1426. The Secretary of State refused, citing the Executive's policy of neutrality toward recognition of Jerusalem as part of Israel and arguing that that there was a "textually demonstrable constitutional commitment to the President of the sole power to recognize foreign sovereigns." *Id*. at 1428 (quotation marks omitted). The Supreme Court focused on the plaintiff's specific request—enforcement of a statutory right—and determined that there was no "exclusive commitment" of that issue to the Executive, and that the case was justiciable. *Id*. The Court found that it was not being asked to "supplant a foreign policy decision of the political branches." *Id.* at 1427. Rather, the plaintiff's claims asked the Court to determine

if the plaintiff's interpretation of a statute was correct—a "familiar judicial exercise." *Id.* The judicial task that Appellants' statutory claims present to this Court is no less familiar and manageable.

Indeed, courts have repeatedly rejected assertions of the political question doctrine where, as here, the plaintiff alleged an international law violation that sounded in tort—even where the claim pertained to Executive conduct during war. In *Nguyen Thang Loi v. Dow Chemical Corporation (In re Agent Orange Product Liability Litigation)*, for example, defendants moved to dismiss an international law-based challenge to the Executive's use of herbicides during the Vietnam War, arguing that the judicial review would entail second-guessing actions committed to the President's discretion and interfere with foreign relations. The court rejected that argument as irreconcilable "with the well-accepted principle that 'international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.'" *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) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)). The court concluded: "That the case may call for an assessment of the President's actions during wartime is no reason for a court to abstain. Presidential powers are limited even in wartime." *Id.* Likewise, the D.C. Circuit rejected the invocation of the political

question doctrine in a suit alleging that U.S. officials had funded the Contras, a paramilitary group that allegedly inflicted economic and physical injuries on plaintiffs. *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 953 (D.C. Cir. 1988) (declaring that the use of the political question doctrine to dismiss lawsuits seeking to vindicate "personal rights" is "troubling"); *cf. Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 82 (D.D.C. 2014) (declining to dismiss Fourth and Fifth Amendment challenges to drone strike on political question grounds).

Similarly, courts have routinely heard challenges that allege that the political branches —and the Executive in particular—have acted unlawfully in the realm of foreign policy and national security. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (striking down a provision stripping courts of authority to hear habeas petitions by Guantanamo detainees); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (invalidating the President's military commissions on grounds that it violated the Uniform Code of Military Justice and the Geneva Conventions); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583-89 (1952) (invalidating President's wartime order to seize and nationalize steel mills); *Brown v. United States*, 12 U.S. 110, 128 (1814) (declaring invalid an executive seizure of British property without congressional authorization during the war of 1812); *Little v. Barreme*, 6 U.S. 170, 177-79 (1804) (rejecting the Navy Secretary's authorization of a military vessel

seizure in defiance of an implied congressional prohibition); *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015) (invalidating NSA bulk surveillance program).

The District Court held that these cases were inapplicable to Appellants' lawsuit because, unlike here, the plaintiffs in those actions were asserting constitutional rights. Op. at 14 (JA 61) ("Because the judiciary is the ultimate interpreter of the Constitution, constitutional claims can require a court to decide what would otherwise be a political question."). But this is an analytic distinction without a difference. The judiciary is no less the "ultimate interpreter" of statutes like the ATS and TVPA, duly enacted by Congress. Likewise, courts are as bound to enforce customary international law and the treaties that comprise it as they are the Constitution itself.[5] *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) ("It is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances . . . ."); *The Nereide*, 13 U.S. 388 423 (1815) ("The Court is bound by the law of nations which is a part of the law of the land."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980) ("It is an ancient and a salutary feature of the Anglo-American legal tradition that the Law

[5] Indeed, the Constitution's Supremacy Clause provides that "all Treaties . . . which shall be made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2.

of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case.").

Moreover, unlike *El-Shifa* and most of the cases on which the District Court relied, this case alleges not destruction of property or mistreatment, but extrajudicial murder. Courts have repeatedly recognized that because the right to life is a fundamental right, a government policy that permits that right to be extinguished is evaluated under the strictest scrutiny. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Reno v. Flores*, 507 U.S. 292, 302 (1993) (stating that Due Process clause forecloses government from "infring[ing] . . . fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest" (internal quotation marks omitted)). Indeed, because "the action of the sovereign in taking [a] life . . . differs dramatically from any other legitimate state action," *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977), the courts have applied the strictest scrutiny even where the government takes life pursuant to a sentence imposed after trial and conviction. *See, e.g.*, *Baze v. Rees*, 553 U.S. 35, 84 (2008) ("[A] number of our decisions rel[y] on the premise that 'death is different' from every other form of punishment to justify rules minimizing the risk of error in capital cases."); *California v. Ramos*, 463 U.S. 992, 998-99 (1983) ("The Court . . . has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater

degree of scrutiny . . . ."); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("[T]he imposition of death by public authority is . . . profoundly different from all other penalties . . . ."). A heightened level of scrutiny is all the more justified where the Executive uses lethal force without the benefit of a trial and conviction.

The District Court ultimately rejected Appellants' contention that they were challenging the lawfulness, not wisdom of the strike, because, in its words: "a policy cannot be viewed in isolation from the actions taken in support of it." Op. at 14 (JA 61). But an unlawful "action" cannot be shielded from review simply because it is in furtherance of a discretionary "policy." No doubt there are a broad range of actions that are shielded from review because they are in furtherance of a policy, but that does not mean that *any* action taken is unreviewable because it is in furtherance of a discretionary policy. The political branch's decision to go to war in Iraq, for example, may be an unreviewable political question, but a decision by a military commander to carpet bomb a neighborhood in Baghdad and kill every man, woman or child within that neighborhood cannot be. Similarly, the bombing of schools during class hours on a vague suspicion of radical teaching or storage of weapons could not be immune from judicial scrutiny. To do so would make both international law and relevant statutes irrelevant in the context of military operations. Neither of the cases the District Court cited suggest otherwise. Thus, in *Bancoult*, natives of Diego Garcia challenged the United States' decision to

depopulate parts of the island to establish a military base. This Court found the unreviewable decision to establish the base and the implementation of that decision by depopulating the island "constitute[d] a sort of Möbius strip that we cannot sever without impermissibly impugning past policy and promising future remedies that will remain beyond our ken." *Bancoult v. McNamara*, 445 F.3d 427, 436 (D.C. Cir. 2006). Likewise, in *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008), this Court invoked the political question doctrine because it would be impossible to assess the lawfulness of the CIA's conduct in Guatemala without "examining the wisdom of the underlying polic[y]." *Id.* at 420.

Here, by contrast, the Court can easily assess the legality under international law and relevant statutes of an individual drone strike under manageable standards without questioning the wisdom of using drones as a strategy in military combat. Indeed, the U.S. military has occasionally singled out individual strikes/operations and acknowledged their unlawfulness, without questioning the decision to enter into combat operations. For example, the United States issued a public apology for the attack on the Doctors Without Borders hospital in Kunduz, Afghanistan, and admitted to violations of the rules of engagement and the law of armed conflict.[6]

[6] Mujib Mashal & Najim Rahim, *U.S. Commander in Afghanistan Apologizes for Bombing of Hospital*, N.Y. Times, Mar. 22, 2016, http://www.nytimes.com/2016/03/23/world/asia/afghanistan-hospital-bombing-apology.html

No reasonable person would read that limited acknowledgement as rendering an evaluation of the strategic decisions underlying the entire mission in Afghanistan. If the military can critique individual uses of force while still prosecuting a war, a court can surely condemn individual strikes that deliberately kill innocent people without commenting on the policies underlying the drone program as a whole. To hold otherwise would give the Executive unreviewable authority to commit war crimes in prosecuting any foreign policy goal.

Confronted with the possibility that its decision might extinguish any judicial review for egregious crimes committed in the prosecution of foreign policy, the District Court responded: "That is not *entirely* true." Op. at 14 (JA 61) (emphasis added). The court's observation that its holding would not "prevent the resolution of constitutional claims" is little comfort for non-U.S. citizens killed abroad, who cannot bring constitutional claims. *Id*. at 14-15 (JA 61-62). There is no requirement to consider this Court's jurisprudence on whether these Appellants have constitutional standing, *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise."); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), when there are statutory and international law norms that clearly govern this conduct and

are subject to judicial review. In short, under the opinion below, only if the Appellants have constitutional rights—which this Court's precedents suggest they may not—do they have any remedy. If they have no such rights, the courts could not review a decision to firebomb a hospital or orphanage in Yemen or to wantonly shell a peaceful village in Pakistan. Perhaps the Court was suggesting that Appellants should have brought constitutional claims in making its elliptical "not entirely true" observation, but there is no obligation for Appellants to take on that burden when there are remedies under statute and international law that allow a court to avoid having to decide a constitutional issue.

Next, the District Court noted that the political question doctrine would not bar a challenge to conduct that was undertaken outside the scope of official duties, and speculated—without any factual support—that "it is unlikely that 'the most heinous war crimes'" would be undertaken by individuals acting within the scope of their official duties. Op. at 15 (JA 62). U.S. history is littered with examples that belie this hopeful speculation. *See, e.g.*, Jeremy Scahill, *Pentagon: Special Ops Killing of Pregnant Afghan Was 'Appropriate Use of Force*,' Intercept, June 1, 2016[7] (describing unjustified killing of pregnant women and three innocent civilians that was formally covered up by the Department of Defense); Amnesty

[7] https://theintercept.com/2016/06/01/pentagon-special-ops-killing-of-pregnant-afghan-women-was-appropriate-use-of-force

International, Left in the Dark: Failures of Accountability for Civilian Casualties Caused by International Military Operations in Afghanistan (2014)[8] (detailing the Department of Defense's practice of defending soldiers who are subsequently found to have committed gross human rights abuses). Assuming that the Executive will "police its own errors" by disavowing the unlawful conduct of its members is an ahistorical exercise in wishful thinking; it "deprive[s] the judiciary of its role . . . [and] deprive[s] Plaintiff[] of a fair assessment of [his] claims by a neutral arbiter." *Mohamed v. Jeppesen Dataplan, Inc*., 614 F.3d 1070, 1101 (9th Cir. 2010) (dissent). It must be remembered that in the course of this century, torture was approved at the highest levels, and waterboarding and "a hell of a lot worse", including killing the entire families of terrorists, has been called for by a major party candidate.[9] If it is only the self-restraint of the Executive that prevents war crimes, then the rule of law has been eviscerated precisely where it is needed most.

Perhaps most disturbingly, the court held that "to the extent that these hypothetical war crimes do result from a deliberate policy decision of the Executive, the courts' inability to review that decision 'underlies our entire constitutional system,'" which tasks the public—not the courts—with holding the

[8] https://www.amnesty.org/en/documents/ASA11/006/2014/en
[9] Response of Donald J. Trump, Transcript, Republican Party Primary Debate (Feb. 6, 2016), http://www.democracynow.org/2016/2/8/trump_leads_gop_charge_embracing_torture

Executive accountable through periodic elections. *Id.* (citing *Gilligan*, 413 U.S. at 10). This is both legally incorrect and practically misguided. The Constitution entrusts the courts with enforcing congressional enactments, like the ATS and TVPA, which limit the scope of Executive conduct. Judicial abdication of that role does not preserve our constitutional system; it undermines it by giving the Executive wide berth to disregard statutory restraints. Moreover, as a practical matter, the Executive has proven remarkably effective at using secrecy to prevent an informed public from holding it to account through periodic elections. Public accountability presumes a modicum of transparency—something that has been absent in the drone program. *See generally* Milena Sterio, *The Covert Use of Drones: How Secrecy Undermines Oversight and Accountability*, 8 Albany Gov't L. Rev. 129 (2015).

The District Court's holding that courts must abstain from evaluating allegations of extrajudicial killing and *jus cogens* violations is a radical proposition that does not harmonize with principles of judicial review and protection of rights and *jus cogens* norms. Where personal liberties secured by statute are at stake, a reviewing court "'is not at liberty to shut its eyes to an obvious mistake," *Al Warafi v. Obama*, No. 09-2368 (RCL), 2015 U.S. Dist. LEXIS 99781, at *12 (D.D.C. July 30, 2015) (quoting *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547 (1924)) — even where the illegality occurs in the context of foreign affairs and national security.

b. The District Court Erred in Finding That There Were No Judicially Manageable Standards to Evaluate Appellants' Claim.

The District Court wrongly concluded that there were no judicially manageable standards to assess whether the lawfulness of the strike that killed Appellants' relatives. In particular, it held that judges would "need to 'fashion[] out of whole cloth some standard for when military action is justified'" to evaluate Appellants' claims. Op. at 11 (JA 58) (quoting *El-Shifa*, 607 F.3d at 845). To the contrary, there is a large, highly-developed body of law governing when states may deploy lethal force.

The Executive has conceded as much when it has called for the application of these norms in domestic law. Thus, the Executive has called upon the courts to apply the same laws that Appellants invoke when charging former-Guantanamo detainee Omar Khadr with tossing a grenade at U.S. soldiers in violation of the laws of war, *United States v. Khadr*, 717 F. Supp. 2d 1215, 1219 (C.M.C.R. 2007); or when it brought charges against al-Bahlul for war crimes; *see Al Bahlul v. United States*, 792 F.3d 1 (D.C. Cir. 2015). When it comes to non-governmental actors violating laws of war, the Government does not merely stay silent on the court's competency to apply this law; it actively presses for judicial enforcement. That body of law, which the Executive concedes is ascertainable when a private

defendant is in the dock, is no less judicially enforceable when its government officials are being held to account under the same standards.

Moreover, the Executive, having repeatedly stated that the targeted killing policy is in full compliance with international law, cannot thereafter argue that in fact its policy is not susceptible to judicial evaluation under those same legal criteria which it has articulated as defining the relevant legal environment. *See, e.g.*, U.S. Dep't of Justice, Lawfulness of Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force (2011)[10] (setting forth the "legal framework" for drone strikes, and defining "imminence," "feasibility of capture," and promising compliance with "fundamental law-of-war principles"); U.S. Dep't of Justice, Legality of a Lethal Operation by the Central Intelligence Agency Against a U.S. Citizen (2011)[11] (outlining the legal basis for CIA drone strikes); Press Release, White House Office of the Press Secretary, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013)[12] (listing legal criteria for using lethal force in counterterrorism operations); Use of Force, 2013 Digest of United States

[10] https://www.documentcloud.org/documents/602342-draft-white-paper.html

[11] https://news.vice.com/article/a-justice-department-memo-provides-the-cias-legal-justification-to-kill-a-us-citizen

[12] https://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism

Practice in International Law, ch. 7 (detailing Executive statements regarding the legal criteria governing drone strikes);[13] Office of the Assistant Attorney General, Memorandum for the Attorney General, Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi, July 16, 2010 at 21-28[14] (containing detailed assessment of the AUMF's applicability to the target of a lethal drone strike, and the strike's compliance with international law, making specific reference to decisions by international tribunals construing IHL).

Most recently, the Administration released yet another guidance document regarding its own internal rules for when and how it decides to take lethal action in non-war zones.[15] This particular release goes so far as to detail the Executive's assessment procedures requiring an individual analysis as to "[feasibility] of capture," "relevant governmental authorities in the country where action is contemplated" as well as "other reasonable alternatives to lethal action."[16]

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[13] http://www.state.gov/documents/organization/226409.pdf

[14] https://www.justsecurity.org/wp-content/uploads/2014/06/OLC-Awlaki-Memo.pdf

[15] Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, Wash. Post, Aug. 06, 2016, https://www.washingtonpost.com/world/national-security/newly-declassified-document-sheds-light-on-how-president-approves-drone-strikes/2016/08/06/f424fe50-5be0-11e6-831d-0324760ca856_story.html.

[16] Procedures for Approving Direct Action against Terrorist Targets Located Outside the United States and Areas of Active Hostilities, May 22, 2013,

The Executive does not simply rely on its discretionary authority in the drone program; it articulates legal standards with which it purports to be able to comply and does comply. The Executive's own memos justifying the strikes have acknowledged, and discussed in granular detail, the applicability of "the 'fundamental rules' and 'intransgressible principles of international customary law,' which apply to all armed conflicts, includ[ing] the 'four fundamental principles that are inherent to all targeting decisions'—namely, military necessity, humanity (the avoidance of unnecessary suffering), proportionality, and distinction." *Id.* at 28. The dozens of citations to authorities—both academic and judicial—elucidating the contours of international humanitarian law ("IHL") and international human rights law ("IHRL") in these memos belie Appellees' contention below that the courts would have to invent legal standards from whole cloth.[17] The standards outlined in these memos and public pronouncements are

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https://www.aclu.org/sites/default/files/field_document/presidential_policy_guidance.pdf

[17] Among the authorities that the Executive relies on are: Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Fourth Geneva Convention"); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 U.N.T.S. 3 (1979); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, 1125 U.N.T.S. 609 (1979); UN Charter art. 51; Hague Convention IV, Annex, art. 23(b), Oct. 18, 1907, 36 Stat. 2277, 2301-02; International Committee of the Red Cross, *Interpretive Guidance on the Notion of*

more than "enough to establish that this case does not 'turn on standards that defy judicial application.'" *Zivotofsky*, 132 S. Ct. at 1430 (quoting *Baker*, 369 U.S. at 211).

Nor is there anything inaccessible about the strictures that international law imposes on states. International law, as made applicable through ATS, provides that a state may only use lethal force in a non-war zone where there is an imminent threat to life that cannot be neutralized through non-lethal means.[18] *See, e.g.*,

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Direct Participation in Hostilities Under International Humanitarian Law 28, 34 (2009), https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf; Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* ¶ 71, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010); Hague Regulations (Annexed to Convention No. II of 1899 and Convention No. IV of 1907) Respecting the Laws and Customs of War on Land, *The Hague Conventions and Declarations of 1899 and 1907* 100, 107 (J.B. Scott, ed., 3rd ed. 1918); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73; European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, Jan. 25, 1974, 13 I.L.M. 540-41; of International Covenant on Civil and Political Rights art. 14(2), Dec. 16 1966, 999 U.N.T.S. 171, 6 I.L.M. 368; The War Crimes Act, 18 U.S.C. § 2441.

[18] Appellant alleges—and Appellees have not contested—that the strikes took place outside a war zone. But even in a war zone, in which the Executive enjoys greater leeway, there is a well-developed body of law governing the use of lethal force. *See, e,g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8) (declaring that "distinction," one of the "cardinal principles" of the laws of war, requires that states distinguish between combatants against whom lethal force may be used, and civilians); *see also* U.S. Air Force, Targeting: Air Force Doctrine Document 2-1.9, at 88 (2006) ("Targeting"); U.S. Dep't Of The Army, Field Manual 27-10: The Law of Land Warfare ch. 5 (1956) ("FM 27-10"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, princ. 4, 9, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (Aug. 27–Sept. 7, 1990) (requiring an "imminent" threat and use of non-violent means before resort to lethal force); *Andronicou and Constantinou v. Cyprus*, App. No. 86-1996-705-897, 1997-VI Eur. Ct. H.R., ¶¶ 183–85, 191 (same); *Aytekin v. Turkey*, App. No. 22880/93, Eur. Comm'n H.R., ¶¶ 95–96 (1997) (holding that a general threat of terrorist activity will not justify the use of lethal force); *McCann v. United Kingdom*, 324 Eur. Ct. H.R., ¶¶ 201–3 (1995) (concluding that U.K. security officials' automatic resort to lethal force in counter-terrorism operation was evidence of a lack of requisite care in planning it).

U.S. courts have plenty of experience applying these principles in the Fourth Amendment context. To evaluate the reasonableness of lethal force under the Fourth Amendment, courts routinely rely on two primary criteria. First, the use of lethal force is reasonable only when an individual poses a concrete and imminent

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NonInternational Armed Conflicts (Protocol II), art. 13(3), June 8, 1977, 1125 U.N.T.S. 609 (individuals who are not members of state armed forces are civilians, and equally clear that civilians may not be directly targeted "unless and for such time as they take a direct part in hostilities"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *accord Hamlily v. Obama*, 616 F. Supp. 2d 63, 77 (D.D.C. 2009); Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law 51–68 (2009), http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf (discussing beginning and end of direct participation in hostilities).

threat of deadly harm. *See Scott v. Harris*, 550 U.S. 372, 384 (2007); *see also, e.g.*, *Graham v. Connor*, 490 U.S. 386, 396 (1989) (imminence of a threat is assessed at the moment force is applied); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *Cordova v. Aragon*, 569 F.3d 1183, 1190 (10th Cir. 2009) (individual who poses a general threat that has not yet become concrete and imminent thus does not justify "such a level of force that death is nearly certain"). Second, officials' intentional use of lethal force must be a "last resort," meaning that no non-lethal means of preventing the threat can reasonably be used. *Price v. United States*, 728 F.2d 385, 388 (6th Cir. 1984); *see also Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 519 (7th Cir. 2012) (finding that force is unreasonable if the officer uses "greater force than was reasonably necessary to effectuate the arrest"); *Johnson v. Dist. of Columbia*, 528 F.3d 969, 977 n.4 (D.C. Cir. 2008) (same).

Moreover, Congress plainly thought that the courts were capable of assessing whether lethal force was lawful, as evidenced by its passage of the War Crimes Act, 18 U.S.C. § 2441(c)(1) (1996), which makes it a "war crime" to commit a "grave breach of any of the international conventions signed at Geneva 12 August 1949." *See* Fourth Geneva Convention, art. 147 (defining "grave breaches" to include "willful killing . . . of a protected person"). If the courts are capable of assessing such criminal claims pursuant to 18 U.S.C. § 2441, they are certainly institutionally equipped to evaluate a civil claim of wrongful civilian

death brought under the ATS. More generally, in the FOIA context, Congress has deputized courts to scrutinize Executive assertions that releasing requested information would jeopardize national security, thereby "unambiguously express[ing]" Congress's "belief that judges are competent to analyze the substance of matters allegedly pertaining to the national security." *Zweibon v. Mitchell*, 516 F.2d 594, 642 (D.C. Cir. 1975) (discussing FOIA Exemption 1, which permits the Government to withhold "properly" classified information).

Finally, the District Court's view that it could not assess whether the strike violated legal restrictions on the use of force without inventing new standards out of "whole cloth" ignores the practices of courts the world over. International tribunals have proven perfectly competent in hearing claims that the use of military force violated the laws of war; there is no reason the U.S. courts cannot do the same. *See, e.g.*, *Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda)*, 45 I.L.M. 271 (I.C.J. Dec. 19, 2005) (finding that Uganda failed to distinguish between military and civilian targets); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9) (assessing whether construction of the separation wall complied with international humanitarian and human rights law); *Oil Platforms, Iran v. United States*, Judgment, Merits, 2003 I.C.J. Rep. 161 (Nov. 2003) (assessing whether U.S. attack on Iranian oil platforms satisfied the

necessity and proportionality requirements under international law); *Isayeva v. Russia*, 41 Eur. Ct. H.R. 847 (2005) (assessing whether Russian aerial bombardment in Chechnya complied with the proportionality and necessity principles); *Isayeva v. Russia*, 41 Eur. Ct. H.R. Rep. 791 (2005) (same); *Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.98 doc. 6 rev. 13 (1997) (hearing challenge to excessive use of force by Argentinian military in re-taking barracks). *See generally* Michele D'Avolio, *Regional Human Rights Courts and Internal Armed Conflicts*, 2 Intercultural Hum. Rts. L. Rev. 249 (2007). There can be no doubt that these tribunals have a critical role in defining and applying *jus cogens* norms in analogous situations and that U.S. courts can apply international and domestic law to the facts of this strike.

c. The Court's Invocation of the Political Question Was, In Any Event, Premature.

Even if this Court were to credit the Executive's argument that resolving disputes about imminence and feasibility of capture would require judges to consider "complex policy questions" outside their sphere of expertise, it would not warrant dismissal at this stage. There is no factual issue for a court to resolve at present, no disagreement about imminence of feasibility of capture that would require the court to craft standards "'out of whole cloth.'" Op. at 11 (JA 58) (quoting *El-Shifa*, 607 F.3d at 845). At this procedural posture, there are only

uncontested factual allegations, which the Court must assume to be true, and which concededly state a claim for extrajudicial murder in violation of numerous U.S. statutes and international law.

Appellees have yet to file an answer to Appellants' detailed averments that the targets were neither high-level members of a terrorist organization nor posed an immediate threat to any U.S. interest, Compl. ¶¶ 9, 104 (JA 10, 37); that there was ample opportunity for capture, *id.* ¶¶ 10, 104, 113 (JA 10, 37, 38); and equally ample opportunity to conduct the strike before the targets began mingling with civilians, *id.* ¶¶ 10, 51-52, 66 (JA 10, 20-21, 23). Instead, Appellees asked the Court to *assume* that they would be able to present viable facts or legal conclusions that rebut these allegations. The District Court failed to let the case develop to the point where it could understand the actual parameters of the decision it was being asked to make: it dismissed Appellants' action because Appellees' eventual defense *might* have required the court to "delineate the point at which the three young men presented an 'imminent' threat to the U.S."; or to decide whether "a 51% chance that the operation would succeed, without any risk of harm to U.S. or Yemeni forces" would render capture "feasible"; or to decide whether the "Yemeni forces were trustworthy allies." Op. at 11 (JA 58). It did not consider what the case would look like if in fact, as Appellants allege, there was a reliable and safe way to carry out the operation without material risk.

A court's task in reviewing the grant of a Rule 12 motion to dismiss "is necessarily a limited one." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Its job is not to decide who will prevail or speculate as to what defenses the defendant might offer; its job is to decide whether factual allegations in the complaint, taken as true, are sufficient to entitle the plaintiff to an opportunity to present evidence. This limited inquiry—long-embedded in the Rules of Civil Procedure—serves a sensible judicial purpose. A court cannot possibly know whether it will be called upon to, for example, devise new judicial standards or opine on the prudence of a discretionary policy without knowing what the defenses or the factual matrices are. In this case, it is entirely possible that Appellees have no evidence that would establish imminence or infeasibility of capture under *any* standard; it is entirely possible that their only defenses are legal ones. Such defenses are precisely the type of "purely legal" questions that courts are equipped to handle. Here, because Appellees have not even answered the complaint, it is impossible to know which allegations are in dispute, much less which disputes might implicate the political question doctrine. *Cf. Crater Corp. v. Lucent Techs., Inc.*, 423 F.3d 1260, 1267-68 (Fed. Cir. 2005) ("deciding the impact of the government's assertion of the state secrets privilege" before the record is "adequately developed" puts "the cart before the horse").

The District Court's assumption that Appellees could offer viable defenses that would raise issues implicating the political question doctrine runs afoul of the well-established requirement that courts must credit "the court must accept all the complaint's well-pled factual allegations as true and draw all reasonable inferences in the plaintiff's favor." *Adair v. Eng*., 183 F. Supp. 2d 31, 35 n.2 (D.D.C. 2002). At this early stage, and especially in light of the growing body of knowledge about the lawlessness of the drone program during the relevant time,[19] it is reasonable to infer that all evidence, including that contained in any Executive assessment of the strike, establishes that the strike was unlawful.

In this regard, this case differs profoundly from *El-Shifa*. There, the Executive gave a detailed public accounting as to why it believed the strike was lawful and appropriate. For example, President Clinton announced in a public address that the factory in Sudan was believed to be "associated with the bin Ladin network" and "involved in the production of materials for chemical weapons." 607 F.3d at 838. In a subsequent letter to Congress, "consistent with the War Powers Resolution," the President reported that the strikes "were a necessary and

[19] After years of insisting that no innocents had been killed by drone strikes, President Obama finally admitted in April 2016 that the program "wasn't as precise as it should have been, and there's no doubt civilians were killed that shouldn't have been." Nicole Gaouette, *Obama: 'No doubt' U.S. drones have killed civilians*, CNN, Apr. 1, 2016, www.cnn.com/2016/04/01/politics/obama-isis-drone-strikes-iran/.

proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities" and "were intended to prevent and deter additional attacks by a clearly identified terrorist threat." *Id.* The following day, in a radio address, President Clinton reiterated that the "goal was to destroy, in Sudan, the factory with which bin Ladin's network is associated, which was producing an ingredient essential for nerve gas." *Id.* As this Court recounted, numerous "[o]ther government officials elaborated upon the President's justifications for the attack on the plant," claiming, for instance, that bin Ladin had a financial interest in the factory. *Id.* Here, by contrast, the Executive has not revealed any justifications for the strike.

Even if the Appellees mounted the hypothetical defenses that they have thus far only hinted at, and even if the Court has concerns about its competency to second-guess Executive assessments of imminence or feasibility of capture, the proper response is not dismissal. Instead, the Court should wait to see what facts Appellees adduce. If they are sufficiently detailed and credible, the Court may appropriately decide to show a degree of deference to the Executive's determinations. *Cf. Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987) (recognizing in the FOIA context that, while some deference to Executive national security determinations is appropriate, courts should not "relinquish[] their independent responsibility" to review an agency's claim that withholding is

necessary to prevent harm to national security). But the Court cannot abdicate its duty to review allegations of extrajudicial killing based on the mere *possibility* that the Court may be required to adjudicate factual disputes on matters outside its traditional comfort zone.

II. The District Court's Footnote Holding That Appellants' Claims Faced Other "Insurmountable Barriers" Was In Error.

In a cursory footnote, the District Court held that the Appellants' claims faced other "insurmountable barriers on the merits"—namely, that Appellants were not entitled to backward-looking relief and that the TVPA does not extend to U.S. personnel. Op. at 15 (JA 62). Neither conclusion is correct.

a. The District Court Erred In Holding That The Case Does Not Present a Live Case or Controversy.

This issue was never raised below and leave to amend was not given, thus, Appellants had no opportunity to present further facts establishing the existence of a live case or controversy. If Appellants had been given that opportunity, they could have supplied ample material for the claim that there is in fact a live case. For instance, between August 29, 2012 and August 1, 2016 there have been twenty-one confirmed incidents of drone strikes in Hadramout, resulting in 122 deaths.[20] Of these, up to sixteen have been civilians, and at least one a child.[21]

[20] *Yemen: Reported US Covert Action 2012*, The Bureau of Investigative Journalism, (Dec. 29, 2012), https://www.thebureauinvestigates.com/

Conservative estimates place the number of those injured at seventeen. For a strike to be confirmed it must be reported as such by a named or unnamed US official, by a named senior Yemeni official, or by three or more unnamed Yemeni officials in different published sources.[22] Ten further strikes have been reported in Hadramout but are, as of August 1, 2016, unconfirmed by officials.[23] Their inclusion takes the number of deceased to 231 (of which twenty are civilians, including two children) and the number of injured to fifty-one .[24] All of the above strikes have been reported by multiple press outlets worldwide; five occasions have been explicitly publicized by the U.S. government, including one CentCom press release, and

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2012/05/08/yemen-reported-us-covert-action-2012; *Yemen: Reported US Covert Actions 2013*, The Bureau of Investigative Journalism, (Dec. 31, 2013), https://www.thebureauinvestigates.com/2013/01/03/yemen-reported-us-covert-actions-2013; *Yemen: Reported US Covert Actions 2014*, The Bureau of Investigative Journalism, (Dec. 06, 2014), https://www.thebureauinvestigates.com/2014/01/06/yemen-reported-us-covert-actions-2014; *Yemen: Reported US Covert Actions 2015*, The Bureau of Investigative Journalism, (Dec. 22, 2015), https://www.thebureauinvestigates.com/2015/01/26/yemen-reported-us-covert-actions-2015; *Yemen: Reported US Covert Actions 2016*, The Bureau of Investigative Journalism, (Aug. 02, 2016), https://www.thebureauinvestigates.com/2016/01/18/yemen-reported-us-covert-actions-2016 [collectively, hereinafter, "Hadramout Drone Strikes 2012-2016"].

[21] *Id.*

[22] Covert US strikes in Pakistan, Yemen and Somalia – Our methodology, Aug. 10, 2011, The Bureau of Investigative Journalism, https://www.thebureauinvestigates.com/2011/08/10/pakistan-drone-strikes-the-methodology2/.

[23] Hadramout Drone Strikes 2012-2016.

[24] *Id.*

another from the Pentagon.[25] At least one of these, which took place on June 9, 2015, was described by U.S. officials as having been a 'signature strike.'[26] The White House confirmed that it killed Nasser al Wuhayshi, though his death in this strike was incidental to the intended target.[27] Appellants and their community quite understandably want to know the circumstances in which it is legal for the U.S. President to bomb their community so that they may take steps to avoid the fate of their murdered relatives.

Moreover, even if the Court were to deem Appellants' claims moot, notwithstanding the above facts, Appellants would still survive had the lower court permitted them to amend the complaint to add a damages action, as Appellants requested. *See* Opp. to Mot. To Dismiss 10; *Qassim v. Bush*, 466 F.3d 1073, 1077

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[25] Press Release, U.S. Central Command Announces Yemen Counterterrorism Strikes, June 03, 2016, http://www.centcom.mil/news/press-release/june-3-u.s.-central-command-announces-yemen-counterterrorism-strikes; Statement by Pentagon Press Secretary Peter Cook on Yemen Airstrike, Department of Defense, Mar. 22, 2016, http://www.defense.gov/News/News-Releases/News-Release-View/Article/700454/statement-by-pentagon-press-secretary-peter-cook-on-yemen-airstrike.

[26] Greg Miller & Hugh Naylor, *Al-Qaeda leader in Yemen is Said to be Killed in U.S. Drone Strike*, Wash. Post, June 16, 2015, https://www.washingtonpost.com/world/national-security/leader-of-al-qaeda-in-yemen-targeted-in-airstrike-by-us/2015/06/15/34121c1e-13a8-11e5-89f3-61410da94eb1_story.html?tid=a_inl.

[27] Greg Miller, *CIA Didn't Know Strike Would Hit al-Qaeda Leader*, Wash. Post, June 17, 2015, https://www.washingtonpost.com/world/national-security/al-qaedas-leader-in-yemen-killed-in-signature-strike-us-officials-say/2015/06/17/9fe6673c-151b-11e5-89f3-61410da94eb1_story.html.

(D.C. Cir. 2006) (damages claims for past wrongs survive even where defendant's change in conduct moots equitable claims); *see also Richardson v. United States*, 193 F.3d 545, 548-9 (D.C. Cir. 1999) ("leave to amend a complaint should be freely given in the absence of undue delay, bad faith, undue prejudice to the opposing party, repeated failure to cure deficiencies, or futility.").

b. The District Court Erred in Holding That The TVPA Does Not Permit Suits Against U.S. Officials.

The District Court's holding that Appellants' TVPA claims were barred in any event because that statute does not authorize suits against U.S. officials was in error. The District Court cited a single case for that proposition: *Saleh v. Titan Corp.*, 580 F.3d 1, 16 (D.C. Cir. 2009). But that case neither involved claims brought under the TVPA, nor did this Court have occasion to consider whether the TVPA would extend to U.S. officials if it could be shown, as here, that they acted under the color of foreign law. Thus, the D.C. Circuit's commentary *Saleh* on the applicability of the TVPA to U.S. personnel is little more than dicta. *See In re Sealed Case*, 494 F.3d 139, 156 (D.C. Cir. 2007) ("Dictum lacks binding precedential value precisely because abstract musings often fail to produce fully-considered legal rules. When we accept dictum uttered in a previous opinion as if it were binding law, which governs our subsequent adjudication . . . , we fail to discharge our responsibility to deliberate on and decide the question which needs to be decided" (internal quotes omitted)).

Nor, for that matter, is it persuasive dicta. In concluding that the TVPA does not extend to U.S. personnel, the *Saleh* Court relied on President Bush's TVPA signing statement. *Saleh*, 580 F.3d at 16. But "signing statements have no legal force and effect. They have the same legal significance as other mechanisms the President could use to deliver the same message, such as a speech, a radio address, or an answer to a question at a press conference: none at all." John F. Cooney, *Signing Statements: A Practical Analysis of the ABA Task Force Report*, 59 Admin. L. Rev. 647, 649 (2007). Crucially, President Bush's signing statement contradicts the plain language of the TVPA, which applies to any "*individual*" who acts under the color of foreign law. TVPA § 2(a) (emphasis added). While signing statements may help resolve statutory ambiguities, Appellants are unaware of any case where a signing statement was given dispositive weight over the plain language of a statute. Accordingly, this Court should reverse the District Court's holding that the TVPA does not apply to U.S. personnel.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded with instructions to proceed to discovery.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it brief contains 10,089 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

Dated: August 22, 2016

/s/ Eric L. Lewis
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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2016, I filed and served the foregoing Brief of Appellants through this Court's ECF system.

/s/ Eric L. Lewis
ERIC L. LEWIS

ADDENDUM

PERTINENT STATUTES
Pursuant to D.C. Cir. Rule 28(a)(5)

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1350

§ 1350. Alien's action for tort

Currentness

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 934.)

28 U.S.C.A. § 1350, 28 USCA § 1350
Current through P.L. 114-219.

End of Document

Editor's and Revisor's Notes (21)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C. 1940, ed., § 41(17) (Mar. 3, 1911, c. 231, § 24, par. 17, 36 Stat. 1093).

Words "civil action" were substituted for "suits," in view of Rule 2 of the Federal Rules of Civil Procedure .

Changes in phraseology were made.

Torture Victim Protection

Pub.L. 102-256, Mar. 12, 1992, 106 Stat. 73, provided that:

"Section 1. Short Title.

"This Act may be cited as the 'Torture Victim Protection Act of 1991'.

"Sec. 2. Establishment of civil action.

"(a) Liability. --An individual who, under actual or apparent authority, or color of law, of any foreign nation--

"(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

"(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

"(b) Exhaustion of remedies. --A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

"(c) Statute of limitations. --No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

"Sec. 3. Definitions.

"(a) Extrajudicial killing. --For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

"(b) Torture. --For the purposes of this Act--

"(1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

"(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from--

"(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

"(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

"(C) the threat of imminent death; or

"(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

