Exhibit 28

March 2013 Government Brief

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI, as personal representative of the estate of ANWAR AL-AULAQI, et al., Plaintiffs, v. LEON E. PANETTA, et al., in their individual capacities, Defendants.	No. 1:12-cv-01192 (RMC)

<u>DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS</u>

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. The Political Question Doctrine Applies Regardless of How Plaintiffs Cast Their Claims 1

II. Plaintiffs Misstate the Special Factors Analysis, Which Counsels Hesitation Here..8

III. Plaintiffs Cannot Rebut Defendants' Entitlement to Qualified Immunity…...15

A. Decedents' Fourth Amendment rights were not clearly established….16

B. Decedents' Fifth Amendment rights were not clearly established……18

C. If the Court reaches the constitutional issue, Plaintiffs' claims must fail...20

1. Plaintiffs fail to allege a violation of the Fourth Amendment..22

2. Plaintiffs fail to allege a violation of the Fifth Amendment….24

CONCLUSION..25

TABLE OF AUTHORITIES

Cases

* *Al-Aulaqi v. Obama*,
727 F. Supp. 2d 1 (D.D.C. 2010) .... passim

Al-Bihani v. Obama,
619 F.3d 1 (D.C. Cir. 2010) 16

Al-Zahrani v. Rodriguez,
669 F.3d 315 (D.C. Cir. 2012) 13

* *Ali v. Rumsfeld*,
649 F.3d 762 (D.C. Cir. 2011) 12, 14, 15, 16

Anderson v. Creighton,
483 U.S. 635 (1987) 19, 22

Arar v. Ashcroft,
585 F.3d 559 (2d Cir. 2009) 11

Ashcroft v. Al-Kidd,
131 S. Ct. 2074 (2011) 19

* *Ashcroft v. Iqbal*,
556 U.S. 662 (2009) 10, 21

Baker v. Carr,
369 U.S. 186 (1962) 1

Bond v. United States,
131 S. Ct. 2355 (2011) 8

Bush v. Lucas,
462 U.S. 367 (1983) 14

Camreta v. Greene,
* 131 S. Ct. 2020 (2011) 7, 15

Carlson v. Green,
446 U.S. 14 (1980) 10

Case v. Milewski,
327 F.3d 564 (7th Cir. 2003) 10

Chappell v. Wallace,
* 462 U.S. 296 (1983) 9

Comm. of U.S. Citizens Living in Nicaragua v. Reagan,
859 F.2d 929 (D.C. Cir. 1988) 6

Cordova v. Aragon,
569 F.3d 1183 (10th Cir. 2009) 17

Corr. Servs. Corp. v. Malesko,
534 U.S. 61 (2001) 10

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 25

Davis v. Scherer,
468 U.S. 183 (1984) 16

* *Doe v. Rumsfeld*,
683 F.3d 390 (D.C. Cir. 2012) 11, 13

Doe v. Rumsfeld,
800 F. Supp. 2d 94 (D.D.C. 2010) 19

* *El-Shifa Pharm. Indus. Co. v. United States*,
607 F.3d 836 (D.C. Cir. 2010) 4, 5, 6

El-Shifa Pharm. Indus. Co. v. United States,
378 F.3d 1346 (Fed. Cir. 2004) 4

Espinosa v. City & Cty. of S.F.,
598 F.3d 528 (9th Cir. 2010) 23

Florida v. Royer,
460 U.S. 491 (1983) 17

Graham v. Connor,
490 U.S. 386 (1989) 22, 23, 24

Haim v. Islamic Republic of Iran,
784 F. Supp. 2d 1 (D.D.C. 2011) 22

Hamdan v. Rumsfeld,
548 U.S. 557 (2006) 20

Hamdan v. United States,
696 F.3d 1238 (D.C. Cir. 2012) 16

Hamdi v. Rumsfeld,
* 542 U.S. 507 (2004) ....passim

Harbury v. Hayden,
522 F.3d 413 (D.C. Cir. 2008) 4

Holland v. Harrington,
268 F.3d 1179 (10th Cir. 2001) 24

Hope v. Pelzer,
536 U.S. 730 (2002) 16

Hui v. Casteneda,
130 S. Ct. 1845 (2010) 10

In re Iraq & Afghanistan Detainees Litigation,
479 F. Supp. 2d (D.D.C. 2007) 16

In re Terrorist Bombings, U.S. Embassies, E. Afr.,
552 F.3d 157 (2d Cir. 2008) 17, 18

Johnson v. District of Columbia,
528 F.3d 969 (D.C. Cir. 2008)....17

Johnson v. Eisentrager,
339 U.S. 763 (1950)....12

Joint Anti-Fascist Communist Committee v. McGrath,
341 U.S. 123 (1951)....19, 20

Jones v. Horne,
634 F.3d 588 (D.C. Cir. 2011)....22

Lebron v. Rumsfeld,
670 F.3d 540 (4th Cir. 2012)....9, 11

Lombardi v. Whitman,
485 F.3d 73 (2d Cir. 2007)....25

Ludecke v. Watkins,
335 U.S. 160 (1948)....20

Mattos v. Agarano,
661 F.3d 433 (9th Cir. 2011)....17

McDonald v. Haskins,
966 F.2d 292 (7th Cir. 1992)....24

Mitchell v. Forsyth,
472 U.S. 511 (1985)....10

Morgan v. United States,
323 F.3d 776 (9th Cir. 2003)....10

Moyer v. Peabody,
212 U.S. 78 (1909)....25

Munaf v. Geren,
553 U.S. 674 (2008)....7

N.Y. Times Co. v. U.S. Dep't of Justice,
-- F. Supp. 2d --, Nos. 11 Civ. 9336, 12 Civ. 794,
2013 WL 50209 (S.D.N.Y. Jan. 3, 2013)....18, 23

N.Y. Times Co. v. United States,
403 U.S. 713 (1971)....6

Nelson v. City of Davis,
685 F.3d 867 (9th Cir. 2012)....23

New Jersey v. T.L.O.,
469 U.S. 325 (1985)....17

Padilla v. Yoo,
* 678 F.3d 748 (9th Cir. 2012)....16, 17, 19

Parisi v. Davidson,
405 U.S. 34 (1971) 10

People's Mojahedin Org. of Iran v. Dep't of State,
182 F.3d 17 (D.C. Cir. 1999) 5

Pitt v. District of Columbia,
491 F.3d 494 (D.C. Cir. 2007) 21

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 20

Rasul v. Myers,
563 F.3d 527 (D.C. Cir. 2009) 12

Reid v. Covert,
354 U.S. 1 (1952) 18, 20

Sanchez-Espinoza v. Reagan,
770 F.2d 20 (1985) 7, 14

Schneider v. Kissinger,
412 F.3d 190 (D.C. Cir. 2005) 3, 9, 10

Schweiker v. Chilicky,
487 U.S. 412 (1988) 13

Smith v. District of Columbia,
413 F.3d 86 (D.C. Cir. 2005) 24

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 16

United States v. Abu Ali,
528 F.3d 210 (4th Cir. 2008) 13

United States v. Stanley,
483 U.S. 669 (1987) 9, 10, 14, 15

United States v. U.S. Dist. Court for the E. Dist. of Mich., S. Div.,
407 U.S. 297 (1972) 12

United States v. Verdugo-Urquidez,
494 U.S. 259 (1990) 18

United States v. Yousef,
327 F.3d 56 (2d Cir. 2003) 13

United States v. Yunis,
924 F.2d 1086 (D.C. Cir. 1991) 16

Vance v. Rumsfeld,
653 F.3d 591 (7th Cir. 2011) 19

Vance v. Rumsfeld,
701 F.3d 193 (7th Cir. 2012) 10

Case 1:12-cv-01192-RMC Document 31-2 Filed 03/07/13 Page 7 of 33

Wilkie v. Robbins
551 U.S. 537 (2007) 13, 14

Wilson v. Libby,
535 F.3d 697 (D.C. Cir. 2008) 11, 12

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S 579 (1952) 6, 9

Zivotofsky v. Clinton,
132 S. Ct. 1421 (2012) 2

Zweibon v. Mitchell,
516 F.2d 594 (D.C. Cir. 1975) 12

<u>Statutes</u>

18 U.S.C. App. 3 12

42 U.S.C. § 1983 10

Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 2

In their motion to dismiss, Defendants demonstrated that Plaintiffs' complaint cannot survive because it presents numerous political questions, binding circuit precedent precludes creating the implied right of action pled in the complaint, and Defendants are entitled to qualified immunity. In response, Plaintiffs have tried to gloss over these fatal defects by recasting their claims at the most general level possible, ignoring nationwide case law, and attempting to disavow the unambiguous context pled: that the country's highest ranking military and intelligence officials allegedly authorized the use of lethal force against terrorist suspects in Yemen. These efforts do nothing to change the inescapable fact that under the terms of their own complaint as pled, Plaintiffs' claims must fail as a matter of law.[1]

I. The Political Question Doctrine Applies Regardless of How Plaintiffs Cast Their Claims.

As explained in Defendants' opening motion, Plaintiffs' claims directly implicate the first four factors of *Baker v. Carr*, 369 U.S. 186 (1962), and thus present non-justiciable political questions. *See* Defs.' Mot. to Dismiss (MTD) at 5-17. Plaintiffs attempt to avoid the clear application of the political question doctrine by describing their constitutional claims at the most general level. This fundamentally misconstrues the political question doctrine and ignores the specific nature of the political and operational judgments Plaintiffs seek to challenge, which render judicial review unmanageable in this extraordinary context. The political question doctrine protects the "separation of powers" and the distinct role each branch of government plays in its respective areas of constitutional authority. *Baker*, 369 U.S. at 217. Ignoring the clear textual commitment to the political branches of the matters pled in their complaint, Plaintiffs argue that the Executive's role in this unique area of national security, self-defense, and war-making should be subordinate to oversight by the Judiciary. Plaintiffs also almost entirely ignore

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[1] Plaintiffs also admit they have not yet shown the capacity to sue. *See* Pls.' Opp. (Opp.) at 44.

Congress's role in the areas implicated by the claims as pled, relegating the Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (AUMF), to a single footnote, Opp. at 6 n.5, and otherwise failing to address any congressional involvement. *See infra* at 14; MTD at 20-21 & n.14. Plaintiffs' misconceptions cannot be squared with binding precedent.

Citing *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), Plaintiffs broadly frame the issue presented as whether the alleged "use of lethal force" violated the Fourth and Fifth Amendments, Opp. at 8-10, and argue that to be a justiciable question. *Zivotofsky* demonstrates that this cannot be done. It is the *precise issues* a court must address to resolve a case—not the most generalized *characterization* of those issues—that determine what is justiciable. *See* 132 S. Ct. at 1427 (rejecting characterization of the issue as "ask[ing] the courts to determine whether Jerusalem is the capital of Israel" because the precise issue was whether a particular statute was constitutional); *id.* at 1434 (Sotomayor, J., concurring) ("In order to evaluate whether a case presents a political question, a court must first identify *with precision* the issue it is being asked to decide." (emphasis added)). In *Zivotofsky*, because the "only real question" presented—whether "§ 214(d) . . . impermissibly intrudes upon Presidential powers"—involved a "familiar judicial exercise," the case was justiciable. *Id.* at 1427, 1428.

Not so here. Plaintiffs' general recitation of the constitutional nature of their claims in their opposition is inconsistent with their complaint, which identifies at least three precise issues that are non-justiciable. Even assuming Plaintiffs properly identify the issues relevant to their claims and accepting their allegations as true, this Court would need to determine whether: (1) Anwar Al-Aulaqi and Ibraham Al-Banna posed a threat sufficient to warrant the use of lethal force abroad; (2) options other than lethal force were reasonably available to counter the threat posed; and (3) U.S. officials took appropriate measures to minimize casualties to bystanders. *See,*

e.g., Opp. at 15 (noting that the "factors involved in evaluating Plaintiffs' constitutional claims" include "whether a threat is imminent, whether non-lethal alternatives are available, and whether lethal force is permissible in light of the threat to bystanders"). Plaintiffs attempt to distance themselves from their pleadings, suggesting their claims "may have arisen in a national-security context." Opp. at 9. But unquestionably their claims as pled not only arise in such a context, but specifically would require this Court to pass judgment on alleged operational decisions military and intelligence officials may have made in carrying out core national self-defense missions.

Indeed, Plaintiffs' own discussion in their opposition of the underlying *constitutional* questions makes clear that their suit would unavoidably require this Court to resolve issues that "implicate real-time decisionmaking in war," *id.* at 23, taking it well beyond its traditional role and thrusting it into the realm of operational combat judgments. *See, e.g.*, *id.* at 33 (arguing that it was "unreasonable," and thus unconstitutional, for military and intelligence officials to allegedly launch a missile at Anwar Al-Aulaqi's vehicle "at the moment Khan was in the vehicle (as opposed to before or after)"); *id.* at 34 (arguing that it was "unreasonable," and thus unconstitutional, for military and intelligence officials to allegedly launch a missile at an individual while he was at a restaurant "as opposed to targeting that person before he arrived or after he left"). Contrary to Plaintiffs' claims, "it is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role." *Schneider v. Kissinger*, 412 F.3d 190, 196 (D.C. Cir. 2005) (citation omitted).

Plaintiffs' conclusory assertion, Opp. at 12, that a "well-developed body of judicial standards" exists to evaluate their claims ignores the substantial body of case law that holds precisely the opposite. *See, e.g.*, *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844

(D.C. Cir. 2010) (en banc) ("In military matters in particular, the courts lack the competence to assess the strategic decision to deploy force or to create standards to determine whether the use of force was justified or well-founded."); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 47 (D.D.C. 2010) ("[T]here are no judicially manageable standards by which courts can endeavor to assess the President's interpretation of military intelligence and his resulting decision—based on that intelligence—whether to use military force against a terrorist target overseas." (citation omitted)). Again, considering the precise context of their claims—alleged missile strikes abroad against a leader of an armed enemy group at the direction of military and intelligence officials—makes clear the absence of judicially manageable standards. *See El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1367 n.6 (Fed. Cir. 2004) ("[I]t would be difficult, if not extraordinary, for the federal courts to discover and announce the threshold standard by which the United States government evaluates intelligence in making a decision to commit military force in an effort to thwart an imminent terrorist attack on Americans."). Despite Plaintiffs' contentions otherwise, Opp. at 12, the existence of case law applying constitutional standards in the routine law enforcement context, and the fact that Executive Branch officials have discussed generally the circumstances under which remotely piloted aircraft (RPAs) may be deployed, do not mean that courts can appropriately address the myriad military, intelligence, and foreign policy considerations that would arise in adjudicating these specific claims. *See* MTD at 14-15.[2]

Plaintiffs' argument that their claims do not involve "policy choices and value determinations," Opp. at 15, suffers from the same flaws. Plaintiffs fail to acknowledge the sorts of determinations that necessarily lie behind all but the most general description of their claims.

[2] Plaintiffs' implicit argument that the second *Baker* factor—an absence of judicially manageable standards—is somehow less important than the first *Baker* factor, Opp. at 9, is contrary to D.C. Circuit precedent. *See Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008). Regardless, the first *Baker* factor alone warrants dismissal of Plaintiffs' claims.

For instance, as Defendants exhaustively explained in their motion, resolving the precise question of "whether non-lethal alternatives are available" involves a host of fact-intensive policy choices. *See, e.g.*, MTD at 16, 18. Plaintiffs offer no substantive rebuttal to Defendants' explanation in this regard, and wholly fail to grapple with the potential real-world implications of possible non-lethal operations. Similarly, Plaintiffs wholly fail to grapple with Defendants' showing, MTD at 16-17, that a determination of whether "feasible measures" were available to protect bystanders during the alleged strikes would require non-judicial expertise.

Plaintiffs' efforts to either distinguish *El-Shifa* or use it as support, Opp. at 9, 10 n.10, are to no avail. In that case, the D.C. Circuit noted that the precise questions raised were whether a U.S. missile attack on a Sudanese pharmaceutical plant "was 'mistaken and not justified,'" and whether the government's stated reasons for the strike were factually valid, regardless of plaintiff's characterization of his claims. 607 F.3d at 844 ("The defamation claim similarly *requires us* to determine the factual validity of the government's stated reasons for the strike." (emphasis added)). These questions squarely fell within the political question doctrine: "If the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target." *Id.* That holding applies with full force here.

Plaintiffs' attempt to distinguish *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17 (D.C. Cir. 1999) ("*PMOI*"), is similarly unavailing. Plaintiffs again characterize their claims at the most general level possible, wholly divorcing the political question inquiry from the particular context they have pled. Viewed through the lens of the issues presented by the allegations in the complaint—including whether Anwar Al-Aulaqi (or Al-Banna), posed a "concrete, specific, and imminent" threat to the lives of Americans, Compl. ¶¶ 24, 34—*PMOI* is

relevant here. *See Al-Aulaqi*, 727 F. Supp. 2d at 47 ("Nor are there judicially manageable standards by which courts may determine the nature and magnitude of the national security threat posed by a particular individual. In fact, the D.C. Circuit has expressly held that the question whether an organization's alleged 'terrorist activity' threatens 'the national security of the United States' is 'nonjusticiable.'" (quoting *PMOI*)).

Hamdi v. Rumsfeld, 542 U.S. 507 (2004), and the other Supreme Court cases Plaintiffs cite allegedly involving "times of conflict" fail to assist them. Opp. at 11. *Hamdi* involved the habeas claim of a U.S. citizen challenging his military detention in the United States, 542 U.S. at 510, a context wholly distinct from the alleged use of lethal force abroad to target a leader of an armed enemy group. *See El-Shifa*, 607 F.3d at 843; *Al-Aulaqi*, 727 F. Supp. 2d at 47 ("But there are no judicially manageable standards by which courts can endeavor to assess the President's interpretation of military intelligence and his resulting decision—based on that intelligence—whether to use military force against a terrorist target overseas." (citation omitted)).[3]

Indeed, as the plurality in *Hamdi* noted, the process provided in the long-term detention context "meddles little, if at all, in the strategy or conduct of war." 542 U.S. at 535. The plurality was careful to add that it accords "the greatest respect and consideration to the judgments of the military authorities in matters relating to the actual prosecution of a war," and recognizes "that the scope of that discretion necessarily is wide." 542 U.S. at 535. Thus, to the extent *Hamdi*

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[3] The other Supreme Court cases Plaintiffs cite also involved contexts and issues distinct from the alleged real-time combat decisions of military and intelligence officers to launch missiles at targets abroad. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (government attempt to enjoin major newspapers from publishing Department of Defense research on the development of policy in Vietnam); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S 579, 582-83 (1952) (Presidential order to seize steel mills to ensure they continued operating to provide for the manufacture of weaponry). Similarly, *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988), involving a legally distinct context, is inapplicable here. *See Al-Aulaqi*, 727 F. Supp. 2d at 50 (distinguishing *Comm. of U.S. Citizens*).

speaks to the context of Plaintiffs' claims—the "conduct" of alleged missile strikes abroad against terrorist threats—it supports Defendants, not Plaintiffs. *Cf. Munaf v. Geren*, 553 U.S. 674, 700 (2008) (in denying habeas petitions of U.S. citizens awaiting transfer to Iraqi criminal system, citing "concerns about unwarranted judicial intrusion into the Executive's ability to conduct military operations abroad").

Finally, and perhaps most fundamentally, Plaintiffs fail to distinguish this case from *Al-Aulaqi v. Obama*. Although Plaintiffs correctly note, Opp. at 14, that the relief sought in *Al-Aulaqi v. Obama* was an injunction, here too a ruling could have prospective effect. As the Supreme Court has explained, a constitutional ruling in a *Bivens* action can affect "future action." Opp. at 14. *See Camreta v. Greene*, 131 S. Ct. 2020, 2029 (2011) (holding that the Court has Article III jurisdiction over an appeal from an adverse constitutional ruling, even in the absence of liability, "because the judgment may have prospective effect on the parties"). *Cf. Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (1985) ("We note in this regard that the discretionary relief of declaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as injunction or mandamus, since it must be presumed that federal officers will adhere to the law as declared by the court."). That Plaintiffs seek damages for past conduct does not diminish the prospective effect a ruling on their claims could have on future operations.

Lastly, *Al-Aulaqi*'s core holding, that the court "lacks the capacity to determine whether a specific individual in hiding overseas, whom the Director of National Intelligence has stated is an 'operational' member of AQAP, presents such a threat to national security that the United States may authorize the use of lethal force against him," is directly on point. *Al-Aulaqi*, 727 F.

Supp. 2d at 52 (citation omitted).[4] Plaintiffs' claims unquestionably present that precise non-justiciable question and must be dismissed.

II. Plaintiffs Misstate the Special Factors Analysis, Which Counsels Hesitation Here.

Defendants established in their opening motion that both the separation-of-powers concerns that warrant dismissal on political question grounds and binding precedent demonstrate that this Court should not create a novel damages remedy in this context. MTD at 21-28. Plaintiffs fail to rebut that showing in any meaningful way. At the most basic level, Plaintiffs misrepresent Supreme Court special factors jurisprudence when they argue that the separation-of-powers concerns underlying special factors apply only to the "legislative prerogative." Opp. at 15-20. This is not so. To the contrary, "[s]eparation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others." *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011). That principle is evident from the structure of the Constitution itself, which designates the powers of each branch in a separate article. In a *Bivens* analysis, this means not intruding on the province of the political branches when factors counsel hesitation.[5]

Case after case has recognized this bedrock principle. Indeed, the five federal courts of appeals to address whether to infer *Bivens* remedies in novel separation-of-powers contexts—the D.C., Ninth, Fourth, en banc Second, and en banc Seventh Circuits—have uniformly declared: "No." *See* MTD at 22 n.15 (citing cases). These consistent holdings derive directly from the Supreme Court's discussion of special factors. As the Court in *United States v. Stanley*, 483 U.S. 669 (1987), made clear, "the insistence . . . with which the Constitution confers authority over

[4] Plaintiffs' selective quotation from *Al-Aulaqi*, Opp. at 14, does not negate its direct application to their claims, Judge Bates's emphasis that his holding was narrow notwithstanding.

[5] Even if Congress's prerogative were the sole concern, Plaintiffs ignore the AUMF, *see supra* p.2, and otherwise misconstrue Congress's activity in this area. *See infra* p.14.

the Army, Navy, and militia upon the *political branches* . . . counsels hesitation in our creation of damages remedies in this field." *Id.* at 682 (emphasis added).[6] The *Stanley* Court noted intrusions on both congressional and executive authority in the field, focusing equally, if not more so, on the negative effects *Bivens* suits could have on the military regime. *See id.* at 682-83 ("[C]ompelled depositions and trial testimony by military officers concerning the details of their military commands . . . would disrupt the military regime.").

Similarly, in *Chappell v. Wallace*, 462 U.S. 296 (1983), contrary to Plaintiffs' reading, Opp. at 18, the Court focused not only on Congress's authority over military discipline in holding that special factors barred a suit by military personnel against their superiors, but also on the inherent and absolute requirement that an effective military have "strict discipline." 462 U.S. at 300. After detailing the obvious need for such discipline, the Court stated that "[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers, [which is] at the heart of the necessarily unique structure of the Military Establishment." *Id.* It takes little imagination to see the disruption to military discipline if courts, and not commanders, were to dictate the conduct of RPA operations abroad, thereby placing military personnel in a Catch-22: disobey the orders of superiors or face personal liability. Accordingly, the proper understanding of the Supreme Court's special factors jurisprudence is that where the implications of inferring a damages remedy could undermine certain core legislative or executive functions—including the operation of an effective military, combat abroad, and national self-

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[6] *See also id.* at 683 ("The special factor that counsels hesitation is . . . the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." (internal quotations and alterations omitted)). *Accord Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir. 2012) ("[T]he Constitution delegates authority over military affairs to Congress and to the President as Commander in Chief."). *Cf. Schneider*, 412 F.3d at 194-95 (detailing the textual commitment of national security matters to the political branches).

defense—the Judiciary should leave it to the Legislative Branch to determine whether a new damages remedy is appropriate.[7]

In addition to fundamentally misunderstanding Supreme Court case law, Plaintiffs fail adequately to grapple with Defendants' demonstration that this case presents an extraordinary context into which a *Bivens* remedy has never been extended. Indeed, Plaintiffs' mistaken premise, Opp. at 16, that a *Bivens* remedy is presumed available, ignores the last three decades of Supreme Court precedent. *See Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) ("Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001))). Plaintiffs' reliance upon *Mitchell v. Forsyth*, 472 U.S. 511 (1985), is misplaced. Opp. at 19. That case, involving domestic wiretapping by the Federal Bureau of Investigation and not the alleged launch of missiles by military and intelligence officials at suspected terrorists abroad, was resolved on immunity, not special factors, grounds. *Mitchell*, 472 U.S. at 513.[8]

Although Plaintiffs cite limited case law discussing the *immunity* of military members out of context, they misstate, or simply ignore, the case law from the D.C. Circuit and other courts of

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[7] Plaintiffs' offer no support for their argument, Opp. at 17 n.18, that the separation-of-powers concerns demonstrating the presence of political questions cannot be raised in the special factors context. Both are justiciability doctrines, and thus there is every reason to think that they embrace overlapping concerns. And the cases Plaintiffs cite, *id.*, mention no distinction between special factors and the political question doctrine. *See Hui v. Casteneda*, 130 S. Ct. 1845, 1850-55 (2010); *Stanley*, 483 U.S. at 678-86; *Carlson v. Green*, 446 U.S. 14, 18-23 (1980).

[8] Similarly, *Case v. Milewski*, 327 F.3d 564 (7th Cir. 2003), and *Morgan v. United States*, 323 F.3d 776 (9th Cir. 2003), involved members of the military acting in a domestic law-enforcement capacity, a wholly separate context, and in any event made no mention of special factors. Nor does *Parisi v. Davidson*, 405 U.S. 34 (1971), a habeas case, have any bearing on the implied remedy sought here. And the cases cited by the dissent in *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc), *cert. petition filed*, No. 12-976 (U.S. Feb. 5, 2013), all either involved military officers acting in a law-enforcement capacity, were brought under 42 U.S.C. § 1983, or are two decades old, non-binding, and fail to reflect more recent special factors jurisprudence. *See Vance*, 701 F.3d at 214-15 (Hamilton, J., dissenting) (listing cases).

Case 1:12-cv-01192-RMC Document 23 Filed 03/08/13 Page 18 of 33

appeals that *does* address special factors in the military and national security contexts. *See* MTD at 22 n.15. Plaintiffs' narrow reading of *Doe v. Rumsfeld*, Opp. at 21, cannot be squared with the court's own opinion. 683 F.3d 390 (D.C. Cir. 2012). The *Doe* court identified three areas where special factors apply (military, intelligence, and national security), mentioning *Chappell* and *Stanley* only in its opening paragraph discussing the military area. *Id.* at 394-96. The court then canvassed the other areas and other case law, concluding that "[m]any of the same special factors" found in those other cases applied in *Doe*. *Id.* It therefore strains credulity to suggest, Opp. at 21 n.25, that this extensive, detailed, and specific analysis of special factors in the areas of national security and intelligence is dicta this Court should ignore.[9]

Plaintiffs' argument, Opp. at 24 n.29, that classified intelligence concerns are not an appropriate special factor, is contrary to explicit D.C. Circuit precedent. *See Wilson v. Libby*, 535 F.3d 697, 704, 710 (D.C. Cir. 2008) (holding that the risk of "judicial intrusion" into "sensitive intelligence information" matters is an independent special factor). Plaintiffs' attempts to distinguish *Wilson* are unavailing. Regardless of the supposed "limited aim" of Plaintiffs' suit, Opp. at 24, the inquiries this Court would inevitably need to conduct run a substantial risk of delving into highly sensitive areas that may include military and intelligence matters and clandestine operations. *See, e.g.*, Compl. ¶ 2 (alleging that "unmanned CIA . . . drones fired missiles at Anwar Al-Aulaqi"). That the alleged operations at issue here already occurred does not, as Plaintiffs suggest, Opp. at 24, lessen the risk of exposing classified information. *Wilson*,

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[9] Plaintiffs entirely disregard *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc), which explored the presence of special factors in cases directly implicating national security, classified information, and foreign affairs. *See id.* at 574-77. And they do not attempt to distinguish the reasoning underlying *Lebron*, which exhaustively detailed the military, national security, and intelligence concerns that precluded a *Bivens* suit against military officials on account of their alleged national security operations, even when filed by a U.S. citizen. *See* 670 F.3d at 548-55.

535 F.3d at 710 ("Pertinent to [whether special factors apply] are the difficulties associated with subjecting allegations involving CIA operations and covert operatives to judicial and public scrutiny.").[10] *See* MTD at 27 n.20 (noting that the precise issues raised in this case were the subject of an earlier invocation of the military and state secrets privilege).[11]

Contrary to Plaintiffs' assertion, Opp. at 22, neither *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011), nor *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009), turned on the plaintiffs' citizenship. Instead, *Ali* emphasized that allowing "enemies" (regardless of citizenship) to sue commanders ordered to subdue them could negatively affect the military. *Ali*, 649 F.3d at 773 (quoting extensively from *Johnson v. Eisentrager*, 339 U.S. 763 (1950)). Plaintiffs fail to demonstrate how citizenship would mitigate that concern. And they provide no reason why decedents' citizenship would diminish the danger of this suit "obstructing U.S. national security policy." *Rasul*, 563 F.3d at 532 n.5. Indeed, as explained above, *see supra* p.3, Plaintiffs' papers remove any doubt that this lawsuit, if allowed to proceed, implicates operational combat decisions. Similarly, Plaintiffs' dismissal of the foreign affairs implications of this suit as "a diversion," Opp. at 25, is no counter to Defendants' showing that inferring a remedy could affect relations with Yemen and others. *See* MTD at 28. The cases Plaintiffs cite on these points involved the merits of various constitutional questions in criminal prosecutions, not the question of whether to infer a civil damages remedy in the first instance. *See United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008) (appeal by convicted terrorist); *United States v. Yousef*, 327 F.3d 56 (2d

[10] Plaintiffs' citation, Opp. at 24 n.30, to *United States v. U.S. Dist. Court for the E. Dist. of Mich., S. Div.* (*Keith*), 407 U.S. 297, 321-22 (1972), and *Zweibon v. Mitchell*, 516 F.2d 594, 641 (D.C. Cir. 1975), is beside the point. Those cases, which did not turn on special factors, involved whether warrants were required for domestic wiretapping related to national security, not whether the potential disclosure of classified information counsels against inferring a damages remedy. *See Keith*, 407 U.S. at 314-20; *Zweibon*, 516 F.2d at 611-14.

[11] The Classified Information Procedures Act, 18 U.S.C. App. 3, Opp. at n.29, applies to criminal prosecutions only and is irrelevant to whether to infer a civil damages remedy.

Cir. 2003) (same). In sum, courts have *not* inferred *Bivens* damages remedies against some of the Nation's highest-ranking officials for the conduct of military, national security, and intelligence functions abroad, and Plaintiffs' suggestions to the contrary are unfounded.

Despite Plaintiffs' claims otherwise, the test is not whether Congress has specifically exempted "certain officials from liability" such that judicial hesitation is warranted, Opp. at 19, but rather whether "congressional inaction has not been inadvertent."[12] *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988). This can be shown either by legislation related to the issue that does not provide the remedy sought, or by the absence of specific legislation despite congressional awareness of the issue. *See, e.g.*, *id.* (noting "frequent and intense" congressional attention to issue without specific legislation providing remedy sought); *Doe*, 683 F.3d at 396-97 (noting legislation regarding detainee treatment that did not provide remedy).

Here, both are present. First, congressional authorization for discretionary relief regarding certain military claims in Iraq and Afghanistan, but not claims such as Plaintiffs', underscores that Congress can provide for relief for military operations abroad when it so chooses.[13] *See* MTD at 24. Second, the use of RPAs and the alleged targeting of U.S. citizens abroad have been and continue to be extensively discussed in public and debated before

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[12]In this regard, Plaintiffs conflate, Opp. at 18-19, the two separate inquiries for determining if a *Bivens* remedy should be inferred: (1) whether Congress has provided an alternative remedial scheme; and (2) whether special factors counsel hesitation. *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Defendants' argument goes to the latter prong, not the former.

[13] And contrary to Plaintiffs' argument, *see* Opp. at 19, that the regulations implementing the statutes Defendants cited in their opening motion exclude Plaintiffs' claims does not negate the fact that both statutes, as passed by Congress, preclude relief for injuries related to combat operations, further demonstrating that congressional inaction has not been inadvertent. *Cf. Schweiker*, 487 U.S. at 426 (noting that Congress had legislated repeatedly regarding Social Security benefits yet had not provided the remedy plaintiffs sought); *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 320 (D.C. Cir. 2012) (recognizing that the special factors analysis is used to "preclude *Bivens* claims even in cases . . . where damages are the sole remedy by which the rights of plaintiffs and their decedents might be vindicated").

Congress. *See, e.g.*, Greg Miller, *Lawmakers Propose Giving Federal Judges Role in Drone Strikes, but Hurdles Await*, Wash. Post., Feb. 8, 2013, *available at* http://articles.washingtonpost.com/2013-02-08/world/36988536_1_drone-program-special-court-judicial-review (last visited Feb. 12, 2013). That deliberative political process is best suited to weigh and appraise the "host of considerations" that should accompany any judicial involvement. This Court should not short-circuit that process by injecting itself into this sensitive arena through the blunt instrument of an inferred damages remedy.[14]

Plaintiffs' final argument, Opp. at 26-27, that this Court should infer a remedy despite the presence of special factors because of the nature of their "egregious" allegations, fails as a matter of law. Both the Supreme Court and the D.C. Circuit have refused to infer a remedy on special factors grounds despite allegations of serious and even egregious conduct.[15] The absence of another remedy for Plaintiffs in this extraordinary context does not alter this conclusion. *See Wilkie*, 551 U.S. at 550 (noting that a *Bivens* remedy "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest"); *Stanley*, 483 U.S. at 683 ("[I]t is irrelevant to a 'special factors' analysis whether the laws currently on the books afford Stanley . . . an 'adequate' federal remedy for his injuries."). Here, where Defendants were allegedly

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[14] *See, e.g.*, *Wilkie*, 551 U.S. at 562 ("Congress can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees."); *Bush v. Lucas*, 462 U.S. 367, 389 (1983) ("Congress is in a far better position than a court to evaluate the impact of a new species of litigation . . . ."); *Sanchez-Espinoza*, 770 F.2d at 208 ("Where . . . the issue 'involves a host of considerations that must be weighed and appraised,' its resolution 'is more appropriately for those who write the laws, rather than for those who interpret them.'" (citation omitted)).

[15] *See, e.g.*, *Stanley*, 483 U.S. at 671 (refusing to infer remedy despite allegations that military secretly gave plaintiff LSD as part of experiment, which caused personality changes that resulted in the abuse of his family and the dissolution of his marriage); *Ali*, 649 F.3d at 765-66 (refusing to infer remedy despite allegations of egregious abuse at Abu Ghraib prison in Iraq); *Sanchez-Espinoza*, 770 F.2d at 205 (refusing to infer remedy despite allegations that government officials supported foreign groups engaged in "summary execution, murder, abduction, torture, rape, wounding, and the destruction of private property and public facilities").

engaged in the core executive function of protecting national security by using armed force to combat a terrorist group abroad, the presence of special factors certainly warrants dismissal.

III. Plaintiffs Cannot Rebut Defendants' Entitlement to Qualified Immunity.

As Defendants demonstrated in their motion to dismiss, they are entitled to qualified immunity because Plaintiffs have failed to allege the violation of a clearly established constitutional right in this extraordinary, unique context. Plaintiffs' argument, Opp. at 28 n.35, that this Court should ignore this defect and proceed directly to the constitutional questions they raise ignores both Supreme Court and D.C. Circuit precedent. Although *Camreta v. Greene* noted that where courts bypass the constitutional issue "again, and again, and again," it may be appropriate for a court to "avoid avoidance," that is not the case here. 131 S. Ct. at 2031. This is the first *Bivens* suit ever brought to challenge the alleged use of RPAs against U.S. citizens, and only the second suit of any type to do so—the other nominally on behalf of one of the same decedents. More importantly, *Camreta* itself stated that the Court already "detailed a range of circumstances in which courts *should* address only the immunity question." *Id.* to 2032 (citation omitted, emphasis added). This case presents those very circumstances. *See* MTD at 30-31. Plaintiffs make no effort to counter this showing. And the D.C. Circuit has clearly stated that "[t]he *Saucier* procedure . . . is not appropriate in most cases." *Ali*, 649 F.3d at 773. If this Court reaches the immunity question, then, it should consider whether the alleged actions violated clearly established law without reaching the constitutional issue.

On *that* question, the series of international law sources and the military handbooks Plaintiffs' cite, Opp. at 42-43, do not help their case. Plaintiffs' claims are—and under governing precedent can only be—for purported violations of the Fourth and Fifth Amendments, not other sources. Thus, the only issue to decide is whether Defendants' alleged actions violated those

Case 1:15-cv-01954-CM Document 34-28 Filed 03/28/15 Page 25 of 35

constitutional amendments under clearly established law.[16] *See Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984) (noting that violation of an administrative regulation will not create liability unless the regulation itself gives rise to the cause of action). The extent to which these international law norms would be considered in the analysis of decedents' constitutional rights is far from clearly established, and Plaintiffs' allegations of law of war violations do nothing to demonstrate how they would clearly define the contours of their *constitutional rights*.[17]

A. Decedents' Fourth Amendment rights were not clearly established.

Plaintiffs cite to no cases establishing decedents had any clearly established Fourth Amendment rights. Although Plaintiffs correctly note, Opp. at 41 (citing *Hope v. Pelzer*, 536 U.S. 730 (2002)), that a case need not address *factually* identical circumstances for a right to be clearly established, at bare minimum, the earlier cases must involve a similar *context*. *See, e.g.*, *Padilla v. Yoo*, 678 F.3d 748, 761-62 (9th Cir. 2012) ("[T]he constitutional rights of convicted prisoners and persons subject to *ordinary* criminal process were, in many respects, clearly established. But Padilla was not a convicted prisoner or criminal defendant; he was a suspected terrorist designated an enemy combatant and confined to military detention by order of the

[16] *See United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) ("Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law."); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 109 (D.D.C. 2007) (noting that "a *Bivens* remedy is available only for constitutional violations, not for violations of . . . international law"), *aff'd sub nom. Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011); *cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004) ("Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution."); *Hamdan v. United States*, 696 F.3d 1238, 1248-50 (D.C. Cir. 2012) (discussing "what body of law is encompassed by the term 'law of war'").

[17] The *Charming Betsy* canon Plaintiffs rely upon, Opp. at 40, simply "counsels courts, where fairly possible, to construe ambiguous statutes so as not to conflict with international law," and simply has no relevance to this case, which involves constitutional, not statutory, claims. *Al-Bihani v. Obama*, 619 F.3d 1, 7 (D.C. Cir. 2010) (en banc) (Brown, J., concurring).

President.”). Plaintiffs’ Fourth Amendment cases, Opp. at 28-35, do not. Those cases involved domestic law enforcement encounters—not the alleged firing of missiles at a leader of an armed enemy group abroad. *See, e.g.*, *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011) (domestic disturbance); *Cordova v. Aragon*, 569 F.3d 1183 (10th Cir. 2009) (car chase); *Johnson v. District of Columbia*, 528 F.3d 969 (D.C. Cir. 2008) (drug bust).

Indeed, context is critical with regard to Fourth Amendment claims. *See New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (“Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the *context* . . . .” (emphasis added)). *Cf. Padilla*, 678 F.3d at 761-62. Some of the very cases Plaintiffs cite support this clear maxim. *See, e.g.*, *In re Terrorist Bombings, U.S. Embassies, E. Afr.*, 552 F.3d 157, 171 (2d Cir. 2008) (holding that “the Fourth Amendment’s Warrant Clause has no extraterritorial application” in the context of law enforcement agents’ search of a U.S. citizen’s residence abroad). Other commonly understood Fourth Amendment principles also vary by context. For example, “not all seizures of the person must be justified by probable cause to arrest for a crime.” *Florida v. Royer*, 460 U.S. 491, 498-99 (1983) (discussing cases). Even domestically, the tests and standards vary both by context—from homes to cars to airports—and by governmental interest.

Given this “constitutional tradition,” Opp. at 41, the extent to which, and under what conditions, the Fourth Amendment’s reasonableness requirement applied in the circumstances here simply was not clearly established. Plaintiffs do not—and cannot—cite a single case applying a Fourth Amendment remedy in this context, where relief depends on the amount of force that would be reasonable in the conduct of alleged military and intelligence operations against suspected enemy fighters abroad. In fact, to the extent the Supreme Court has spoken to

the application of the Fourth Amendment abroad, it has suggested that some of its protections would be limited, further compounding the absence of clearly established rights in this arena. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-74 (1990).[18] *Cf. Terrorist Bombings*, 552 F.3d at 171 (holding that reasonableness alone governed search of U.S. citizen's home abroad). Certainly, to wholly adopt and apply domestic law-enforcement standards of reasonableness to this unique context, as Plaintiffs recommend, Opp. at 29-30, would be unprecedented.

B. Decedents' Fifth Amendment rights were not clearly established.

Plaintiffs' argument that decedents' Fifth Amendment rights were clearly established is similarly flawed. Plaintiffs again ignore the concept of context and Justice Harlan's instruction that the question of "which specific safeguards" apply "in a particular context overseas" depends on "the particular circumstances of a particular case." *Reid v. Covert*, 354 U.S. 1, 75 (1952) (Harlan, J., concurring). Plaintiffs do not—and again, cannot—cite any cases involving the "particular context" here. To the extent this Court were to look to "constitutional tradition," Opp. at 41, even assuming that reliance on such generalities was appropriate in a qualified immunity inquiry, that tradition only supports Defendants, given the numerous wars the United States has fought that involved killing U.S. citizens in battle, and the total lack of case law suggesting that such citizens' constitutional rights were thereby violated.[19] *See N.Y. Times Co. v. U.S. Dep't of Justice*, -- F. Supp. 2d --, 2013 WL 50209, at * 8 (S.D.N.Y. Jan. 3, 2013) ("Indeed, during the American Civil War, hundreds of thousands of persons recognized by the United States

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[18] That *Verdugo-Urquidez* involved a "foreign national" defendant (who Plaintiffs erroneously describe as a plaintiff, Opp. at 29 n.36), does not change the fact that Plaintiffs have failed to cite *any* Fourth Amendment precedent involving seizures abroad.

[19] *Vance v. Rumsfeld*, 653 F.3d 591 (7th Cir. 2011), *vacated and rev'd en banc*, 701 F.3d 193 (7th Cir. 2012), and *Doe v. Rumsfeld*, 800 F. Supp. 2d 94 (D.D.C. 2010), *rev'd*, 683 F.3d 390 (D.C. Cir. 2012), are not to the contrary. Both cases involved detention, not the actual conduct of armed conflict. And neither case is good law.

Government as American citizens, who were engaged in armed rebellion against the country, were killed in battle without any suggestion that their due process rights were being violated.”).

Plaintiffs’ implicit argument, Opp. at 41, that the contours and extent of decedents’ due process rights were “beyond debate,” *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2083 (2011), is untenable given the complete absence of any case law clearly establishing the contours of due process in the unique and extraordinary context alleged. To the extent Plaintiffs suggest notice and opportunity were due, Opp. at 35-36, the only member of the Supreme Court to have discussed this particular context clearly stated to the contrary. *See Hamdi*, 542 U.S. at 597 (Thomas, J., dissenting) (notice and opportunity “clearly would not” be required in the context of alleged RPA missile strikes against terrorist targets, including a U.S. citizen, in Yemen). Indeed, Plaintiffs themselves fail to identify precisely what type of notice or opportunity they contend should have been afforded to decedents, instead leaving it “for this Court to consider,” Opp. at 35 n.45. Curiously, at the same time, they remind the Court that it “need not” decide “[w]hether more process was due.” Opp. at 36 n.46. The absence of case law and Plaintiffs’ inability to articulate the process to which they claim decedents were entitled confirm that the “contours” of decedents’ due process rights were not clearly established. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). *See Padilla*, 678 F.3d at 761-62.[20]

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[20] Regarding Plaintiffs’ Bill of Attainder Clause claim, they bear the burden to establish it. Plaintiffs, who mention a concurrence, Opp. at 38, cite not a single case holding that executive actions can violate that clause. The opinion in *Joint Anti-Fascist Communist Committee v. McGrath*, 341 U.S. 123 (1951), is not to the contrary. There, the Court focused on plaintiffs’ denial of the Executive’s classification of them as “fascist, communist, or subversive,” noted that the Executive had provided no support for its classification, and thus found that “on the face of” plaintiffs’ complaints, the executive action was entirely arbitrary. *Id.* at 133-37. Notably, the Court indicated that if the allegations suggested the classification were proper, “the case would have bristled with constitutional issues” and “would have raised questions as to the justiciability and merits” of plaintiffs’ claims. *Id.* at 135-36. In any event, given the lack of case law applying the Bill of Attainder Clause to executive action, any alleged violation is not clearly established.

C. If the Court reaches the constitutional issue, Plaintiffs' claims must fail.

Should the Court reach the merits of Plaintiffs' constitutional claims, Plaintiffs make two preliminary arguments, neither of which succeeds.[21] First, they dispute Defendants' characterization of the context of their claims as an "armed conflict." Opp. at 5-6. Second, they contend that this Court should ignore the Defendants' judicially noticeable material. *Id.* at 6-7.

Plaintiffs first argue that the question of whether their claims arise outside the context of armed conflict is a "mixed question of law and fact," and that therefore their assertions regarding that question must be accepted as true, Opp. at 6, but this misses the mark. Mixed questions of law and fact are "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 290 n.19 (1982). Aside from the obvious difficulty of applying that definition to Plaintiffs' conclusory assertions about the absence of an armed conflict, Plaintiffs fail to cite a single United States court case that sets a particular standard for when an armed conflict arises or ends.[22] As the termination of a "state of war" is a "political act," *Ludecke v. Watkins*, 335 U.S. 160, 168-69 (1948), Plaintiffs' inability to cite authority in support of their position is unsurprising. Defendants, on the other hand, cite the AUMF, a point consistently absent from Plaintiffs' discussion.

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[21] Although Plaintiffs place these arguments at the beginning of their opposition, and at times suggest they control the *other* bases for dismissal, they do not. Whether the United States was technically in an armed conflict with al-Qa'ida in the Arabian Peninsula (AQAP), or whether Anwar Al-Aulaqi was a Specially Designated Global Terrorist, simply does not affect the context in which Plaintiffs' claims were otherwise pled for purposes of the political question doctrine, special factors, or the identification of clearly established law.

[22] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), did not set such a standard. *See id.* at 629-31. Nor did *Hamdi*. *See* 542 U.S. at 520-21.

Moreover, even assuming the question were a mixed one, Plaintiffs' conclusory allegations are wholly inadequate under the most basic pleading standards. To illustrate the fallacy of Plaintiffs' contention, one need look no further than to the existence of probable cause in the malicious prosecution context, a mixed question of law and fact. *See Pitt v. District of Columbia*, 491 F.3d 494, 502 (D.C. Cir. 2007). A plaintiff cannot baldly allege—without any factual enhancement—that a prosecution lacked probable cause and thereby survive a motion to dismiss on qualified immunity grounds simply because the ultimate question is a mixed one. *See, e.g.*, *Iqbal*, 556 U.S. at 678 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."). But that is precisely what Plaintiffs' attempt to do. They offer no *factual* allegations suggesting that their claims *did not* arise in the context of armed conflict. To the contrary, the very acts alleged in the complaint—that high-level officials of the U.S. government allegedly directed missile strikes from RPAs against enemy targets abroad—appear on their face to be in the context of an armed conflict.[23]

Plaintiffs' second argument, that this Court cannot take judicial notice of the U.S. Department of the Treasury's notice designating Anwar Al-Aulaqi as a Specially Designated Global Terrorist (SDGT) and of the stated basis for the assertions supporting that designation, Opp. at 5-7, is also incorrect. As Defendants explained, MTD at 9 n.4, they do not ask this Court to take judicial notice of the underlying facts asserted in the designation, which themselves technically may be subject to reasonable dispute (but tellingly are not disputed by Plaintiffs). Rather, they ask this Court to take judicial notice of the fact that the U.S. government *made* those

[23] Similarly, Plaintiffs argue that the United States was not engaged in an armed conflict "with or within Yemen," Compl. ¶ 4, but the very facts they allege—that the United States carried out missile strikes within Yemen—are entirely consistent with the U.S. position that it is in an armed conflict with al-Qa'ida. *Cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006). And Plaintiffs provide no support for their suggestion, Opp. at 5 n.2, that the geographic scope of an armed conflict is limited to "hot battlefields." *Id.* (quoting Compl. ¶ 18).

Case 1:12-cv-01192-RMC Document 23 Filed 12/18/12 Page 29 of 33

assertions. *See* MTD at 9 n.4. That limited fact is not "subject to reasonable dispute"—nor do Plaintiffs dispute it—and therefore *Haim v. Islamic Republic of Iran*, 784 F. Supp. 2d 1 (D.D.C. 2011), is inapposite.[24] Qualified immunity, moreover, is adjudicated based on the facts *known to the official*. *See Anderson*, 483 U.S. at 641 (noting that the "relevant question" in a qualified immunity analysis is whether "a reasonable officer" could have believed his or her actions were lawful "in light of clearly established law and the information the . . . officer possessed"). Thus, the information believed to be true by U.S. officials, as demonstrated by the SDGT designation, is relevant and should be considered.[25] In addition to these preliminary arguments, Plaintiffs' arguments on the merits of their constitutional claims fail as well.

1. *Plaintiffs fail to allege a violation of the Fourth Amendment.* Fundamentally, Plaintiffs point to no case law establishing that Defendants' alleged actions in this unique and extraordinary context constituted a violation of any of the decedents' Fourth Amendment rights. As an initial matter, Plaintiffs' argument that Defendants' "intent or motivation" is irrelevant, Opp. at 31 n.39, is misplaced. *Graham v. Connor*, 490 U.S. 386 (1989), states that officials' *subjective* malice or good faith does not affect the reasonableness of their actions. *Id.* at 397. Plaintiffs confuse subjective intent with objective facts as Defendants understood them to be. The former is irrelevant. The latter is controlling for qualified immunity purposes. *See, e.g.*, *Jones v. Horne*, 634 F.3d 588, 596 (D.C. Cir. 2011) (qualified immunity "extends 'regardless of whether the government official's error is . . . a mistake of fact'" (quotation omitted)).

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[24] Indeed, Judge Bates considered the contents of the SDGT designation in deciding the motion to dismiss in *Al-Aulaqi v. Obama. See* 727 F. Supp. 2d at 10-11.

[25] Although Plaintiffs correctly note, Opp. at 31, that the judicially noticeable information was released a year or more before the alleged strike on Anwar Al-Aulaqi, that information should not lose its force. Plaintiffs do not suggest that U.S. officials' perception of Anwar Al-Aulaqi was misconceived or changed, or that between 2010 and 2011, Anwar Al-Aulaqi disavowed or otherwise distanced himself from the terrorist activities those officials detailed.

Similarly, the alleged absence of formal criminal charges against Anwar Al-Aulaqi, Opp. at 31, does not affect the reasonableness analysis. First, the relevant inquiry is "the severity of the crime at issue," *Graham*, 490 U.S. at 396, not whether charges were filed. Second, in the cases Plaintiffs cite, law enforcement officers either were *unable* to file charges *because* the plaintiff had done nothing wrong at the time force was used, *see Nelson v. City of Davis*, 685 F.3d 867, 879 (9th Cir. 2012), or employed force *knowing* the plaintiff had not been accused of any wrongdoing. *See Espinosa v. City & Cty. of S.F.*, 598 F.3d 528, 537 (9th Cir. 2010). Not so here. In any event, with respect to Anwar Al-Aulaqi, it cannot reasonably be disputed that he committed severe crimes as understood by U.S. officials, regardless of whether he was ever charged. *See N.Y. Times Co.*, 2013 WL 50209, at * 8 ("The activities in which Al–Awlaki is alleged to have engaged violate United States law. Specifically, they constitute treason . . . .").

With respect to Samir Khan, Plaintiffs' argument regarding the reasonableness of his alleged seizure is similarly unavailing. Even assuming the reasonableness of his alleged seizure turns on that of Anwar Al-Aulaqi, as explained, the latter seizure was not constitutionally unreasonable. Moreover, Plaintiffs offer no case law establishing that the reasonableness of the seizure of a vehicle's passenger depends on the reasonableness of seizing the intended target in the unique context alleged.[26] Indeed, Plaintiffs themselves acknowledge that "bystander deaths" are not *per se* constitutionally unreasonable. Opp. at 33 (alleging that Defendants "had time" to "minimize"—not eliminate—"bystander deaths").

Plaintiffs' attempts to demonstrate that Abdulrahman Al-Aulaqi was constitutionally seized also fall short. The cases involving errant bullets—while admittedly not completely analogous given the unique circumstances here—did not turn on whether officers knew who was

[26] Furthermore, Plaintiffs' statements that Samir Khan was "in the vehicle" that was allegedly struck by a missile, Opp. at 32, 33, are not found in their complaint. *See* Compl. ¶ 31.

possibly in the line of fire or were attempting to save them. Even accepting Plaintiffs' theory, however, Plaintiffs make no allegations about Defendants' knowledge as to whether Abdulrahman Al-Aulaqi was present at the "open-air restaurant" where they allege a strike occurred. Compl. ¶ 37. The lack of any alleged knowledge on the part of Defendants also explains away the cases involving the use of force against children. Opp. at 35. Even assuming those domestic cases apply, the officers there *knew* the object of their force was a child. *See Holland v. Harrington*, 268 F.3d 1179, 1184 (10th Cir. 2001) (officer trained laser siting onto back of fleeing four-year-old); *McDonald v. Haskins*, 966 F.2d 292, 294 (7th Cir. 1992) (officer held gun to head of nine-year-old).[27]

2. *Plaintiffs fail to allege a violation of the Fifth Amendment.*[28] Plaintiffs' argument that a "deliberate indifference" standard should control their substantive due process claims, Opp. at 37, fails on two counts. First, the deliberate indifference standard applies in the custodial context; "deliberate indifference will not violate due process where the state has no 'heightened responsibility toward the individual.'" *Smith v. District of Columbia*, 413 F.3d 86, 93-94 (D.C. Cir. 2005) (citation omitted). Second, Plaintiffs cite no support for their contention that the alleged launch of missiles from RPAs at armed enemy groups in Yemen did not involve tense and rapidly evolving variables merely because it involved "advance planning." Opp. at 31, 37. In any event, "[h]urried or unhurried," Defendants would have been "subjected to the 'pull of competing obligations'"—namely, the need to protect this Nation from terrorist threats arising abroad versus other concerns like the need to avoid excessive harm to innocent bystanders.

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[27] Regardless of whether Plaintiffs specifically allege Al-Banna was the target of the alleged strike, Opp. at 33 n.42, they certainly *do not* allege Abdulrahman Al-Aulaqi was the target.

[28] Plaintiffs effectively concede that to the extent their claims are properly analyzed under the Fourth Amendment, their substantive due process claims are precluded. Opp. at 37 n.47. *See Graham*, 490 U.S. at 395.

Lombardi v. Whitman, 485 F.3d 73, 83 (2d Cir. 2007) (affirming dismissal of due process claim where U.S. officials allegedly misled plaintiffs regarding safety of Ground Zero because agency was subjected to pull of competing obligations). *Cf. County of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998) ("Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other."). In such circumstances, only a conscience-shocking "intent to cause harm arbitrarily," not deliberate indifference, can give rise to a substantive due process claim. *Lombardi*, 485 F.3d at 75. *See Lewis*, 523 U.S. at 854-55. No fact alleged supports such a claim.[29]

And again, other than to assert generally that due process requires "fair notice and an opportunity to be heard," Opp. at 35, and to claim in conclusory fashion that Anwar Al-Aulaqi did not receive that process, Plaintiffs still fail to specify what process he was due under existing case law. As already detailed, *see supra* p.19, one justice has unequivocally stated that such process would not be due in the context of alleged missile strikes against terrorist targets in Yemen. In the context of alleged military and intelligence operations abroad against a leader of AQAP like Anwar Al-Aulaqi, notice and opportunity simply have no place. Indeed, Plaintiffs fail to adequately grapple with the Supreme Court's observation in *Moyer v. Peabody*, 212 U.S. 78 (1909), that in limited circumstances of national danger, executive process suffices, *id.* at 85, a freestanding observation not bound to the ultimate resolution of that case.

CONCLUSION

This Court should dismiss Plaintiffs' claims in their entirety.

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[29] With regard to Samir Khan and Abdulrahman Al-Aulaqi, Plaintiffs' conclusory assertion that their claims do not sound in negligence is unsupported. Plaintiffs do not allege that Defendants intentionally used RPAs to *maximize* harm to bystanders—an allegation which might shock the conscience. Rather, they claim Defendants *failed to act to minimize* harm, Opp. at 33, a claim squarely sounding in negligence.

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Respectfully submitted,

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