UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI, as personal representative of the estates of ANWAR AL-AULAQI and ABDULRAHMAN AL-AULAQI, *et. al.*,

Plaintiffs,

v.

LEON C. PANETTA, *et. al.*, in their individual capacities, ntiffs

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INTRODUCTION

This case concerns the most fundamental right the Constitution guarantees to citizens: the right not to be deprived of life without due process of law. Defendants respond with various arguments for dismissal of the case, but they all boil down to a single assertion: The Executive has the unilateral authority to carry out the targeted killing of Americans it deems terrorism suspects—even if those suspects do not present any truly imminent threat, even if they are located far away from any recognized battlefield, and even if they have never been convicted (or even charged) with a crime. The Executive can exercise this authority, Defendants say, without presenting evidence to any court before or after a killing is carried out and without even acknowledging to any court that their claimed authority to kill has been exercised.

Defendants argue, in other words, that the judiciary has no role whatsoever to play in assessing whether the Executive's killing of American citizens is lawful. This argument is exceedingly dangerous, and it is wrong. Under our constitutional system, the right to life is not entrusted to the Executive alone. It should not require repeating that "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

Plaintiffs' Complaint makes clear that Defendants have violated clearly established constitutional rights. Outside the context of armed conflict, lethal force may be used only as a last resort to counter an imminent threat of grave harm. The killings of Plaintiffs' sons and 16 year-old grandson—all American citizens—violated this standard, in part because officials have defined the term "imminent" so broadly as to negate its plain meaning. Even if the decedents had been killed in the context of armed conflict, Defendants' actions would have been illegal

because the laws of war prohibit the use of lethal force against civilians who are not "directly participating in hostilities"—a standard that requires a causal a

In April 2012, then–Deputy National Security Advisor John Brennan acknowledged publicly that the United States "carries out targeted killings" beyond hot battlefields like Afghanistan," frequently using "remotely

Aulaqi, Samir Khan, and at least two others. Id. Soon after, senior government officials publicly proclaimed that the United States had killed Al-Aulaqi. Id. ¶ 33.

Two weeks later, on October 14, 2011, sixteen-year-old Abdulrahman Al-Aulaqi was eating dinner at an open-air restaurant in the southern Yemeni province of Shabwa when Defendants authorized and directed another drone strike, killing Abdulrahman and at least six others, including another child. Id. ¶¶ 36–37. An anonymous senior government official described Abdulrahman as a "military-aged male" after his death. Id. ¶ 38. It was only after his family released his birth certificate that U.S. officials acknowledged, again anonymously, that Abdulrahman was a child. Id.

The killings of Anwar Al-Aulaqi, Samir Khan, and Abdulrahman Al-Aulaqi took place outside the context of any armed conflict. These killings were unlawful because at the time of their deaths, none of the three were engaged in activities that presented a concrete, specific, and imminent threat of death or serious physical injury. Id. ¶¶ 34, 35, 40. The killings were unlawful even if they were carried out in the context of armed conflict because at the time of their deaths, none of the three were directly participating in hostilities. Id. If Khan and Abdulrahman Al-Aulaqi were killed as bystanders, they died because of Defendants' failure to take legally required measures to protect them. Id. ¶¶ 35, 40. In authorizing and directing the use of lethal force that killed these three American citizens, Defendants violated the decedents' rights under the Constitution. Through this lawsuit, Plaintiff asks this Court to exercise its proper role as the ultimate interpreter of the Constitution and hold Defendants to account for their unlawful actions.

ARGUMENT

I. Plaintiffs Have Properly Pled Constitutional Claims and Defendants' Arguments Depend on Factual Assertions That Cannot be Considered at This Stage of the Litigation

Plaintiffs state claims under the Fourth and Fifth Amendments. Defendants do not—indeed, cannot—contest that the "Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens." *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 157, 167 (2d Cir. 2008) (quotation marks omitted); *see also Reid v. Covert*, 354 U.S. 1, 6 (1957). But through their Motion to Dismiss, Defendants improperly attempt to introduce facts contesting the Complaint's well-pled allegations, and specifically contest that the decedents were unlawfully killed outside the context of armed conflict.[2] *See, e.g.*, Defs. Br. 2, 9, 14, 37. Indeed, Defendants premise their entire argument against this Court's jurisdiction over Plaintiffs' claims on the erroneous assumption that Plaintiffs' family members were killed in the context of armed conflict.[3] That assumption is predicated on factual assertions that cannot be credited by this Court at this stage of the litigation. While Defendants may challenge Plaintiffs' allegations at trial or through a motion for

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[2] Plaintiffs clearly allege that the killings of all three decedents took place outside the context of armed conflict. *See* Compl. ¶¶ 1, 4, 17, 18, 20. The Complaint provides factual context for these allegations, referencing a statement by John Brennan "acknowledg[ing] publicly that the United States carries out targeted killings of suspected terrorists beyond hot battlefields like Afghanistan,'" and specifically in Yemen. Compl. ¶ 18. And the Complaint alleges that U.S. officials "have made clear that the government claimed authority to carry out the targeted killing of suspected terrorists, including killings executed outside the context of armed conflict, extends to American citizens." *Id.* ¶ 20. These allegations more than satisfy federal pleading requirements, and Defendants do not argue otherwise.

[3] *Compare* Compl. ¶¶ 4, 17, 18 (alleging killings took place outside of armed conflict and far from any battlefield), *with, e.g.*, Defs. Br. 6 ("enemy forces engaged in an armed conflict against the United States"), 26 ("active-war decision-making"), 30 ("in the course of waging war"), 32 ("active battlefield"), 40 ("on the battlefront"), 40 n.28 ("active hostilities"), 41 ("The very context of Plaintiffs' claims" is "the conduct of hostilities in an armed conflict . . . .").

dispute. See Haim v. Islamic Rep. of Iran, 784 F. Supp. 2d 1, 6 (D.D.C. 2011) (because findings of fact even in prior judicial proceedings are "'subject to reasonable dispute'—a necessary requisite under the Federal Rules

to usurp that which is

violated the rights of the decedents under the First and Fifth Amendments. That Plaintiffs' claims may have arisen in a national-security context does not change these core constitutional questions, nor remove them from the expertise of the judicial sphere. *See, e.g.*, *Comm. of U.S.*

whether Defendants' use of lethal force against th[illegible] American citizens violated their Fourth and Fifth Amendment rights[illegible]. The two questions are not "one and the same."

Defendants urge the Court to demur from that task by asserting that the "conduct of armed conflict" is a matter with a "textually demonstrable constitutional commitment" to the political branches. Defs. Br. 9–10. But even if armed conflict were the context, the Supreme

"hardly competent" to evaluate such information, Defs. Br. 14, flies in the face of this experience.

Indeed, in Al-Aulaqi v. Obama, Judge Bates stated that the plaintiff was "correct to point out that habeas cases involving Guantanamo detainees often involve judicial scrutiny of highly sensitive military and intelligence information." 727 F. Supp. 2d 1, 50 (D.D.C. 2010). Judge Bates ultimately concluded that the relief the plaintiff sought in that case—an injunction against future action—"dictate[d] a different outcome" there than in the habeas litigation. Id. But the relief Plaintiffs now seek requires only the type of "post hoc determinations [that] are 'precisely what courts are accustomed to assessing,'" id. (quoting Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 65 (D.D.C. 2004)). Defendants gloss over this important distinction in arguing that the "same logic" of Judge Bates' deliberately narrow political question ruling applies here, Defs. Br. 10. See Al-Aulaqi, 727 F. Supp. 2d at 52 ("[T]his Court does not hold that the Executive possesses unreviewable authority to order the assassination of any American whom he labels an enemy of the state." (quotation marks omitted)).

C. Plaintiffs' constitutional claims pose legal questions, not policy choices, and the Court's adjudication of these questions would not show a lack of due respect to the political branches.

Defendants erroneously argue that Plaintiffs' claims involve "policy choices," the

842; see also Zivotofsky, 132 S. Ct. at 1427. The factors involved in evaluating Plaintiffs' constitutional claims—for example, whether a threat is imminent, whether non-lethal alternatives are available, and whether lethal force is permissible in light of the threat to bystanders—are not "policy choices and value determinations," Defs. Br. 18 (quotation marks omitted), but well-established legal criteria that courts routinely apply in evaluating the constitutionality of the use of lethal force under the Fourth and Fifth Amendments.[15] See infra § IV(A)(1)–(2).

Finally, the Court "should be particularly cautious before forgoing adjudication of a dispute on the basis that judicial intervention . . . would express a lack of respect due coordinate branches of government." Zivotofsky, 132 S. Ct. at 1432 (Sotomayor, J., concurring) (quotation marks omitted). The Supreme Court has "repeatedly rejected th[is] view." Id. Simply put, "[i]nterpretation of the Constitution does not imply lack of respect for a coordinate branch." Goldwater v. Carter, 444 U.S. 996, 1001 (1979).[16]

III. A *Bivens* Remedy Is Available to Plaintiffs

"'[I]t has been the rule from the beginning,'" the Supreme Court stated in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that "'where

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[15] *People's Mojahedin Org. of Iran v. U.S. Dep't of State* ("*PMOI*"), 182 F.3d 17 (D.C. Cir. 1999), is a far cry from the proposition for which Defendants cite it: that the determination of whether the decedents presented an imminent threat—a judicially established inquiry that is part of the Fourth and Fifth Amendment tests for determining the legality of lethal force—is a political question, Defs. Br. 15. In *PMOI*, the D.C. Circuit found that the Secretary of State's determination, for the purpose of designating foreign terrorist organizations, that an organization "threatens . . . the national security of the United States" was a "political judgment[]" beyond the competence of the Judiciary to disturb. 182 F.3d at 23. Plaintiffs' claims, which allege violations of the constitutional rights of U.S. citizens, are the antithesis of "decisions of a kind

federally protected rights have been invaded, . . . courts will be alert to adjust their remedies so as to grant the necessary relief." *Id.* at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). In *Bivens*, the Supreme Court held that an individual alleging a F

A. No special factors counsel hesitation.

1. "Special factors" identified by the Supreme Court concern the legislative, not executive, prerogative.

Defendants correctly represent that "separation-of-powers concerns" underlie the "hesitation" aspect of the *Bivens* "special factors" analysis. Defs. Br. 21. But they wrongly imply that such concerns relate to judicial reluctance to interfere with executive action. Rather, the Supreme Court has clearly identified "special factors" relating to the legislative prerogative as those "counseling hesitation" under *Bivens*.[17] Recognizing a *Bivens* claim here would implicate no such concerns.

The Supreme Court has identified only a limited number of "special factors" to date: (1) concerns relating to "federal fiscal policy" or a congressional delegation of authority, *see Bivens*, 403 U.S. at 396–97; (2) intrusion on "'the unique disciplinary structure of the Military Establishment and Congress' activity in the field,'" *United States v. Stanley*, 483 U.S. 669, 683 (1987) (quoting *Chappell v. Wallace*, 462 U.S. 296, 304 (1983)); and (3) "difficulty in defining a workable cause of action," *Wilkie v. Robbins*, 551 U.S. 537, 555 (2007). Citation in the "special factors" analysis is therefore only related to congressional action—particularly to Congress's decisionmaking as to whether, and which, remedies should lie for rights violations.[18]

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[17] *See Bush v. Lucas*, 462 U.S. 367, 380 (1983) (describing the "special factors" cited in *Bivens* as "not concern[ing] the merits of the particular remedy" but, rather, "the question of who should decide whether such a remedy should be provided"—*i.e.*, the Judiciary or the Legislature). In fact, Defendants' own citation in *Bush* acknowledges that it is "those who write the laws" to whom "special factors" deference is due. Defs. Br. 24 (quotation marks omitted).

[18] Concerns about intrusion into Executive Branch functions and decisionmaking are more appropriately considered in the context of absolute or qualified immunities from suit, the state-secrets privilege, or the political question doctrine. *See Hui v. Castaneda*, 130 S. Ct. 1845, 1852 (2010) (explaining that *Bivens* "special factors" and qualified immunity "present[] . . . separate questions[]" (emphasis added)); *Stanley*, 483 U.S. at 684 ("[T]he *Bivens* inquiry . . . is analytically distinct from the question of official immunity from *Bivens* liability."); *Carlson*, 446 at 19. By invoking the same concerns in relation to *Bivens* that they raise in their political

than forty years. Thus, since that decision,

Defendants' "special factors" warnings of damage to military effectiveness, prestige, and decisionmaking are unconvincing. *See* Defs. Br. 25–27. Military and intelligence officers must obey the commands of the Constitution regardless of the context in which they act, even when exercising national-security and war powers.[27] When those officers violate the constitutional rights of citizens, judicial review is not an "intrusion" into their affairs but rather the performance of the courts' constitutional duty to ensure that the officers act "consistent with . . . the Constitution." *Parisi v. Davidson*, 405 U.S. 34, 55 (1971) (Douglas, J., concurring); *see* id.

Moreover, unlike other cases in which courts have dismissed Bivens claims, this lawsuit does not seek to delve into the "job risks and responsibilities of covert CIA agents" or "ongoing covert operations." Wilson, 535 F.3d at 710 (quotation marks omitted).[29] It does not seek to uncover future national-security plans. It is, instead, a suit of limited aim, asking the Court to determine whether Defendants acted in accordance with the Constitution when they took actions resulting in the deaths of three American citizens.[30]

Finally, any "special factor" concern related to foreign relations is likewise unfounded and unpersuasive. As Defendants' own brief acknowledges, "the precise foreign affairs concerns detailed in Ali and Sanchez-Espinoza—a—the two cases, in addition to Doe, they cite to demonstrate the very existence of such a "special factor"—"do not squarely arise in this case." Defs. Br. 28.[31] While Defendants cast Plaintiffs' claims—whether Defendants' killings of U.S. citizens violated the U.S. Constitution—as having the potential to "clearly affect our government's relations with the government of Yemen," Egypt, and other countries, id., this is

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a diversion, not an argument directed at substance.[32] In determining whether to provide a remedy for constitutional violations committed in a foreign country, courts routinely inquire into the relationships, cooperation, and communications between the United States and foreign governments and officials. Cf. Zivotofsky, 132 S. Ct. at 1428.

B. Congress has not provided an alternative remedy.

In considering Plaintiffs' *Bivens* claims, this Court must also consider whether an existing remedy protects the constitutional interest at stake. *Wilkie*, 551 U.S. at 550. But just as in *Bivens* itself, Plaintiffs have no alternative means to redress for the killings of their sons and grandson. For Plaintiffs, "it is damages or nothing," 403 U.S. at 410 (Harlan, J., concurring). Statutes cited by Defendants are unavailable, inadequate, or both.[33] Without a *Bivens* remedy, Plaintiffs will have no opportunity to challenge the legality of Defendants' conduct in any U.S. forum. See, e.g., *Lebron v. Rumsfeld*, 670 F.3d 540, 556 (4th Cir.) (finding that the plaintiff "had extensive opportunities to challenge the legal basis for his detention" in several habeas in

C. A Bivens

In long ago rejecting an absolute-immunity regime in national-security cases, the Supreme Court took for granted officials' good faith in executing their duties, but, even so, warned that the "danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity." Mitchell, 472 U.S. at 523; accord Butz v. Economou, 438 U.S. 478, 501 (1978) ("[T]he cause of action recognized in Bivens . . . would . . . be drained of meaning if federal officials were entitled to absolute immunity for their constitutional transgressions." (quotation marks omitted)). That "danger" is distinctly present in this case. Defendants' arguments would deny a cause of action to future plaintiffs based on the mere possibility that their suits might somehow burden Executive Branch officials by requiring them to justify grave constitutional abuses. But that is manifestly not what Bivens represents. This Court should not endorse a rule that would effectively insulate from judicial review the most egregious type of official misconduct.

IV. The Defendants Are Not Entitled to Qualified Immunity from Their Violations of Decedents' Constitutional Rights

The constitutional right not to be deprived of life by government officials without due process of law is elemental. Under the circumstances Plaintiffs allege, Defendants' use of deadly force against the decedents—Americans citizens who had never been charged with and convicted of a crime, and did not pose a specific, concrete, and imminent threat—was unambiguously unconstitutional under the Fourth and Fifth Amendments. Even in the context of armed conflict, the Constitution continues to protect U.S. citizens, and, at a minimum, the laws of war establish clear constraints on the use of lethal force against civilians that are well known to, and binding

on, U.S. military and intelligence officials.[34] Defendants therefore violated the decedents' clearly established rights and are not entitled to qualified immunity. See Harlow, 457 U.S. at 818 (1982).[35]

A. Defendants' use of lethal force violated the decedents' clearly established constitutional rights.

Outside the context of armed conflict, the Constitution unambiguously prohibits the deprivation of life and the use of excessive force in effecting seizures, except where lethal force

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[34] Defendants concede that the clearly established Fourth and Fifth Amendment standards upon which Plaintiffs rely are "accepted" standards. Defs. Br. 41. They assert, however, that Plaintiffs seek to "import" these standards into the context of armed conflict, thereby rendering the decedents' rights in that context unclear. Id. 35. But Defendants misconstrue Plaintiffs' argument: Plaintiffs argue that Fourth and Fifth Amendment standards developed in the law-enforcement context apply to their claims in the non-armed-conflict context Plaintiffs allege; they separately argue that clearly established law-of-war standards apply to the use of lethal force in the context of armed conflict. See infra § IV(B)(1). And while Defendants argue that the decedents' rights not to be arbitrarily killed were unclear in the factual context they ask the Court to assume, that argument—yet again—depends on factual assertions that are improper at this stage. See supra § I. In any event, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." Hope v. Pelzer, 536 U.S. 730, 741 (2002); cf. Coolidge v. New Hampshire, 403 U.S. 443, 454 n.4 (1971) ("It has been repeatedly decided that [the Fourth and Fifth] Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous executive officers.").

[35] The Court should thus not forgo, as Defendants urge, the usual first inquiry of the qualified immunity analysis—whether the facts alleged, "[t]aken in the light most favorable" to Plaintiffs, make out the violation of a constitutional right,

is a last resort in the face of an imminent threat. Defendants do not argue otherwise.[36] That the decedents were killed abroad does not render their clearly established constitutional rights unclear. See, e.g., Reid, 354 U.S. at 6 ("When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government.").

1. Defendants' conduct violated the Fourth Amendment rights of the decedents.

It is among the most basic of constitutional interpretations that the Fourth Amendment's prohibition on "unreasonable seizures" bars government officials from using excessive force against citizens. See Graham v. Connor, 490 U.S. 386, 395 (1989). Under the Supreme Court's prevailing standard, an official's use of deadly force violates the Fourth Amendment unless it is "objectively reasonable" under the circumstances. Id. at 397.

To evaluate the reasonableness of lethal force, courts routinely rely on two primary criteria. First, the use of lethal force is reasonable only when an individual poses a concrete and imminent threat of deadly harm. See Scott v. Harris, 550 U.S. 372, 384 (2007); see also, e.g., Graham, 490 U.S. at 396; Tennessee v. Garner, 471 U.S. 1, 11 (1985). The imminence of a threat is assessed at the moment force is applied. See Graham, 490 U.S. at 396. An 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." Cordova v. Aragon, 569 F.3d 1183, 1190

[36] To the extent that Defendants rely on United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), Defs. Br. Tfd l rely o Duv Tj /T suggestns that ht

(10th Cir. 2009). 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, e.g., 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). And when, as here, officials use deadly force against an individual who has not been accused or charged with a crime, the use of force becomes less objectively reasonable. See, e.g., Espinosa v. City & Cnty. of S.F., 598 F.3d 528, 537 (9th Cir. 2010); cf. Garner, 471 U.S. at 9 ("The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment."[37]).

(a) Anwar Al-Aulaqi

Applying the clear standards above to the Complaint, Defendants' deliberate use of lethal force against Anwar Al-Aulaqi was an unreasonable seizure. Although Defendants (improperly) assert facts supporting their contention that lethal force was reasonable against Al-Aulaqi because he was "an enemy and an active threat," Defs. Br. 37–38, they do not claim that he posed a concrete and imminent threat when he was killed as the Fourth Amendment requires for lethal force to be reasonable. The distinction is critical; it means that federal officials cannot

[37] The Fourth Amendment's limitations on the use of deadly force are consistent with established standards under international human rights law. See, e.g., 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, 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).

Defs. Br. 38, Garner did not dispense with the imminence requirement, 471 U.S. at 11 ("Where the suspect poses no immediate threat to officers . . . the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."). And Defendants' assertion that Al-Aulaqi's surrender was not a viable option, Defs. Br. 38, is no answer at all (even setting aside its procedural deficiency) to the relevant question of whether Defendants could reasonably have pursued non-lethal alternatives, such as capture. To Plaintiffs' knowledge, no court has ever held that a suspect's professed unwillingness to turn himself in—in the absence of criminal charges—justifies the use of lethal force; certainly, Defendants do not cite any.

(b) Samir Khan

Defendants argue that the killing of Samir Khan did not violate the Fourth Amendment solely on the grounds that Khan was a bystander who "unintentionally struck" when Al-Aulaqi was killed, and thus was not "seized" for Fourth Amendment purposes. Defs. Br. 36, 40-42. Defendants' argument directly contradicts clearly established law. As Defendants note, a Fourth Amendment seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied." Brower v. Cnty. of Inyo, 489 U.S. 593, 597 (1989) (emphasis removed). A seizure occurs "even when an unintended person or thing is the object of

seized he must be the officer's "target"). Pl

demonstrate above, even if Abdulrahman was an unintended victim of the October 14 drone strike, he was "seized" within the meaning of the Fourth Amendment because the "means" of the

a public restaurant made it entirely foreseeable that bystanders, including children, would be killed. Indeed, seven people, including Abdulrahman and another child, were killed. Compl. ¶ 37. Abdulrahman's status as a child also weighs heavily against the reasonableness of lethal force; courts have repeatedly held that deadly force deliberately used against minors who are not

To comply with the Fifth Amendment, the government must provide an individual not

(1998) (quotation marks omitted).[47] In the language of Fifth Amendment doctrine, when the conduct of an executive officer "may fairly be said to shock the conscience," it violates the substantive component of the Due Process Clause. Id. at 847 n.8. When courts evaluate the use of deadly force under the Fifth Amendment, they prescribe essentially the same objective limitations as under the Fourth Amendment: That is, where the circumstances allow for "actual deliberation" and "repeated reflection"—that is, when a threat is not imminent—an officer's use of lethal force will shock the conscience if he acts with deliberate indifference to a risk of serious harm. Id. at 851, 853.[48]

Here, Defendants authorized and directed the strikes that killed the decedents with premeditation and deliberation—indeed, in the case of the strike that killed Anwar Al-Aulaqi and Samir Khan, with at least weeks (if not more) of advance planning. Their actions were not made "in haste" or in response to an "unforeseen" situation. Lewis, 523 U.S at 853–55. While Defendants assert that there is a plausible basis to conclude that their actions were "unrelated to a legitimate government interest," Defs. Br. 42, that action, "even if taken pursuant to legitimate objectives[,] . . . may not proceed via means that shock the conscience." Norris v. Dist. of Columbia, 737 F.2d 1148, 1151 (D.C. Cir. 1984) (alteration and quotation marks omitted).

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[47] Should the Court conclude that Plaintiffs' claims of excessive force are not properly analyzed under the Fourth Amendment, it must adjudicate those claims under the Fifth Amendment. See Lewis, 523 U.S. at 842–45; Graham, 490 U.S. at 395 (discussing relationship between Fourth and Fifth Amendments in context of excessive-force claims).

[48] Defendants argue for a higher standard of liability that applies in situations where there is no time for deliberation, such as "sudden police chases" or "an occasion calling for fast action." Lewis, 523 U.S. at 853. See Defs. Br. 42 (arguing Plaintiffs must show that Defendants engaged in "'conduct 62 T.u act44 ss0 T20007 Te94 0 TD 59 0 TD -.0001 T 1 g 7T 12 0 0 12 72wherT 12s

Defendants' conduct with respect to Anwar Al-Aulaqi has all the markings of a Bill of Attainder. See Selective Serv. Sys. v. Min. Pub. Interest Research Grp., 468 U.S. 841, 847 (1984) (discussing specificity, punishment, and the lack of judicial process as the three elements of acts of attainder). Defendants authorized Al-Aulaqi's placement on CIA and JSOC kill lists. Compl. ¶¶ 23, 25. They directed the use of lethal force against Al-Aulaqi, inflicting the ultimate punishment. See BellSouth Corp. v. F.C.C., 162 F.3d 678, 683 (D.C. Cir. 1998) (sentence of death "is a bill of attainder, without regard to whether Congress could articulate some nonpunitive purpose for the execution, such as the protection of public safety[50]") and they imposed punishment without any of the protections akin to those available in a judicial trial, authorizing and directing his killing after a secret executive process. United States v. Lovett, 328 U.S. 303, 316–17 (1946) (holding that the Attainder Clause prohibited plaintiffs from being tried by secret legislative hearings adjudicating guilt based on secret evidence). The death warrant for Anwar Al-Aulaqi unquestionably would have been unlawful if it had originated from the Legislature; it is no less constitutionally offensive because it came from the Executive. Other than citing to three cases holding no weight in this Circuit, Defendants offer no compelling reason why the Attainder Clause should not apply here.[51]

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executive death warrants not been considered an archaical relic at the Founding, the Attainder Clause would likely have had a place in Article II. See Targeted Killing FOIA, 2013 WL 50209, at *7 (citing THE FEDERALIST NO. 47 (James Madison)) (noting the Founders' fear of concentrating power in any single person, particularly in the Executive).

[50] At common law, bills of attainder imposed the death penalty. Selective Serv. Sys., 468 U.S. at 852.

[51] This Court has already examined executive action under the Attainder Clause in several instances, albeit without deciding the question. See, e.g., Hoffa v. Saxbe, 378 F. Supp. 1221, 1239 (D.D.C. 1974) (that executive action was at issue "[did] not legally distinguish" the case from another in which a state statute was challenged as a bill of attainder).

B. Even if the law of armed conflict does not apply, Defendants violated decedents' clearly established rights.

1. The rights of the decedents were clearly established under the law of armed conflict.

Even if the Court were to determine that the appropriate context here is armed conflict, Defendants would still not be entitled to qualified immunity. The Supreme Court has emphasized that citizens are entitled to fundamental constitutional protections even in war, and it has reaffirmed that principle in the specific armed conflict context Defendants assert here. See, e.g., Hamdi, 542 U.S. at 531 ("reaffirm[ing] . . . the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law"). Citizens asserting constitutional rights are t

Speech).[52] This is not a situation where there is an "open legal question" about the circumstances under which lethal force is permissible, as in Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2085 (2011). See, e.g., Defs. Br. 29. And the lack of a specific case on point addressing identical circumstances, without which Defendants claim they could not have known of the illegality of their actions, id. 32, is far from dispositive. See, e.g., Hope v. Pelzer, 536 U.S. 730, 741 (2002) (where the constitutional violation is obvious, the lack of a case addressing factually identical circumstances is not fatal to showing that the right was "clearly established"); Burgess v. Lowery, 201 F.3d 942, 946 (7th Cir. 2000) ("The relevant sources of law from which perception of [the] contours [of a right] is derived include not only cases on point but also the constitutional tradition that generates those decisions." (emphasis added)). No reasonable official would have believed that directing lethal force against American civilians without due regard for fundamental restrictions on the use of lethal force in armed conflict, as Plaintiffs allege occurred here, would be lawful.[53]

2. Plaintiffs have adequately alleged that

(a) Targeting of the Decedents

In the context of an armed conflict, the laws of war prescribe core limitations on the use of deadly force. "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. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8); 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"). In a non-international armed conflict (that is, a conflict between a nation state and an armed group), it is clearly established that 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." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 13(3), June 8, 1977, 1125 U.N.T.S. 609; 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).[54] Defendants' use of lethal force against the decedents was unlawful because, as Plaintiffs allege in the alternative, none were directly participating in hostilities at the time they were killed. See Compl. ¶¶ 4, 5, 34, 35, 40.[55]

[54] Direct participation in hostilities is a broader restriction than the "imminence" requirement in the law-enforcement and human rights context, but it still requires a causal and temporal nexus to actual hostilities. See NILS MELZER, INTERPe12 246.0 12 in ,

(b) Harm to the Decedents as Bystanders

Clear standards under the laws of war also constrain the use of lethal force against civilians who are bystanders. *See* TARGETING 39, 89–90; FM 27-10 ¶ 254. First, the "proportionality" requirement prohibits the use of lethal force that could reasonably be expected to cause excessive harm to civilian bystanders. *See* TARGETING 89–90; FM 27-10 ¶ 41. Second, even if the use of lethal force is proportionate, the party using lethal force must take all feasible precautions to avoid or minimize civilian harm. *See* TARGETING 89–90; FM 27-10 ¶ 41. Defendants do not argue that these standards are unclear, and Plaintiffs have adequately pled that if Samir Khan and Abdulrahman Al-Aulaqi were killed as bystanders, Defendants' use of lethal force against them was unlawful because Defendants failed to "comply with the requirements of distinction and proportionality and [to] take all feasible measures to protect bystanders." Compl. ¶¶ 5, 35, 40.[56] Thus, for example, Defendants' missile strike at or near a public restaurant, where civilians gather, killing Abdulrahman, was objectively a violation of law of war limitations on the use of lethal force.

(c) Procedural Due Process

Defendants' only argument against Plaintiffs' procedural due process claims as alternatively pled in armed conflict is that protections "may be diminished" in a battlefield situation, and that the closed executive process that resulted in the decedents' killings was sufficient under the circumstances. *See* Defs. Br. 43. But while process may be

have only pursued non-lethal alternatives against them, such as capture and detention under the laws of war, or prosecution. If the decedents had been captured and lawfully detained, they would have been entitled to the minimum Fifth Amendment protections of fair notice and an opportunity to be heard. *Hamdi*, 542 U.S. at 535 (U.S. citizen captured in Afghanistan and detained as an "enemy combatant" was constitutionally entitled to "core" procedural due process rights); *Targeted Killing FOIA*, 2013 WL 50209, at *8 (suggesting that government's killing of Anwar Al-Aulaqi may have violated the Fifth Amendment's requirement of "notice of the proposed action and an opportunity to be heard").[57] Defendants' unlawful use of lethal force against the decedents thus violated their right to procedural due process protections.

V. Plaintiffs Have Capacity To Sue on Behalf of Decedents

On a Rule 12(b)(6) motion, the Court "must accept" Plaintiffs' allegations that they are the personal representatives of the decedents' estates, Compl. ¶¶ 10, 11, "as true." *Pineo v. City of Sacramento*, No. Civ. S-052080, 2006 WL 193181, at *1–*2 (E.D. Cal. Jan. 19, 2006); *accord Clarke ex rel. Estate of Medina v. Dist. of Columbia*, No. CIV.A 06-0623, 2007 WL 1378488, at *1 (D.D.C. May 9, 2007); *Deirmenjian v. Deutsche Bank, A.G.*, No. CV 06-00774, 2006 WL 4749756, at *30 (C.D. Cal. Sept. 25, 2006) ("[A] plaintiff's capacity to sue generally cannot be decided on a motion to dismiss." (citing FED. R. CIV. P. 9(a)), and Defendants cite no pleading requirement to the contrary.[58]

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[57] Defendants cite two cases for the proposition that judicial process is not always required in circumstances like rebellion or armed conflict. Defs. Br. 44. But the government provided post-deprivation process (like that sought here) in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974), and *Moyer v. Peabody*, 212 U.S. 78 (1909), is properly read as a dismissal based on qualified immunity long before the robust development of that doctrine as it applies today. See *Scheuer v. Rhodes*, 416 U.S. 232, 248 (1974).

[58] Although they are not obligated to do so, Plaintiffs will attach an attorney declaration providing details about Plaintiffs' probate representations, and will file additional documents should the Court so require. Plaintiff Khan is recognized as the personal representative of Samir Khan's

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion to Dismiss.

Dated: February 5, 2013

Respectfully submitted,

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estate in the District. Kebriaei Decl. ¶ 3. Plaintiff Al-Aulaqi was appointed the personal representative of the estates of his son and grandson in Yemen on January 10, 2012. *Id.* ¶¶ 4–6, but that representation has not yet been recognized in the District. *Id.* Plaintiff made repeated, documented efforts to schedule a timely appointment at the U.S. Embassy in Sana'a to obtain the consular certification of his Yemeni record required by District law, but Embassy personnel did not grant that request until January 21, 2013. *Id.* ¶¶ 7–8. Plaintiffs' counsel will diligently assist Plaintiff in finalizing recognition after his scheduled March 2013 appointment. *See id.* ¶ 8.

In filing this declaration now, Plaintiffs expressly disclaim reference to it in the event the Court would take its attachment as requiring conversion of Defendants' motion into one for summary judgment under Rule 56. If there is a capacity defect, it is "curable." *Estate of Manook v. Research Triangle Inst., Int'l*, 693 F. Supp. 2d 4, 17 (D.D.C. 2010), and in any event, "[t]he court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action." FED. R. CIV. P. 17(a)(3) (emphasis added). Moreover, D.C. SUPER. CT. R. CIV. P. 44(a)(2) authorizes the Court to accept a foreign document even without consular certification "for good cause shown" where authenticity is not disputed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF PARDISS KEBRIAEI

I, Pardiss Kebriaei, hereby declare and state as follows:

1. I am a member of the New York State Bar and am one of counsel for Plaintiffs in this case. On July 30, 2012, this Court granted my motion for leave to appear pro hac vice.

2. I am a Senior Staff Attorney at the Center for Constitutional Rights, 666 Broadway, 7th Floor, New York, New York 10012 and have worked in that capacity since 2007. I submit the following declaration in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss.

3. I have reviewed a certificate that, by its terms, was issued by the Register of Wills for the Probate Division of the Superior Court of the District of Columbia. The certificate is dated May 17, 2012, and it confirms the filing with the Register of Wills of an authenticated copy of Samir Khan's will and an authenticated copy of the Notice of

Alexandria, Virginia. The certificate states that Sarah Khan's appointment of personal representative was made on February 6, 2012.

4. In January 2012, I met with my client in the above-captioned case, Nasser Al-Aulaqi. At that time, Mr. Al-Aulaqi transferred to my possession a document written in Arabic, which he told me was a legal document issued by the Yemeni government appointing him as the legal representative of the estates of his son and grandson.

5. In March 2012, I commissioned a U.S. Department of State–approved translator to provide a certified English translation of the document given to me by Mr. Al-Aulaqi.

6. I have reviewed the certified translation. By its terms, the translation indicates that the original document was issued by the Department of Justice of the Republic of Yemen. The translation authorizes Nasser Al-Aulaqi's appointment as the legal representative of the estates of his son, Anwar Al-Aulaqi, a

9. Pursuant to 28 U.S.C. § 1746, I hereby declare and state under the penalty of perjury that the foregoing is true and correct.

Date: February 5, 2013

/s/ Pardiss Kebriaei
PARDISS KEBRIAEI