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)

DEFENDANTS' MOTION TO DISMISS

Under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants Secretary Leon Panetta, Admiral William McRaven, Lieutenant General Joseph Votel, and former CIA Director David Petraeus—all current or former federal employees sued in their individual capacities—hereby move this Court to dismiss Plaintiffs Nasser Al-Aulaqi and Sarah Khan's complaint because this Court lacks subject matter jurisdiction over Plaintiffs' claims, and because Plaintiffs have failed to state a claim upon which relief may be granted. The grounds for this motion are set forth in the accompanying memorandum of points and authorities. A proposed order is attached.

Dated: December 14, 2012

Respectfully submitted,

STUART F. DELERY
Principal Deputy Assistant Attorney General
Civil Division

RUPA BHATTACHARYYA
Director, Torts Branch

MARY HAMPTON MASON
Senior Trial Counsel
D.C. Bar No. 427461

/s/ *Paul E. Werner*
PAUL E. WERNER
(MD Bar, under LCvR 83.2(e))
Trial Attorney
United States Department of Justice
Torts Branch, Civil Division
P.O. Box 7146, Ben Franklin Station
Washington, D.C. 20044
(202) 616-4152 (phone)
(202) 616-4314 (fax)
E-mail: Paul.Werner@usdoj.gov

Attorneys for Defendants

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MEMORANDUM OF SUPPORTING POINTS AND AUTHORITIES

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Torts Branch, Civil Division
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Washington, D.C. 20044
(202) 616-4152 (phone)
(202) 616-4314 (fax)
E-mail: Paul.Werner@usdoj.gov

Attorneys for Defendants

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Plaintiffs Nasser Al-Aulaqi and Sarah Khan filed this complaint as the purported representatives of the estates of Anwar Al-Aulaqi, Samir Khan, and Abdulrahman Al-Aulaqi (Anwar Al-Aulaqi's son), claiming decedents died in two separate "missile strikes" in Yemen.[2] *See* Compl. ¶¶ 2-3, 10-11. Plaintiffs claim these alleged strikes were launched from remotely

conduct of Executive Branch officials in carrying out purported military and counterterrorism operations abroad in exercising the Executive's prerogative of national self-defense and in the course of an armed conflict authorized by Congress. Such a request is a "quintessential source[]" of non-justiciable political questions. *Al-Aulaqi*, 727 F. Supp. 2d at 45 (citation omitted).

The Supreme Court has long recognized that certain questions, "in their nature political," are not fit for adjudication. *Marbury v. Madison*, 1 Cranch 137, 170 (1803). The "political question doctrine" is "primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210-11 (1962). It is the "relationship between the judiciary and the coordinate branches of Federal Government" that gives rise to a political question. *Id.* at 210. Such questions arise in "controversies which revolve around policy choices and value determinations" that are constitutionally committed to the Executive or Legislative Branches of our system of government. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

In this case, the gravamen of Plaintiffs' complaint is that U.S. officials unlawfully applimB. o(es)-5(o)-4

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identifies the issues presented, it considers whether any factors the Supreme Court identified in *Baker v. Carr* apply.

In *Baker*, the Court listed six factors to consider in determining whether a suit presents non-justiciable political questions. Courts should refrain from adjudicating suits raising issues that (1) have a "textually demonstrable constitutional commitment" to the political branches; (2) lack "judicially discoverable and manageable standards" for resolution; (3) require "an initial policy determination of a kind clearly for nonjudicial discretion" for resolution; (4) require the court to express "lack of the respect due coordinate branches of government" through their resolution; (5) present "an unusual need for unquestioning adherence to a political decision already made"; or (6) risk embarrassing the government through "multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217. The first two factors are the "most important." *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008). However, to dismiss a case on political question grounds, a court "need only conclude that one factor is present, not all." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

Here, even assuming that Plaintiffs' complaint properly identifies the issues that would need to be decided to adjudicate their claims, those issues each implicate *Baker* factors. First, the complaint as pled by Plaintiffs asks this Court to determine that Anwar Al-Aulaqi did not pose a "concrete, specific, and imminent threat of death or serious physical injury" (presumably to U.S. citizens) at the time he was allegedly targeted by a missile strike while in Yemen. Compl. ¶¶ 24, 34. Second, the complaint asks this Court to determine that at the time of the alleged strike, "means short of lethal force" were available—presumably to the federal officials allegedly participating in any underlying decisions—which "could reasonably have been used to neutralize any threat" that Anwar Al-Aulaqi posed. *Id.* ¶ 34. Third, Plaintiffs contend that Defendants did

not use "all feasible measures to protect bystanders" during alleged missile strikes on Anwar Al-Aulaqi and an Egyptian national in Yemen, thereby violating Samir Khan and Abdulrahman Al-Aulaqi's Fourth and Fifth Amendment rights. *Id.* ¶¶ 35, 40.[3]

Plaintiffs thus invite this Court to determine whether an individual in Yemen whom the Executive Branch had already declared a leader of an organized armed enemy group, and a foreign operative of that group, posed a sufficient threat to the United States and its citizens to warrant the alleged use of missile strikes abroad within the context of an armed conflict and the Executive's national self-defense mission. Moreover, they ask this Court to pass judgment on the Executive's purported battlefield and operational decisions in that conflict—namely, to determine whether lethal force was the most appropriate option available; if so, what sort of lethal force to employ; and whether appropriate measures were taken to minimize collateral damage. Each of these issues is a "quintessential source" of political questions.

A. Plaintiffs' claims raise issues with a "textually demonstrable constitutional commitment" to the political branches.

There is "no doubt that decision-making in the fields of foreign policy and national security is textually committed to the political branches of government." *Schneider*, 412 F.3d at 194. The issues raised by this complaint unquestionably involve the conduct of hostilities in armed conflict, as well as national security, and foreign policy—matters which are constitutionally committed to the Executive and the Legislature in the first instance and are "rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981) (citations omitted).

First and foremost, Plaintiffs' claims directly challenge the Executive's alleged acts of

[3] In assessing the claims of Samir Khan and Abdulrahman Al-Aulaqi, the complaint also implicitly asks this Court to determine the magnitude of the threats posed by the alleged targets, Anwar Al-Aulaqi and Al-Banna—a necessary predicate to evaluating which protective "measures" were "feasible" or "proportionat[e]" in any action against them.

warfighting and national self-defense abroad targeting members of an armed enemy group against which the political branches have authorized the use of all necessary and appropriate force. The United States is currently engaged in an armed conflict with al-Qa'ida and associated forces. *See Hamdan*, 548 U.S. at 630-31 (holding that Common Article 3 of the Geneva Conventions—which applies in armed conflicts not of an international character—applies to the conflict between the United States and al-Qa'ida and associated forces). The stated reasons for the U.S. government's designation of Anwar Al-Aulaqi as an SDGT explain his role in that conflict. *See* SDGT Designation. Particularly, Al-Aulaqi was a leader of AQAP, which had conducted numerous attacks on U.S. targets, and he

commitment”

Aulaqi, but also the propriety of the alleged attack on Al-

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strikes on AQAP targets. To the contrary, the Attorney General has laid out some of the principles underlying the Executive Branch's exercise of its national self-defense prerogative against a leader of al-Qa'ida or an associated force.[6] It is the notion of *judicially* crafted and managed standards in the context of the issues raised by Plaintiffs' complaint that collides with the separation of powers delineated in our Constitution.[7]

Plaintiffs challenge alleged decisions by the military and the CIA purportedly to carry out missile strikes in Yemen—decisions that exceed the scope of the Judiciary's expertise. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490-91 (1999) (explaining that courts are "ill equipped to determine the[] authenticity and utterly unable to assess the[] adequacy" of the government's "reasons for deeming nationals of a particular country a special threat"); *see also El-Shifa*, 607 F.3d at 845 (citing *Reno*). The Supreme Court has acknowledged that with respect to decisions involving military matters, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan*, 413 U.S. at 10. *See also Waterman*, 333 U.S. at 111 (noting that the Executive "has available intelligence services whose reports neither are nor ought [sic] to be published to the world"); *Schneider*, 412 F.3d at

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[6] *See Attorney General Eric Holder Speaks at Northwestern University School of Law*, Justice News, Mar. 5, 2012, *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html (last visited Dec. 4, 2012) (Holder Speech), at 3. Defendants' political question argument is raised under Rule 12(b)(1). *See Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1262 (D.C. Cir. 2006). Thus, courts can consider matters outside of the pleadings in evaluating that argument. *See Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003).

[7] Similarly, Defendants do not suggest that the Executive has unchecked power to conduct purported missile strikes abroad, particularly against citizens. Indeed, the Legislative Branch has .29 -1.15 Td [(N)14(n c)4(81 9(.3d 199 0 Td [(, pa)-6(r)3(t)-2(i)-2(c)414(n c) -4(h)-1ze3)]TJ [(C)-3(i)-2(rGu

197 (finding non-justiciable claim challenging alleged CIA action because there were "no justiciably discoverable and manageable standards for the resolution of such a claim").

Litigating a case involving such alleged circumstances would be rife with problems of manageability. In general, courts do not "sit in camera in order to be taken into executive confidences." *Waterman*, 333 U.S. at 111.

decisions. *See El-Shifa*, 607 F.3d at 845 (noting the court could not evaluate the decision to conduct a missile strike on foreign soil "without first fashioning out of whole cloth some standard for when military action is justified"). Faced with that prospect in a similar context, the en banc D.C. Circuit stated bluntly: "The judiciary lacks the capacity for such a task." *Id. See also 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 t

The other two specific issues Plaintiffs contend this Court must resolve also lack judicially manageable standards. Whether other "means short of lethal force" were available that "could reasonably have been used" to counter "any" threat the alleged targets posed, Compl. ¶ 24, is not a question the Judiciary is suited to decide. Myriad military, intelligence, and foreign policy considerations arise from the issue of whether less-than-lethal means were "reasonably" available to counter a threat posed by a leader of AQAP in the course of this armed conflict. Such a determination necessarily would require the Judiciary to weigh—in hindsight—the costs and benefits of other possible options. For example, perhaps the United States could send ground troops into Yemen to attempt to apprehend someone who, like Anwar Al-Aulaqi, was a leader of AQAP. But surely such an operation would present its own unique risks of harm to those troops, collateral damage, and foreign policy consequences. It could also raise the possibility of U.S. soldiers captured in foreign lands by hostile enemies—with significant humanitarian, diplomatic, and military implications. These are but a few of the host of considerations that would have to be balanced when determining whether "means short of lethal force" were "reasonably" available. These considerations are "delicate, complex, and involve large elements of prophecy." *Waterman*, 333 U.S. at 111. They "should be undertaken only by those directly responsible to the people whose welfare they advance or imperil." *Id.*

Whether, as Plaintiffs contend, other "feasible measures" were available "to protect bystanders from harm" during the alleged strikes, Compl. ¶¶ 31, 35, 40, also raises a host of considerations most appropriately evaluated by the political branches. Determining which

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See Clapper Decl. at ¶ 18 (asserting privilege over "information that relates to the terrorist threat posed by Anwar al-Aulaqi, including information related to whether this threat may be 'concrete,' 'specific' or 'imminent'"). The United States, which is not a party to this suit, has filed a statement of interest and has reserved its right to invoke the state secrets privilege in the event this case proceeds beyond the motion-to-dismiss stage.

"feasible measures" to protect bystanders are "legally required," *id.*, when missiles are allegedly launched from RPAs at a leader of AQAP and at an AQAP operative abroad, requires an analysis to which the Judiciary is ill-suited. Relevant factors could include what other assets were available in the region at the time; where they were located; how long it would take to divert them for an operation; whether the alleged target would have moved to another location by the time those assets arrived; what risks would arise from removing those assets from their original locations; what additional risks may arise to U.S. forces during the modified operation; and any additional risks to civilians during the operation. And this list would only be the tip of the iceberg. The courts, however, "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." *El-Shifa*, 607 F.3d at 844. Moreover, the nature of intelligence-gathering at a given moment may also be fluid—requiring action far more flexible than a judicial proceeding is equipped to reflect.

regarding specific threats posed by armed terrorist organizations that operate outside the constraints of the laws of war and hide amongst civilian populations—that are "of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. It requires balancing the risk of harm to our Nation and the potential consequences of using force. Similarly, whether non-lethal means were "reasonably" available requires "policy choices and value determinations." *Japan Whaling*, 478 U.S. at 230. As detailed above, the risks to ground forces that may or may not be tolerable as a possible non-lethal alternative to a purported missile strike clearly involve policy choices, as do the foreign policy implications that making such an operational choice abroad might entail.

Any decision on the potential level of harm to innocent bystanders that may be tolerable in the context of alleged missile strikes against enemy targets overseas in an armed conflict undoubtedly raises policy choices for executive, not judicial, determination. As Plaintiffs implicitly acknowledge, Compl. ¶¶ 35, 40, civilian casualties are a regrettable but ever-present reality in armed conflict. The question is not whether such casualties will occur, but [illegible]

Judiciary has "institutional limitations" when it comes to "strategic choices" involving national security and foreign affairs. *El-Shifa*, 607 F.3d at 843. Unlike the Executive, "the judiciary has no covert agents, no intelligence sources, and no policy advisors." *Schneider*, 412 F.3d at 196. Moreover, the "complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches." *Gilligan*, 413 U.S. at 10. "The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability." *Id.* Thus, "[i]t is not the role of judges to second-guess, with the benefit of hindsight, another branch's determination that the interests of the United States call for military action." *El-Shifa*, 607 F.3d at 844.

The use of RPAs to combat the threat to this Nation's security emanating from abroad posed by al-Qa'ida and associated forces involves just such a considered policy choice. *See* Robert Chesney, *Text of John Brennan's Speech on Drone Strikes Today at the Wilson Center* (RPA Speech), Lawfare (Apr. 30, 2012, 12:50 pm), http://www.lawfareblog.com/2012/04/brennanspeech/ ("Targeted strikes are wise.").[11] A finding by a court that another method of counterterrorism was more appropriate under the precise circumstances alleged—and in fact was constitutionally required—would show a "lack of the respect due" to the Executive's policy choices regarding how to conduct a congressionally authorized armed conflict and its national defense mission. *See El-Shifa*, 607 F.3d at 844; *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003) ("It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role.").

[11] Because Plaintiffs refer to the above speech and quote from it, *see* Compl. ¶ 18, it can be considered in deciding this motion to dismiss. *See Vanover*, 77 F. Supp. 2d at 99.

As noted, here, in addition to its inherent national self-defense prerogative, the Executive's alleged conduct is consistent with an affirmative act of Congress—the Authorization

limiting the Executive's authority to conduct missile strikes of the type alleged here.[14]

Accordingly, a judicial finding that the alleged strikes were illegal would show a lack of deference regarding policy choices made by the political branches. It would take the Judiciary well beyond its traditional role and would thrust it into the realm of policymaking. *See Schneider*, 412 F.3d at 197 ("To determine whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking."). And it would upend the carefully balanced "relationship between the judiciary and the coordinate branches of Federal Government," *Baker*, 369 U.S. at 210, and violate the separation of powers the Constitution enshrines.

In sum, at a minimum, the first four *Baker* factors apply. Plaintiffs' complaint raises non-justiciable political questions. Accordingly, this Court should dismiss this case.

III. Under Governing Precedent, Special Factors Preclude a Damages Remedy.

Even if this Court determines that Plaintiffs have the capacity to sue and their claims do not raise non-justiciable political questions, the issues detailed above counsel against devising a discretionary damages remedy not authorized by Congress in this highly sensitive context.

A. Plaintiffs' claims raise separation-of-powers concerns, which counsel hesitation.

As a threshold matter, the separation-of-powers concerns detailed in the preceding section apply with special force when considering whether to infer a new damages remedy in this context at all. Indeed, the five federal courts of appeals—the D.C., Ninth, and Fourth Circuits,

[14] Not only have members of the Executive Branch made public statements regarding counterterrorism operations carried out under the AUMF, but the Legislative Branch has been explicitly notified of alleged missile strikes—and has not acted to preclude them. *See* Sen. Dianne Feinstein, *Letters: Sen. Feinstein on Drone Strikes*, L.A. Times, May 17, 2012 (noting that the Senate Intelligence Committee receives "key details" shortly after each strike; has held twenty-eight oversight meetings to question "every aspect" of the targeting program, "including legality"; and "has been satisfied with the results").

the en banc Second Circuit, and most recently the en banc Seventh Circuit—to address whether to infer civil damages actions against federal officials in novel separation

against military officers for alleged actions taken on the battlefield would risk

would warrant denying a judge-made constitutional tort remedy in this novel context. Together, they are overwhelming.

First, the D.C. Circuit has repeatedly held that where claims directly implicate matters involving national security and particularly war powers, special factors counsel hesitation. *See Doe*, 683 F.3d at 394-95 (discussing the "strength of the special factors of military and national security" in refusing to infer remedy for citizen detained by military in Iraq); *Ali*, 649 F.3d at 773 (explaining that "the danger of obstructing U.S. national security policy" is a special factor in refusing to infer remedy for aliens detained in Iraq and Afghanistan (internal quotation and citation omitted)); *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (same for aliens detained at Guantánamo Bay). These cases alone should control Plaintiffs' claims here. Plaintiffs challenge the alleged targeting of and missile strikes against members of AQAP in Yemen. Few cases more clearly present "the danger of obstructing U.S. national security policy" than this one.

e i a *Ali*, 649 F.3d at 773. (ch)24(c)(o)

explicit circuit precedent. As the court in *Ali* explained: "It would be

chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to close up like a clam.'" *Id.*

under binding precedent. *See Ali*, 649 F.3d at 774 ("[T]he danger of foreign citizens' using the courts . . . to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist." (quoting *Sanchez-Espinoza*, 770 F.2d at 209)). Although Plaintiffs' decedents are all U.S. citizens, and therefore the precise foreign affairs concerns detailed in *Ali* and *Sanchez-Espinoza* do not squarely arise in this case, *see Doe*, 683 F.3d at 396, without question, litigating the allegations in this case, which involve at least one foreign citizen and purported events abroad, threatens to disrupt U.S. foreign policy. *Cf. Vance*, 2012 WL 5416500 at *4 ("The [Supreme] Court has never created or even favorably mentioned a nonstatutory right of action for damages on account of conduct that occurred outside the borders of the United States.").[21]

Plaintiffs' claims, if litigated, could clearly affect our government's relations with the government of Yemen. Litigating these issues also could affect our relations with Egypt because Plaintiffs claim Defendants specifically targeted and attempted to kill an Egyptian national. *See* Compl. ¶ 37. Beyond these countries, Plaintiffs allege that the United States has conducted strikes in other countries as well. *See id.* ¶ 1. Assuming the truth of Plaintiffs' allegations, adjudication of this case could disrupt U.S. relations with these countries too. It takes little imagination to envision the repercussions on foreign relations that could be spurred by the creation of an entirely novel and discretionary damages remedy—in private civil litigation no less. Given the above separation-of-powers, national security, military effectiveness, classified information, and foreign policy concerns—and the binding precedent on these issues—the Court should decline to create a remedy for Plaintiffs' claims in this novel context.

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IV. Defendants Are Entitled to Qualified Immunity.

in deciding whether first to consider the constitutional question, or to forego the constitutional inquiry altogether and proceed immediately to the second prong. *Pearson*, 555 U.S. at 236. Under the longstanding principle of constitutional avoidance, courts should resolve a case on clearly-established grounds alone whenever possible. *See Ashwander v. TVA*, 297 U.S. 288, 346-

armed terrorist group. Nor does any body of case law involve

which specific safeguards of the Constitution are appropriately to be applied in a *particular context* overseas can be reduced to the issue of what process is 'due' . . . in the *particular circumstances* of a *particular case*." (emphasis added)). Moreover, no court has explained whether or how the Fourth and Fifth Amendments apply to operations involving armed force in a foreign country. Given the unique and extraordinary circumstances alleged by Plaintiffs' complaint, and the standards for qualified immunity, it is impossible to avoid the conclusion that any rights decedents had under the Fourth and Fifth Amendments were not clearly established. Thus, qualified immunity applies.

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

In Count II of Plaintiffs' complaint, Plaintiffs allege each decedent was unconstitutionally "seized" in violation of the Fourth Amendment. Compl. ¶ 42. Because the Supreme Court has suggested that traditional notions of the Fourth Amendment may not apply in the context of the conduct of armed conflict abroad, and because sufficiently analogous case law in the lower courts is wholly lacking, the scope of any Fourth Amendment rights of decedents was not clearly established. To the extent the Supreme Court has intimated anything in this extraterritorial context, it has suggested at most that Fourth Amendment protections would be limited. In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court noted that application of the Fourth Amendment in the context of military action abroad to protect national security "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Id.* at 273-74. *Cf. Hamdi*, 542 U.S. at 534 (plurality) (noting that "initial captures on the battlefield" need not receive the due process protections required for U.S. citizens in the context of lengthy military detention). Certainly, nothing in the existing body of precedent clearly establishes that routine application of the Fourth Amendment to the conduct

Plaintiffs, then, are left to argue that this Court should import a Fourth Amendment standard from the domestic law enforcement context and apply it to the alleged facts of this case. But the very process of importing such a standard for the first time into a unique context *itself* makes the law not clearly established. Finally, even were this Court to rely on domestic Fourth Amendment law enforcement case law by analogy, the case law that is arguably most analogous from the domestic context does not (as explained below) warrant the finding of a constitutional violation, let alone a clearly established one.

C. Assuming the Fourth Amendment extends to this unique context, Plaintiffs fail to state a violation.

The Fourth Amendment protects "the people" from "unreasonable . . . seizures." U.S. Const. amend. IV. The burden is upon Plaintiffs to state a Fourth Amendment claim. To state such a claim, Plaintiffs must show both that a "seizure" of each decedent occurred, and that it was "unreasonable." In the domestic law-enforcement context, a "seizure" only occurs when government action terminates freedom of movement "*through means intentionally applied*." *Brower v. County of Inyo*, 489 U.S. 593, 597-99 (1989) (holding driver of car that collided with police roadblock was seized). Under *Brower*, the "means intentionally applied" must terminate the movement of the *intended* target to constitute a seizure. *See Emanuel v. District of Columbia*, 224 F. App'x 1, 2 (D.C. Cir. 2007) ("There is no evidence that Officer Long intended to shoot Emanuel rather than the plainclothes officer, as a valid [Fourth Amendment] claim requires." (citing *Brower* and other cases)). *Cf. Livermore v. Lubelan*, 476 F.3d 397, 404 (6th Cir. 2007) (analyzing claim of decedent killed by police sniper under the Fourth Amendment).

Because the context of Plaintiffs' claims is unique, however, there is no clear body of case law to apply to the Fourth Amendment claims here. Courts have repeatedly held that law enforcement officials who shoot at fleeing or resisting suspects and accidently strike bystanders

do not seize those bystanders.[25] To the extent any traditional domestic law-enforcement cases apply by analogy, those cases provide the closest analogy and foreclose Abdulrahman Al-

A seizure satisfies this balancing test so long as it is "objectively reasonable." *Harris*, 550 U.S. at 381. Even in the domestic law-enforcement context, when lethal force is used, no "magical on/off switch" exists to trigger "rigid preconditions" for when such force may be reasonable. *Id.* at 382. Instead, the objective reasonableness of a specific use of force "must be judged from the perspective of a reasonable officer on the scene," and not with "the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Also, a reasonableness determination must allow for the reality that government officials "are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Id.* at 397.

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id.; *see also* Clapper Decl. ¶ 14.[26] The objective severity of this conduct as understood by U.S. officials is plain. Second, regarding the threat Anwar Al-Aulaqi posed, the United States possessed information indicating that he had already directed an attack on a civilian airliner. *See* SDGT Designation. If successful, that operation would undoubtedly have cost all the passengers and crew on the flight their lives. Under such circumstances, the complaint does not "plausibly suggest" it would have been objectively unreasonable to have viewed Anwar Al-Aulaqi as an enemy and an active threat to the lives of U.S. citizens. *Iqbal*, 556 U.S. at 681.[27] Third, it would have been equally and objectively reasonable to conclude that surrender was not a viable option. As this district noted, Anwar Al-Aulaqi had stated in a video interview that he "will never surrender." *Al-Aulaqi*, 727 F. Supp. 2d at 11. *See also* Clapper Decl. ¶ 16 (stating that Anwar Al-Aulaqi "declares he has no intention of turning himself in to America").

As the Supreme Court stated in *Tennessee v. Garner*—another domestic law-enforcement case—if there is "probable cause to believe that [a suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape." 471 U.S. 1, 11 (1985). The alleged strike on Anwar Al-Aulaqi at the very least fits that example. And again, to the extent that case law is not directly on point, it is

[26] Defendants reiterate that the information in the Clapper Declaration is used not to establish that information in a factual sense. Rather, the Court can take judicial notice of the government's understanding, *i.e.*, "the perspective of" reasonable officials "on the scene" at the time of the alleged strike, which informs the qualified immunity inquiry. *Graham*, 490 U.S. at 396. The complaint, in any event, does not dispute these assertions. Nor could Plaintiffs plausibly deny the United States' stated *understanding* regarding Al-Aulaqi's activities—even if they sought to dispute, as a matter of fact, particular pieces of evidence that supported that understanding.

[27] Were this Court to seek to delve into the particulars of the United States' knowledge regarding the threat Anwar Al-Aulaqi posed, the state secrets privilege could be implicated. *See* United States Statement of Interest. This possible outcome is all the more reason why this Court should avoid the constitutional issue and instead should resolve this case on any of the numerous other grounds presented in this motion.

Plaintiffs' burden to state a claim in the first instance. Accordingly, Plaintiffs cannot establish that the alleged seizure of Anwar Al-Aulaqi violated the Fourth Amendment.

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

personnel subjected to courts martial abroad); *Kar*

claims as alleged present those precise "extraordinary circumstances," the extent of judicially enforceable due process rights in the context pled is wholly unclear.

In sum, the threshold question of which, whether, and to what extent Fifth Amendment due process rights apply abroad under the circumstances alleged is simply unclear. The very context of Plaintiffs' claims—the conduct of hostilities in an armed conflict—means that the precise contours of any due process rights of the decedents were not clearly delineated. *See Padilla v. Yoo*, 678 F.3d 748, 761-62 (9th Cir. 2012). And, as with the Fourth Amendment claim, even if this Court were to borrow from an otherwise accepted standard for the Fifth Amendment in this novel context, the very borrowing of standards would make any right not clearly established. Finally, even assuming the requisite "test" were clearly established, which it is not, its application to the extraordinary and unique circumstances of this case does not, for the reasons explained below, state a Fifth Amendment claim and so such a claim certainly could not be clearly established. Qualified immunity thus applies, and this Court should dismiss Plaintiffs' claims.

E. Assuming the Fifth Amendment extends to this unique context, Plaintiffs have failed to allege facts showing a due process violation.

To the extent Plaintiffs seek to bring a substantive due process claim on behalf of Anwar Al-Aulaqi, a point on which the complaint is unclear, that claim fails because such a claim would be properly addressed under the Fourth Amendment. *See supra* Part IV.C. As the Court in *Graham* held, claims that government officials used excessive force in seizing a citizen "should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham*, 490 U.S. at 395. This is because the Fourth

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detained by the military in Afghanistan because of the "practical obstacles" inherent in applying that clause in an active theater of war).

Amendment "provides an explicit textual source" of protection against unreasonable seizures, in contrast to the "more generalized notion of 'substantive due process.'" *Id.* Accordingly, any substantive due process claim by Anwar Al-Aulaqi fails as a matter of law.

Even if Samir Khan and Abdulrahman Al-Aulaqi could raise colorable substantive due process claims in light of the fact that they were not "seized" for Fourth Amendment purposes, the allegations in the complaint fail to state a substantive due process violation as to them. The allegation that Defendants failed to "take all feasible measures to protect bystanders," Compl. ¶ 40, sounds in negligence. Negligence does not give rise to a due process claim—substantive or procedural. *See Davidson v. Cannon*, 474 U.S. 344, 348 (1986) ("[T]he protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care . . . .").

Moreover, a substantive due process claim requires allegations of conduct that "shocks the conscience," which is generally defined as "conduct intended to injure in some way unjustifiable by any government interest." *Lewis*, 523 U.S. at 846, 849. Plaintiffs' complaint provides "no reason to believe" Defendants' purported actions met that standard. *Lewis*, 523 U.S. at 849, 855 (dismissing substantive due process claim based on unintentional death of bystander in domestic law enforcement context). Nor, in the context of alleged missile strikes targeting AQAP operatives abroad in the course of an armed conflict, would there be any plausible basis to second-guess the strikes' alleged purpose, *see* Compl. ¶ 1, or to otherwise conclude that the alleged actions were unrelated to a legitimate government interest. *See Iqbal*, 556 U.S. at 678. Accordingly, the substantive due process claims fail.

Lastly, Plaintiffs fail to state a procedural due process claim. Plaintiffs make no allegations that either Samir Khan or Abdulrahman Al-Aulaqi was subjected to any

Aulaqi were reached—albeit a "closed" one. Compl. ¶ 24.[30] And the Executive has "regularly inform[ed]" members of Congress regarding any missile strikes. RPA Speech at 5.

Where an individual identified as a leader of AQAP orchestrated a failed terrorist attack on a U.S.-bound airliner but remains abroad, evading capture, and declares his refusal to submit to U.S. authorities, nothing suggests that the "closed" executive process that the complaint alleges the government undertook to decide what particular threat he posed and whether to use lethal force would constitute arbitrary government action. *Cf. Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974) (holding that seizure, without prior notice and hearing, of yacht in "extraordinary situation" was constitutional). To the extent Plaintiffs are suggesting that—under the facts alleged and in the extraordinary context of purported missile strikes abroad against enemies—Anwar Al-Aulaqi was constitutionally entitled to *judicial* process to determine the threat he posed and how the United States should respond to that threat, that claim must fail, both as a historical and a practical anomaly. Indeed, in this weighty and unique context, "[w]hen it comes to a decision by the head of the state upon a matter involving its life," such a situation of national danger "warrants the substitution of executive process for judicial process." *Moyer v. Peabody*, 212 U.S. 78, 85 (1909). Accordingly, Plaintiffs' due process claims fail.

V. The Bill of Attainder Does Not Apply to Executive Action.

Plaintiffs' bill of attainder claim fails because the Bill of Attainder Clause applies to bills: legislative acts—not executive ones. That clause is found in Article I of the Constitution, the in (l)-nA(r)ched [/E

article addressing the powers of Congress. U.S. const. art. I., § 9 cl. 3. *See also United States v. Lovett*, 328 U.S. 303, 315 (1946) ("A bill of attainder is a legislative act which inflicts punishment without a judicial trial." (quotation and citation omitted)). Lower courts have uniformly refused to apply the Bill of Attainder Clause to Executive Branch acts. *See Paradissiotis v. Rubin*, 171 F.3d 983, 988 (5th Cir. 1999) ("No circuit court has yet held that the bill of attainder clause . . . applies to regulations promulgated by an executive agency."). *See also Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 755 (7th Cir. 2002); *Walmer v. U.S. Dep't of Defense*, 52 F.3d 851, 855 (10th Cir. 1995). Even if this Court determines the Bill of Attainder Clause somehow applies, special factors would preclude inferring a private right of action under that clause in this context