IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2013

MASHRIQI

Petitioner,

v.

MILLER, ET AL.,

Respondent

On Writ of Certiorari to the United States Supreme Court

BRIEF FOR THE RESPONDENTS

September 22, 2013

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Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the political question doctrine bars judicial review of the military strikes resulting in the deaths of Yousef Mashriqi, Mohammed Saeed, and Majibullah Saeed?
2. Whether these strikes violated the decedents' Fourth and Fifth Amendment rights and if these rights were clearly established at the time of the orders?

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STATEMENT OF THE CASE

The United States has exercised its right to self-defense for the last twelve years in armed conflict against al-Qaeda and those associated with its reign of terror. On September 18, 2001, Congress passed a joint resolution "to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States." *Authorization for Use of Military Force*, PL 107-40, September 18, 2001, 115 Stat 224 [hereinafter AUMF]. The resolution authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future attacks of international terrorism against the United States by such nations, organizations or persons." *Id.* Three United States' citizens died in the course of these American counterterrorism efforts.

One of the decedents, Mohammed Saeed, was an al-Qaeda leader in the Arabian Peninsula (AQAP) and designated as a Specially Designated Global Terrorist (SDGT). Mohammed recruited and trained extremists, plotted violence against the United States, and was a catalyst in numerous terrorist attacks. His jihadist propaganda was found on computers of numerous terrorist plotters in Great Britain, Canada, and the United States. Saeed left the United States in December 2006, never to return. On November 25, 2008, over two years before his death, Saeed was added to the "kill list" by President Bush. The list includes enemy targets and is maintained by the CIA and Joint Special Operations Command (JSOC) of the Department of Defense. Noorulah El-Hadj told FBI agents that Saeed helped him prepare a martyrdom video and directed him to detonate a bomb over Detroit, resulting in a failed airline attack on December 25, 2009. Following the testimony, American intelligence directly linked Saeed to Osama bin Laden's terrorist network via intercepted communications.

Yousef Mashriqi met Mohammed Saeed in 2006 and became the creative editor of ZION, an Internet magazine with extremist ideals. The magazine aimed to "pierce the 'haze' which western politics hides behind and unveil its true agenda" and detailed how to build bombs and conduct mass shootings. In March of 2009, Mashriqi left the United States and moved to Cuba while continuing to spread Mohammad's jihadist propaganda. JSOC reported Mashriqi's role with al-Qaeda's operational activity was increasing, though not to a level warranting his addition to the "kill list." He continued to ridicule the American justice system, claiming it was "decades behind social justice" and it was his mission was to "awaken" the judicial branch. In a condemnation of a recent opinion from the Twelfth Circuit, he stated he would personally "enlighten" the minds of the judges in "heaven or in hell."

On March 7, 2011, Mohammed Saeed travelled to meet Mashriqi in Cuba, resulting in the first confirmation of Saeed's location since his release from Yemeni prison. His imprisonment lasted 14 months after he claimed the United States was at war with Islam.

On March 28, 2011, Mohammed Saeed and Mashriqi entered a remote portion of Guantanamo Bay to load explosives onto a small jet. Government officials located the two on the premises, noticed their threatening activity, and ordered a fatal missile strike. The FBI found explosives, terrorist propaganda, and details of an attack on American soil.

Two weeks after the strike, JSOC authorized the targeted killing of the AQAP propagandist Ibrahim al-Danna. The strike was deemed a horrible mistake, as al-Danna was not in the targeted Yemeni café. Seven Yemenis and one American civilian, Majibullah Saeed, were killed. Majibullah had no terrorist ties other than his father, Mohammed, and was never targeted by government officials. On August 15, 2011, Petitioners brought a *Bivens* action against Respondents in the Northern District of York. Petitioners contend Respondents' role in the

targeted strikes violated the decedents' Fourth Amendment rights against unreasonable seizure and their Fifth Amendment protection against deprivation of life without due process. In *Mashriqi v. Miller et al.*, 37 F.3d 2000 (N.D. Y. 2012) [hereinafter *Mashriqi I*], the District Court dismissed Petitioners' claims, finding the issues beyond judicial review under the political question doctrine and Respondents' qualified immunity.

Petitioners appealed the dismissal to Thirteenth Circuit Court of Appeals. In *Mashriqi v. Miller et al.*, 328 F.3d 1959 (13th Cir. 2012) [hereinafter *Mashriqi II*], the Court of Appeals reviewed the case *de novo* and considered an application of qualified immunity to be overly broad, finding clearly established rights in this matter. The dismissal was affirmed, as the court agreed that further policy analysis barred under the political question doctrine.

SUMMARY OF THE ARGUMENT

Respondents respectfully submit to this Honorable Court the following arguments for consideration: (1) five of *Baker v. Carr*'s six factors detailing the presence of a nonjusticiable political question are present in this suit; and (2) the doctrine of qualified immunity should apply because none of Respondents' acts violated the decedents' clearly established Fourth or Fifth Amendment rights.

This Court does not question issues constitutionally committed to coordinate political departments' discretion and lacks manageable standards for resolving the complex matters involved in this suit. The Respondents' actions were in their official duties as highly ranking officers of the Department of Defense and CIA. The strikes leading to the decedents' deaths were pursuant to direct Executive orders in the United States' ongoing War on Terror. The Executive Branch has been designated express authorization to take whatever force deemed necessary and appropriate to combat threats of terrorist attacks against our nation. Petitioners seek a review of

these orders, which questions the President's constitutional authority to act, along with executive policies related to foreign affairs and national security. In respect to Congress and the President's efforts to counter threats against our nation, this Court should abstain from conducting policy review and affirm the lower court's dismissal of this suit.

The Fourth and Fifth Amendment do not protect belligerents engaged in activity threatening our nation. The qualified immunity doctrine bars liability for officials in Respondents' positions, in that the decedents did not have rights against unreasonable seizure or deprivation of life without due process. If this Court finds it necessary to declare constitutional protection of individuals in the decedents' position, it must grant Respondents qualified immunity because no reasonable official could have known that such rights existed in the unique context of war. Finally, if the Court finds that the rights were established at the time of decedents' death, it must recognize use of deadly force as reasonable considering the gravity of the potential harms.

ARGUMENT

I. The Political Question Doctrine Bars Judicial Review of Petitioners' Claims

Certain questions are political in nature and beyond the power of the courts to resolve. *Marbury v. Madison*, 5 U.S. 137, 170 (1803). They respect the nation, not individual rights, and are entrusted to the discretion of the President or Congress. *Id.* at 166. Petitioners seek judgment on unique policy choices, Congressional delegation of authority, and the President's execution of counterterrorism operations. The presence of one of six factors establishes a political question and bars judicial review. *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005) (*writ denied*, 547 U.S. 1069 (2006)). These factors are:

> [1] [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for

> resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). Petitioners' claims raise complex matters of national security and foreign policy, subjects rarely proper for judicial intervention. *Haig v. Agee*, 453 U.S. 280, 292 (1981).

A. Petitioners' claims raise policy questions textually committed to the coordinate branches

Decisions made in the interest of national self-defense while in armed conflict are committed to the political branches. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 840 (D.C. Cir. 2010) (*writ denied*, 131 S. Ct. 997 (2011)). Controversies involving value determinations are constitutionally committed to the "halls of Congress or the confines of the Executive Branch." *Id*. This case requires the Court to decide matters textually committed to coordinate political branches. Abstention is warranted because the court lacks authority to resolve the issue. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1432 (Sotomayor, J., concurring).

Congress has enumerated rights to declare war, make rules concerning captures on land, regulate armed forces, provide for arming and disciplining the military, and to call forces to suppress insurrections and repel invasions. U.S. CONST., art. I, § 8. In accordance with these powers, Congress passed the AUMF. The resolution authorized the President to use "all necessary and appropriate force against those that he "determines planned, authorized, committed or aided the terrorist attacks . . . in order to prevent future attacks of international terrorism against the US." *Id.*

Petitioners' claims ask the Court to infringe on Congressional authority in several forms. The Court may decide whether targeted killings fall within the Fourth Amendment's definition

of "seizure", or "capture on land" contained in Article I, § 8, cl. 11. If it is the latter, the Court must abstain from ruling on the merits, as it would constitute policy making rather than policy enforcement. With power to arm the military, Congressional funding of the drone program serves as express approval of its use. A condemnation of the strike and Executive's process would implicate regulation of the armed forces. Questioning the application of the AUMF to the strikes directly interferes with Congressional authority to "suppress insurrections" and "repel invasions". The decedents' actions at Guantanamo Bay fit squarely within the definition of both provisions. No form of judicial review can avoid critiquing decisions designated solely to Congress.

The President has ultimate discretion regarding the use of authorized military force. U.S. CONST., art. II, § 2, cl. 1. In carrying out counterterrorism operations, the President acts pursuant to inherent powers and with the Congressional authority of the AUMF. His authority is at its maximum. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring). There is no way to analyze the strikes without infringing on policy decisions committed to the Executive.

B. There are no judicially discoverable and manageable standards to resolve these claims

There are no standards to assess whether, or when, drone strikes are permissible, or what constitutes a threat to national security. Courts lack competence to assess the strategic deployment of military force or standards determining whether use of force was justified. *El Shifa* at 844. It is difficult to conceive of an area of governmental activity "where courts have less competence than weighing the appropriateness of military force". *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Determining whether decedents posed imminent threats or whether viable

alternative measures existed requires an understanding of national security far beyond the judiciary. *See Schneider* at 196.

Petitioners claim standards of "excessive force" should apply. The Court cannot decide these issues without fashioning "out of whole cloth some standard for when military action is justified". *El-Shifa* at 845. In *Schneider*, the Plaintiffs argued that standards of "wrongful death" apply to military actions. *Schneider* at 196-97. The Court considered preexisting standards of no use because of the unique circumstances. *Id.* Recasting foreign policy and national security questions in a new term, such as "wrongful" or "excessive", does not provide standards for making or reviewing national security judgments. *Id*. The judiciary lacks the capacity to determine whether an individual presents such a threat to national security that the United States may authorize the use of lethal force. *Id*. Accordingly, the judiciary is fundamentally underequipped to formulate policies or standards for matters not legal in nature. *El Shifa at* 844.

C. It is impossible to decide these claims without an initial policy determination of a kind clearly for nonjudicial discretion

These claims cannot be resolved without establishing initial policy determinations considering whether the loading of jets with explosives is an "imminent" threat, and whether the policy of targeting of American al-Qaeda leaders is permitted.

The DOJ issued an internal policy statement supporting targeted killing of American citizens who serve as senior operational leaders in al-Qaeda.[1] The Black Paper outlined specific circumstances when lethal force is justified, requiring the presence of an imminent threat, the infeasibility of capture, and adherence to the laws of war. Analyzing Petitioners' claims requires initial policy determinations for or against targeted killings. These declarations are constitutionally reserved to Congress. U.S. CONST., art. I, § 8.

[1] U.S. DEP'T OF JUSTICE BLACK PAPER, LAWFUL USE OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QAEDA OF AN ASSOCIATED FORCE [hereinafter Black Paper]

This suit requires the Court to declare whether the decedents could have reasonably been considered imminent threats. Whether foreign terrorist activity constitutes an imminent threat to the United States is a political judgment, a decision which the judiciary "has neither the aptitude, facilities, nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion". *El-Shifa* at 843 (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)). The Court may determine if a person is engaged in terrorist activity, but it may not determine if terrorist activity of the person threatens the security of the United States. See *Id*. In *El Shifa*, the court explicitly dismissed the suit under the political question doctrine, denying the invitation to weigh policy decisions related to missile strikes. *El Shifa* at 838. ("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."). The context, standards, and policies justifying foreign use of deadly force are unlike any of those applied in domestic suits and should continue to be precluded from judicial review.

D. Two of the final three *Baker* factors appear in this case and counsel against resolution of the claims

The final three *Baker* factors address circumstances counseling against a court's resolution of an issue. *Zivotofsky* at 1432 (Sotomayor, J., concurring). The fourth of the six factors appears when the Court must come to an independent resolution by expressing a lack of respect due coordinate branches of government. *Baker* at 217. Because of this due respect, courts resist questioning the good faith another branch attests to the authenticity of its internal acts. *Id.* at 1433. The Executive was afforded the broadest of discretion when Congress implemented the AUMF. Attempting to comply with existing laws, the Department of Justice detailed limited circumstances when the Executive may order a strike against an American citizen. It would be an

outright rejection of *Baker*'s fourth factor to question the Black Papers and the drone program. Questioning the discretion and judgment of senior military and security officials may not be blatant disrespect in many occasions, but there could be no other conclusion in this case. Not only were Respondents authorized to order the strikes, but they sought to comply with internal policy, the authorization of Congress, and their understanding of legal precedent. The Court should remain cognizant of this prudence and abstain from inspecting the merits of the claims.

The sixth *Baker* factor counsels against judicial review if there is potential embarrassment from multifarious pronouncements by various departments. *Baker* at 217. Any opinion related to the strikes or the process used would undoubtedly result in the array of multifarious statements *Baker* guards against. President Obama already displayed heightened awareness of the issues in his statement following the death of Majibullah Saeed. The DOJ drafted its Black Paper and would be forced to contest any alternate interpretation of the issues from this Court. While the Department of Defense, the CIA, and Congress have yet to weigh in on the case, any declaration from this Court would result in multiple pronouncements. The number of interested Executive agencies strongly weighs against this Court's deciding to enter the political fray.

II. The Decedents' Fourth and Fifth Amendment Rights Were Not Clearly Established and Were Not Violated

A. Respondents are entitled to qualified immunity

Official protection from personal liability for unlawful official action turns on the objective reasonableness of the action, assessed by clearly established legal rules at the time the action was taken. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). The rules must have been so clear that reasonable officials knew their action violated an individual's rights in the specific context of the case. *Saucier v. Katz*, 533 U.S. 194 (2001).

Respondents acted with Presidential authorization, Congressional mandate, and according to internal policy directives. *See* Black Paper. Though cases on point are not required, the constitutional question must be beyond debate. *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011). Reasonable officials could not have known that the alleged rights were violated in this context, considering members of the Federal judiciary are presently at odds as to their existence. *See Mashriqi I* at 2012 (explaining that "[d]efendants have qualified immunity based on Plaintiff's inability to establish a constitutional violation); *but see Mashriqi II* at 1964 ("The court finds . . . there are guiding [constitutional] principals.").

Petitioners' claims may be dismissed without analyzing the constitutional merits. The nature of the claims suggests deciding the qualified immunity question prior to the constitutional issues. *Ashcroft* at 2080 ("[C]ourts have discretion to decide which of the two prongs of qualified-immunity analysis to tackle first."); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of."). Failure to grant qualified immunity would deem Respondents' adherence to executive policy as objectively unreasonable, while retroactively bestowing an unwarranted degree of culpability based on an initial declaration of a violation. This would pronounce an outright reversal on the elements of qualified immunity, while overturning a lineage of precedent in its wake.

B. The Constitution does not protect citizen enemy combatants engaged in activities threatening the United States

Mohammed Saeed and Mashriqi cemented their status as combatants when they entered Guantanamo Bay Naval Base with explosives. *Ex Parte Quirin*, 317 U.S. 1, 37 (1942) ("[E]ntry upon our territory in time of war by enemy belligerents . . . for the purpose of destroying property used or useful in prosecuting the war, is a hostile and warlike act."). Mashriqi and

Saeed were citizen enemy combatants within the *Quirin* and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), interpretations.[2] Once individuals qualify as enemy combatants, their citizenship is immaterial and their liberties are subject to process outside of those in civilian matters. *Quirin* at 37-38. In the plurality opinion of *Reid v. Covert*, 354 U.S. 1 (1957), the concurring Justices extended extraterritorial constitutional protection to citizens, but explicitly on practical considerations rather than on the basis of citizenship. *Reid* at 67 (Harlan, J., concurring in result).

Though *Hamdi* extended the protection of habeas petitions to citizen enemy combatants, it did not extend all constitutional rights and processes owed to civilian citizens. See *Hamdi*, 542 U.S. at 534. In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Court disclaimed any disturbance to laws governing the extraterritorial reach of constitutional provisions, other than the Suspension Clause. *Id*. Combatants outside American custody and sovereign territory are not protected by the Constitution. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-75 (U.S. 1990) ("If there are to be restrictions on searches and seizures which occur incident to such American [military] action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation."). Because constitutional protection is not afforded to enemy combatants on the foreign battlefield, the Fourth Amendment did not warrant securing the decedents in their person. The method or degree of force used to seize enemy combatants is within sole discretion of military command and Congressional authority, not the Bill of Rights.

C. Use of lethal force did not a violate of the decedents' Fourth Amendment right

[2] *Quirin* held that "citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war". *Quirin*, 317 U.S. at 37-38. *Hamdi* accepted for purposes of the case the government's definition of "enemy combatants" as those who were "part of or supporting forces hostile to the United States or coalition partners'" in Afghanistan and who '"engaged in an armed conflict against the United States" there *Hamdi*, 542 U.S. at 516.

The calculus determining whether deadly force is excessive was created in the context of police interaction with civilians. It has never been applied to executive orders targeting enemy combatants. The test is inappropriate for this case because it does not incorporate pertinent laws enacted by Congress, executive policies, or the laws of war. This Court has determines what the law is, *Marbury* at 177, but is not afforded the opportunity to "make Rules concerning Captures on Land and Water". U.S. CONST., art. 1, § 8. The Court must look to existing standards of combat to determine whether force was unreasonable.

Congress expressly limits the weapons and degree of force used against belligerents. Though the President's discretionary power is at its maximum following the passage of the AUMF, *Youngstown* at 635 (Jackson, J., concurring), the Executive branch exercised self-restraint by setting requisite conditions for lethal force. Black Paper at 1. Reasonableness has been determined by weighing the threat's certainty of deadly harm, the availability of non-lethal means to prevent the harm, and the threat to innocent bystanders. *See Scott v. Harris*, 550 U.S. 372, 384 (2007) (detailing the imminent threat requirement); *see also Price v. United States.*, 728 F.2d 385, 388 (6th Cir. 1984) (requiring all non-lethal alternatives to be unavailable). Military principles do not severely alter standards of reasonableness, but there are significant differences between police seizures and military strikes. Strikes deter imminent threats to the entire nation, while police officers defend lethal threats to themselves or bystanders. Police are to give notice to the dangerous criminal when feasible, while providing the strike target with a warning would be counterintuitive. *Compare* Black Paper; *with Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985). If this Court chooses to weigh the reasonableness of military and security intelligence commands, it must recognize the heightened risks of variables involved.

Mohammed Saeed and Mashriqi posed imminent threats to the United States when they trespassed onto an American naval base and loaded an aircraft with crates of explosives. Whether their target was the Guantanamo Bay Naval Base, the Twelfth Circuit Court, or another destination, is immaterial. If that plane took off, the risk of American fatalities would become far too great and no deterrent could have proven less fatal. When weighing non-lethal alternatives, the Respondents "need not have taken that chance and hoped for the best." *Scott* at 384. The targets of military strikes pose dangers unparalleled in daily American life. If this Court can permit an officer's use of deadly force in a high-speed police chase, *id.*, it must allow this strike as justified.

Majibullah Saeed's constitutional rights were not violated. The reasonableness of force must be judged from the perspective of a reasonable officer at the time, rather than with the benefit of hindsight. *Graham v. Connor*, 490 U.S. 386, 396 (1989). The Fourth Amendment is not violated by an arrest based on probable cause, even if the wrong person is detained. *Hill v. California*, 401 U.S. 797 (1971). It is not violated by the mistaken execution of a valid search warrant on the wrong premises. *Maryland v. Garrison*, 480 U.S. 79 (1987). And it was not violated by a strike on Ibrahim al-Danna in a Yemini café, even when he was not on site. Analyzing the reasonableness of deadly force requires a balancing test weighing the probability of injuring or killing bystanders against the probability of injuring or killing a single person. The appropriate consideration is not only the number of lives at risk, but also the target's relative culpability. *Scott* at 384. Officials determined al-Danna was such a threat to national security that a targeted killing was warranted. The Fourth Amendment does not protect nonresident aliens against unreasonable seizures conducted outside U.S. sovereign territory. *Verdugo*, 494 U.S. 259. Though an official order may be mistaken, it does not make it unjustified.

D. Use of lethal force did not violate decedents' Fifth Amendment rights

Claims of excessive force in seizures are analyzed under the Fourth Amendment's "reasonableness" standard, rather than a substantive due process approach. *See Graham v. Connor*, 490 U.S. 386, 394-395 (1989). Petitioners allege Respondents' actions "shock the conscience" by their "unhurried manner in deliberating the ultimate outcome." *Mashriqi I*. The Court should hesitate to expand concepts of substantive due process, as it only protects liberties deeply rooted in our Nation's history. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). If Petitioners' argument is for the protection of the criminally accused, their quest for due process is founded on a faulty premise. The strike was not to punish the decedents for obvious crimes, but to eliminate a terrorist bombing before it was too late.

Had American officials wanted to offensively eliminate Mohammed Saeed, the strike could have come earlier in his two-and-a-half year period on the kill list. Instead, it came during his only recorded engagement at the scene of an impending attack. Saeed's history on the kill list and the timing of the strike support a conclusion that the order was defensive. The deprivation of life was not an execution, but in response to a rapidly developing threat. The Fourth Amendment is the appropriate source protection in these circumstances, *Graham*, though it should not apply here. If the Court determines the Fifth Amendment as the source of review, it must declare what process was due in this unique context. *Reid* at 75 (Harlan, J., concurring in result).

Due process claims are considered by standards set in *Matthews v. Eldridge*, 424 U.S. 319, 248 (1976). *Id.* (weighing private interests against the Government's asserted interest). Balancing an individual's right to life against the nation's self-defense has never been calculated. *Mashriqi II*. Interaction on the battlefield does not require process at all. *Hamdi* at 534. To the extent procedural due process exists for military strikes, the decedents received as much as

possible. Designation of "enemy combatant" status is only done after multiple levels of review by officers in the military and Department of Defense. *Boumedeine* at 809 (Roberts, J., dissenting). The "kill list" is subject to review, evidenced by choices to add Mohammed Saeed and forgo Yousef Mashriqi. Withholding Mashriqi from the list after official deliberation was the process at work. Extraordinary circumstances justify postponing notice and hearing. In these cases, seizure is necessary to secure important governmental or general public interests, prompt action is required, and officials initiating seizure are authorized to determine the necessity and justification in the instance. *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972). All of these factors were present in this case. The forms of "notice" and "hearing" owed in criminal matters are inherently not available in theatres of war. *Hamdi* at 597 (Thomas, J., dissenting).

Majibullah Saeed was not privy to due process for reasons similar to those negating claims of unreasonable seizure. The strike against Ibrahim al-Danna was justified under a due process analysis, as he was not extended Fifth Amendment protection. *Verdugo* at 269 (noting the Court's emphatic rejection of entitling aliens outside United States sovereign territory custody with due process rights). The strike was lawful, Majibullah was not the target, therefore his death qualifies as collateral damage.

CONCLUSION

For the foregoing reasons, Respondents request this Court to hold that 1) the political question doctrine renders Petitioners' claims nonjusticiable; and 2) Respondents' are entitled to qualified immunity because the actions do not violate decedents' Fourth and Fifth Amendment rights.

Respectfully Submitted, 32