IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2013

ELIJAH MASHRIQI, ET AL.

Petitioner,

v.

DAVID MILLER, ET AL.

Respondent.

On Writ of Certiorari to the United States Supreme Court

BREIF FOR THE RESPONDENT

September 22, 2013

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Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the targeted killing of Mohammed Saeed, Majibullah Saeed and Yousef Mashriqi was a violation of their Fourth Amendment right to be protected from unreasonable seizure and their Fifth Amendment right to due process before the deprivation of life.

2. Whether the political question doctrine bars judicial review of this matter.

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STATEMENT OF THE CASE

On September 11, 2001, operatives of the terrorist organization al-Qaeda used airplanes as high-explosive weapons, killing more than 3,000 Americans. Three days later, Congress passed a joint resolution that authorized the Executive to use "all necessary and appropriate force against [the] nations, organizations, or persons" responsible for the attacks. *Authorization for Use of Military Force*, Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001) (AUMF).

Mohammed Saeed was a U.S. citizen. As early as 1999, Mohammed Saeed was under investigation by the FBI; in 2006, he left the U.S. and traveled to Yemen where he assumed leadership of al-Qaeda in the Arabian Peninsula (AQAP). In that role, Mohammed Saeed helped plan an attempted attack within the United States and gave both private and public encouragement to Noorulah El-Hadj (the so-called "underwear bomber"). Mohammed Saeed was labeled a Specially Designated Global Terrorist in May 2007. In November 2008, President George W. Bush placed Mohammed Saeed on the "kill list"—a database maintained by the Central Intelligence Agency and the Joint Special Operations Command of the Department of Defense of individuals for whom targeted killing has been authorized.

Yousef Mashriqi was a U.S. citizen. Beginning in law school, Mashriqi began writing anti-Western, pro-jihadist literature, publishing it on the Internet. Mashriqi met Mohammed Saeed in 2006. In 2009, Mashriqi left the U.S. and began living in Cuba, where he continued writing pro-jihadist propaganda that became popular among al-Qaeda operatives.

On March 7, 2011, U.S. intelligence located Mohammed Saeed in Cuba meeting with Mashriqi. On March 28, 2011, a drone "visually acquired Mohammed Saeed and Mashriqi on an abandoned portion of Guantanamo Bay that is still a part of the United States leasehold." *Mashriqi v. Miller*, 37 F.3d 2000, *4 (N.D.N.Y 2012). The drone observed Saeed and Mashriqi

loading "small crates into a Honda HA-420 HondaJet" containing high explosive materials. *Id.* The drone fired one AGM-114 Hellfire missile, killing both Mohammed Saeed and Mashriqi. *Id.*

On April 11, 2011, Majibullah Saeed—the son of Mohammed Saeed and a U.S. citizen—was killed in a café in Yemen. The café was destroyed in a drone strike targeting Ibrahim al-Danna, an AQAP propagandist. Majibullah Saeed was not targeted by U.S. intelligence or defense agencies in that strike or any other.

SUMMARY OF ARGUMENT

The political question doctrine bars the issues before this Court from adjudication because they are constitutionally committed to the political branches. *Baker v. Carr*, 369 U.S. 186, 217 (1962), sets out six factors for determining the application of the political question doctrine. Those factors demonstrate that issues of military decisions in a time of war are not fit for adjudication.

If the Court is inclined to depart from precedent and doctrine, the petitioners' claims would still be barred by qualified immunity because there is no Fourth or Fifth Amendment violation. This Court found that excessive force claims are properly Fourth Amendment claims, and not Fifth Amendment due process claims. As such, petitioners' Fifth Amendment due process claims fail. There is no Fourth Amendment precedent to deal with the unique facts of this case, and therefore the objective reasonableness test used to analyze Fourth Amendment claims is not applicable. Even if the objective reasonableness test applied, the excessive force claim would still fail because the government's interest in national security with an imminent terrorist attack outweighs the petitioners' Fourth Amendment interests.

The U.S. has a right to defend itself against attack, and this trumps the petitioners Fifth Amendment claims under the *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) calculus because

the government's interest in national security outweighs the petitioners' procedural due process interests. The petitioners' substantive due process claims fail because the government's decision to issue a missile strike on terrorists posing an imminent threat to the U.S. does not shock the conscience. Thus, there is no constitutional rights violation to sustain a *Bivens* action, and the Court must affirm the decision of the Thirteenth Circuit.

ARGUMENT

I. THE POLITICAL QUESTION DOCTRINE BARS THE JUDICIAL BRANCH'S CONSIDERATION OF WAR TIME, MILITARY DECISIONS

a. U.S. Courts consistently decline to adjudicate matters of military importance.

A judicial determination on the constitutionality of defending the country against terrorists would impede the Executive's constitutional role as the Commander in Chief. The political question doctrine requires courts to abstain from "controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 229 (1986). The Supreme Court set out six factors for application of the political question doctrine and if one is met, the court must abstain:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 186, 217 (1962).

In *Hirota v. General of the Army Douglas MacArthur*, 338 U.S. 197, 199 (1949), citizens of Japan tried in the International Military Tribunal petitioned the Supreme Court for habeas.

The Supreme Court denied the petition for lack of jurisdiction. Justice Douglas's concurrence elaborates that conduct and decisions of war, "[w]hether they are wise or unwise, necessary or improvident are political questions, not justiciable ones." *Id.* (Douglas, J., concurring) at 208. This principle has long guided judicial determinations in similar circumstances.

In *Ex parte Quirin*, 317 U.S. 1, 20 (1942), all but one of the petitioners were German citizens. The petitioners returned to Germany during World War II and trained at a sabotage school. *Id.* at 21. Tasked with destroying war facilities, the petitioners buried their uniforms and explosives after arriving in the U.S. and proceeded in civilian dress. *Id.* After the F.B.I apprehended the petitioners, the President issued an order appointing a Military Commission to try the petitioners for their crimes. *Id.* at 22. The Supreme Court found that when the President "exercise[s] . . . his power as Commander in Chief of the Army in a time of war and of grave public danger," his decisions "are not to be set aside by the courts without the **clear conviction** that they are in conflict with the Constitution or laws of Congress." *Id.* at 25 (emphasis added).

The District Court for the District of Columbia dealt with a similar issue to those presented here in *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010). The plaintiff sued the President, Secretary of Defense, and Director of the CIA claiming they unlawfully authorized the targeted killing of the plaintiff's son, a dual U.S. and Yemen citizen. *Id.* at 8. In finding the issue nonjusticiable under the political question doctrine, the court found that "decision-making in the realm of military and foreign affairs is textually committed to the political branches, and . . . courts are functionally ill-equipped to make the types of complex policy judgments that would be required." *Id.* at 52. The District of Columbia District Court laid out the same governing principles that keep this case from being justiciable under the political question doctrine.

b. Five key *Baker* factors are met, thus the political question doctrine bars the issues of this case from being adjudicated.

First, the U.S. Constitution enumerates the President's power as the Commander in Chief; thus, the matter is constitutionally committed to the executive branch. U.S. Const. art. II, § 2. In *Ex Parte Quirin* and *Hamdi*, this Court recognized that it could not judge the President's strategic military decisions. The Constitution specifically enumerates war powers to the political branches in Articles I and II, but Article III makes no mention judicial war powers. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 514–15 (2004) (noting that Article III does not enumerate war powers). Therefore, this is an issue textually committed to the political branches.

The President's constitutional role is to faithfully execute the laws. Congress passed AUMF with the intention that the President, as the executor of the laws, would ensure the safety of our country. AUMF authorizes military force when "such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad." Thus, the President is acting at his maximum powers with the express authorization of Congress to "personify the federal sovereignty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring).

When considering the judiciary's role in our nation's military, the District of Columbia Circuit Court recognized that "it 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 Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (2010). The political framework that the U.S. Constitution sets up, and the powers that it enumerates, demonstrates that military determinations are fully committed to the political branches.

Second, as the District Court noted, the Court would be required to judge military decisions that it lacks judicially discoverable and manageable standards to resolve. *Mashriqi v. Miller*, 37 F.3d 2000, *11 (N.D.N.Y. 2012). The U.S. military has many resources devoted to

gathering knowledge about enemies and making decisions based on that intelligence. Courts have realized that the judiciary has "no covert agents, no intelligence sources, and no policy advisors," unlike the political branches. *Schneider v. Kissinger*, 412 F.3d 190, 196 (D.C. Cir. 2005). Beyond the lack of ability to acquire the knowledge, Courts also do not have the specific military intelligence required to make military decisions. "Courts are thus institutionally ill-equipped 'to assess the nature of battlefield decisions.'" *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1, 45 (D.D.C. 2010) (citing *DaCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973)).

Because military decisions are so unique, "the courts lack the competence to assess the strategic decision to deploy force or to create standards to determine whether the use of force was justified or well-founded." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010). In this case, the respondents had very specific information and "there are no judicially manageable standards by which courts can endeavor to assess the President's interpretation of military intelligence and his resulting decision . . . . Nor are there judicially manageable standards by which courts may determine the nature and magnitude of the national security threat posed by a particular individual." *Al-Aulaqi*, 717 F.Supp.2d 1, 47 (D.D.C. 2010). Furthermore, if courts were to attempt to adjudicate issues surrounding military decisions, it would make available national security information for our enemies.

Third, if the Court were to make an independent resolution, it would express a lack of respect to the President as the Commander in Chief of our military. This Court realized that "[w]ithout a doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004). If the judicial branch undermined the President's

decisions as Commander in Chief by making a separate determination of this matter, it could demonstrate a point of weakness to our enemies in a war that knows no geographical boundaries.

Fourth, there is an imperative need for unquestioning adherence to the political decisions already made for the same reasons that they were initially made: the safety of our nation. The decision about Saeed was made at two levels: to be put on the kill list and then to initiate the drone strike to prevent harm to the U.S. Deciding that our military commanders are not in a position to execute determinations about enemy combatants who pose a serious and imminent threat to U.S. citizens would impede the Executive's ability to effectively protect the nation. Today, our enemies do not operate within specific borders and often attempt to evade military forces. Not allowing military discretion in enemy attacks would allow our enemies to unknowingly invade our borders and harm our people. Thus, there is an imperative need to stick to the political branches' determinations in the matter.

Fifth, the executive branch and military made one decision about this matter, and it would be embarrassing if the judicial branch could undermine strategic military, wartime decisions on how to pursue our enemies. Beyond embarrassment, it would be dangerous and leave us vulnerable to our enemies because enemies would be able to take advantage of our country's competing branches.

The Constitution makes clear that military decisions are to be left to the political branches. In matters of national security such as this, it is imperative for the safety of our nation that the executive branch can act swiftly and without the internal strife of our political system. Five *Baker* factors are met, including two of the most important: textual commitment to a political branch and lack of judicially discoverable and manageable standards for resolving the issue. Thus, this court must affirm the decision of the lower courts.

II. EVEN IF POLITICAL QUESTION DOCTRINE DID NOT APPLY, THERE WAS NO FOURTH AMENDMENT VIOLATION

a. Fourth Amendment precedent is based on the facts of police apprehending suspects—not terrorists preparing an attack on the U.S.

Fourth Amendment precedent involves excessive use of force in apprehending a suspect. Courts use an "objective reasonableness" test to determine whether a Fourth Amendment violation occurred, but that is not applicable to the present case. This case is not about police officers apprehending suspected criminals for the purpose of domestic security, but about military officials neutralizing a terrorist threat to protect national security.

In *Graham v. Connor*, 490 U.S. 386, 386 (1989), the police arrested the plaintiff after he fainted from low blood sugar due to diabetes. The District Court gave a directed verdict for the defendants on the plaintiff's § 1983 claim. *Id.* The Fourth Circuit affirmed, but the Supreme Court reversed because the lower courts failed to consider the issue under the proper Fourth Amendment standard. *Id.* at 399. This Court noted that all excessive force claims must be analyzed under an objective reasonableness standard of the Fourth Amendment, and **not** under a substantive due process approach. *Id.* at 395. The Court found that a balancing test must be used to consider "'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing government interests at stake." *Id.* at 396 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). In determining reasonableness, the analysis must also consider when the seizure was made and how it was carried out "from the perspective of a reasonable officer on the scene." *Id.* at 395–96.

The Supreme Court returned to this issue in *Scott v. Harris*, 550 U.S. 372 (2007). The plaintiff engaged the police in a high-speed chase, which ended when Deputy Scott applied his push bumper to the back of the plaintiff's car. *Id.* at 375. As a result, the plaintiff crashed and

sustained injuries leaving him a quadriplegic. *Id.* The Court determined that Deputy Scott did not violate the plaintiff's Fourth Amendment rights after using the balancing test to consider the risk of the police officer's actions compared to the harm he was trying to eliminate. *Id.* at 383. The Court acknowledged the difficulty in determining how to properly weigh the two interests, but decided "to take into account not only the number of lives at risk, but also their relative culpability." *Id.* at 384.

The precedent that the plaintiff has put forth to bolster his argument for a Fourth Amendment violation is not applicable here because the facts of excessive force cases are not analogous to the facts of this case.

b. Even if the objective reasonableness analysis applied, and it was not precluded by the political question doctrine, there would still be no Fourth Amendment violation.

Even if the objective reasonableness test was applicable, the government's interest in protecting the nation heavily outweighs the Fourth Amendment interests of the terrorists in this case. The facts indicate that Mashriqi and Mohammed Saeed were planning an attack against the United States; from the point of view of the respondents, it appeared that Saeed and Mashriqi were loading a plane with explosives, directed towards the United States. Employing the *Scott* analysis, there was the potential for hundreds of victims, and they would not have had any culpability for their own deaths. Furthermore, time was of the essence, and considering these two terrorists continuously evaded the U.S. government's radar, they were a flight risk and of deadly danger if the government tried to bring troops in on the ground. Thus, the government's interest in protecting the lives of innocent citizens outweighed the terrorists' Fourth Amendment interests.

To find that the action that killed Majibullah Saeed violated the Fourth Amendment, the Court would have to find that the drone strike was objectively unreasonable. To do that, the

Court would be forced to analyze the strength of the intelligence regarding the target, the threat that that target posed to U.S. interests, and the likelihood of collateral damage, all of which are foreclosed by the political question doctrine. Even on the surface of the facts, the government's interest outweighs the terrorists' Fourth Amendment interests. Thus, the decision of the lower courts must be affirmed.

c. Under *Graham*, if the Court accepts that there is a Fourth Amendment excessive force issue, there cannot be a Fifth Amendment substantive due process claim.

The plaintiff's qualified immunity argument fails because he does not successfully claim a Fourth Amendment violation, and under case precedent, the plaintiff cannot also claim a Fifth Amendment Due Process violation if the plaintiff is making a Fourth Amendment excessive force claim. *See Graham*, 490 U.S. at 395 (discussing that a claim of excessive force is properly analyzed under the Fourth Amendment standard and not a due process standard).

III. RESPONDENTS, ACTING IN THEIR OFFICIAL CAPACITIES, VIOLATED NEITHER THE PROCEDURAL NOR SUBSTANTIVE DUE PROCESS RIGHTS OF THE PETITIONERS

The claims of all three petitioners fail to establish a clear due process violation that would sustain the present action. The due process claims of Mohammed Saeed and Yousef Mashriqi fail because of the U.S.'s right to national self-defense and because those petitioners posed an imminent threat to the U.S. The due process claim of Majibullah Saeed fails because it is categorically excluded from procedural or substantive due process review because he was not an intended target.

a. The U.S.'s right to national self-defense supersedes the petitioners' due process claims.

Every nation has a right to self-defense. *See* U.N. Charter art. 51. Since 2001, the U.S. has asserted that right and has been engaged in an armed conflict with al-Qaeda. *See* AUMF; *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 629–32 (2006). Furthermore, "a state that is engaged in

an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force." Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks to Annual Meeting of the Amer. Soc. of Int'l Law (Mar. 25, 2010).

The drone strike of March 28 falls squarely within the "armed conflict/legitimate self-defense" framework. The intelligence community knew of petitioner Mashriqi's and petitioner Mohammed Saeed's affiliation with al-Qaeda for years. Mohammed Saeed ran the operations of AQAP and helped plan an attempted 2009 attack within the U.S. Petitioner Mashriqi was a known associate of Saeed's and was an intellectual favorite of other al-Qaeda personnel. Both men were members of, or at the very least affiliated with, an organization that was in armed conflict with the U.S. As such, neither was entitled to any legal process before the U.S. used lethal force against him.

b. The imminent threat posed by petitioner Mashriqi and petitioner Mohammed Saeed on March 28, 2011 trumped any due process rights that either one possessed.

Even if the Court is inclined to depart from the well-established principles of national self-defense, neither petitioner Mashriqi nor petitioner Mohammed Saeed can assert a valid due process claim because of the imminent threat each posed on March 28, 2011.

The due process clause of the Fifth Amendment protects "the individual against arbitrary action of government." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). It protects against both "denial[s] of fundamental procedural fairness"—procedural due process—and "the exercise of power without any reasonable justification in the service of a legitimate governmental objective"—substantive due process. *Id.* at 845–46.

Both sets of protections apply in some circumstances outside the U.S., including in the context of U.S. citizens abroad and the context of government conduct on the leasehold at

Guantanamo Bay. *See Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (plurality opinion) (explaining that Constitutional protections apply to citizens abroad); *see also Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (explaining that petitioners were entitled to habeas petitions). But those protections are not so broad—no matter where they apply—so as to proscribe **any** government action that deprives a person of life or liberty.

1. The government's interest in stopping a terrorist attack outweighs the petitioners' interests and the value of additional procedural safeguards.

Respondents do not dispute that petitioners had a substantial and important private interest affected by official action: life itself. Avoiding the erroneous deprivation of one's life is a "uniquely compelling" interest in the eyes of this Court. *Ake v. Oklahoma*, 470 U.S. 68, 178 (1985). However, conducting the *Mathews* test in this case leads to the inescapable conclusion that the Government afforded petitioner Mashriqi and petitioner Mohammed Saeed no less process than they were constitutionally due.

To assess procedural due process, courts must perform a balancing test as articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The *Mathews* test weighs:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), this Court applied *Mathews* in the context of enemy combatants captured and detained during the armed conflict against al-Qaeda. The Court acknowledged the "weighty and sensitive governmental interests" in the matter at hand, and said that "due process analysis need not blink at" the "realities of combat." *Id.* at 531. The Court went

on to recognize that "the exigencies of the circumstances" require flexibility in what constitutes due process in order to "alleviate [the] uncommon potential to burden the Executive at a time of ongoing military conflict." *Id.* at 533.

These principles apply *a fortiori* to defeat the petitioners' procedural due process claims. Unlike the petitioner in *Hamdi*, who was already under government lock and key, petitioners here were in the process of launching an attack. Petitioner Mashriqi and petitioner Mohammed Saeed were loading highly explosive materials into a small plane when the drone first located them on March 28. From their location, the two were only minutes from a substantial U.S. military installation. According to the manufacturer, the HA-420 HondaJet has a range of almost 1,400 miles—more than enough to reach the 90 miles to Miami, to New Orleans, to Atlanta, or even to the seat of this nation's Government and the building in which this very Court sits. The governmental interest is never going to be stronger than it was in stopping petitioners before they carried out an attack that could have cost countless American lives.

2. The strength of the government interest justifies the government's use of lethal force.

The test for substantive due process is far less mechanical than the *Mathews* procedural test. Instead, the standard is whether the government takes an action that "shocks the conscience." *Cnty. of Sacramento*, 523 U.S. at 846–47 (citing *Rochin v. California*, 342 U.S. 165, 172–73 (1952)). "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Id.* at 849. Determining substantive due process claims is necessarily fact-intensive: "the concern with preserving the constitutional proportions of substantive due process demands an exact analysis of the circumstances before any abuse of power is condemned as conscience shocking." *Id.* at 850.

The circumstances that defeat petitioners' procedural due process claim similarly defeat their substantive due process claim. The March 28 drone strike was unquestionably conduct intended to injure. But its justification was the very highest government interest: the protection of innocent citizens' lives. To say that it shocks the conscience for the government to use lethal force in the face of an imminent threat would fly in the face of experience and reason.

c. Petitioner Majibullah Saeed was not the intended target of government action.[*] His death could not have been a denial of either procedural or substantive due process.

Procedural due process has, at its heart, the right to notice and an opportunity to be heard. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). This right is one that an intended government target can assert before the government acts. *See Baldwin v. Hale*, 68 U.S. 223, 233 (1863) ("Parties whose rights *are to be affected* are entitled to be heard; and in order that they may enjoy that right they must first be notified." (emphasis added)). The opportunity to assert that right "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Before assessing any of petitioner Majibullah Saeed's claims under *Hamdi*, *Mathews* or any other procedural due process standard, the Court is confronted with a simple question: Did Majibullah Saeed have a right to challenge the mid-April drone strike before it happened? The intended target was another person; any deprivation of Majibullah Saeed's life was neither intended nor—with respect to Majibullah Saeed's person specifically—foreseeable. Allowing petitioner Majibullah Saeed's procedural due process claim to go forward would open the door to any number of post hoc procedural due process challenges.

[*] The District Court below implied in its opinion that the death of petitioner Majibullah Saeed was the result of a mistake by U.S. government officials. Respondents accept that interpretation as fact only for the purposes of argument during this appeal and reserve the right to contest that information in any other proceeding.

Petitioner Majibullah Saeed's substantive due process claim is categorically barred by *County of Sacramento v. Lewis*. "[T]he Constitution does not guarantee due care on the part of state officials; liability for negligently afflicted harm is categorically beneath the threshold of constitutional due process." 523 U.S. at 849 (citing *Daniels v. Williams*, 474 U.S. 327, 328 (1986)). Assuming *arguendo* that Majibullah Saeed's death was the result of negligence, there is no relief available under the due process clause.

d. The contours of the due process standard are not clear enough to sustain a *Bivens* action.

At the time of the March 28 drone strike, only one court had issued any ruling related to targeted killings of U.S. citizens associated with al-Qaeda. *See Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010). That was a District Court ruling, and the Court properly denied standing and invoked the political question doctrine. *Id.* at 35, 52. There was thus no judicial precedent on the merits. The Legal Adviser of the Department of State had stated firmly that the use of lethal force in national self-defense was within constitutional bounds. *See* Koh, *supra*. The constitutional question today is still far from having been "placed . . . beyond debate." *Ashcroft v. Al-Kidd*, 131 S.Ct. 2074, 2083 (2011). As such, this *Bivens* action may not be maintained.

CONCLUSION

Petitioners ask this Court to reject two established and well-justified principles of law: the conduct of foreign affairs is left to the political branches, and in the face of a serious imminent threat, the government is permitted to use lethal force. Petitioners simultaneously bring a negligence action under the guise of a civil rights suit. The great weight of history, policy, and precedent mandates that the petitioners' action be dismissed, and the judgment of the Court of Appeals affirmed.