

1-1-2020

Constitutional Law - America's Drone War Abroad - Jaber v. United States, 861 F.3D 241 (D.C. Cir. 2017)

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Recommended Citation

25 Suffolk J. Trial & App. Advoc. 191 (2019-2020)

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CONSTITUTIONAL LAW—AMERICA’S DRONE WAR ABROAD—*JABER V. UNITED STATES*, 861 F.3D 241 (D.C. CIR. 2017).

Drone technology has expanded the United States ability to conduct operations in support of the War on Terror to a global level.¹ Since 2001, presidential administrations have employed drone strikes as a lethal option in covert international operations.² In *Ahmed Salem Bin Ali Jaber v. United States*,³ the District of Columbia Circuit Court of Appeals addressed whether the family of an innocent victim killed in a drone strike could be awarded a declaratory judgment based on a violation of international law.⁴ The court looked to the Torture Victim Protection Act⁵ (“TVPA”) and the Alien Tort Statutes⁶ (“ATS”) to analyze the use of force.⁷ The court appropriately affirmed the district court’s ruling that these claims are barred under the political question doctrine.⁸

In August 2012, the bin Ali Jaber family gathered in Khashamir, Yemen to attend a week-long wedding celebration.⁹ On August 24, 2012, Ahmed Salem bin Ali Jaber (“Salem”) provided a guest sermon at a local Khashamir mosque, directly challenging al Qaeda to “justify its attacks on civilians.”¹⁰ Shortly after the sermon, on August 29, 2012, three young men arrived at Salem’s father’s house and asked to speak with Salem, but he was

¹ See *Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities*, ACLU (May 22, 2013), available at https://www.aclu.org/sites/default/files/field_document/presidential_policy_guidance.pdf [<https://perma.cc/ENB9-AB69>] (establishing standard procedures for when United States takes direction action against targets).

² See *id.* (authorizing use of lethal drone strikes).

³ 861 F.3d 241 (D.C. Cir. 2017).

⁴ See *id.* at 243 (addressing issue in case).

⁵ See Torture Victim Protection Act Of 1991, Pub. L. No. 102-256, 106 Stat. 73 (“[t]o carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.”).

⁶ 28 U.S.C. § 1350 (1948) (“[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

⁷ See *Jaber*, 861 F.3d at 243 (referencing plaintiffs’ claims).

⁸ See *id.* at 250 (affirming district court’s dismissal of plaintiffs’ claims).

⁹ See *id.* at 243 (explaining why plaintiff was in area).

¹⁰ See *id.* (restating facts of case). Ahmed Salem bin Ali Jaber, an imam in the port town of Mukalla, was asked to speak as a guest in the Khashamir mosque. *Id.* According to the plaintiffs’ complaint, this sermon was not overlooked by local extremists. *Id.* at 243.

unavailable.¹¹ Later that same evening, the men approached Salem at the mosque to discuss statements from his sermon.¹²

When Salem met the group, two of the three men followed him to sit under a palm tree.¹³ Shortly after Salem went with the group of men, “members of the bin Ali Jaber family heard the buzzing of the drone, and then heard and saw the orange and yellow flash of a tremendous explosion.”¹⁴ According to witnesses, four missiles impacted and resulted in the death of all five people.¹⁵ Salem’s family contends that a United States-operated drone deployed four Hellfire missiles that killed the five men.¹⁶ Salem’s family lobbied the Yemeni and United States governments for redress.¹⁷

The plaintiffs sought official recognition from the United States government and filed a lawsuit against it for damages.¹⁸ The United States moved to dismiss the action for “lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.”¹⁹ The district court granted the government’s motion based on political question grounds,

¹¹ See *Jaber*, 861 F.3d at 243–44 (identifying time when unknown individuals approached). The group of unidentified men first arrived at Salem’s father’s home in the early afternoon. *Id.* at 243. Salem’s father told the group that Salem was visiting neighboring villages and the men left. *Id.* Later that evening, the group returned to the home and Salem’s father informed them that they might find Salem “at the mosque after evening prayers.” *Id.* at 244.

¹² See *id.* at 244 (discussing how meeting took place). Salem was fearful of meeting with the group of men and asked one of the two local policemen, Waleed bin Ali Jaber (“Waleed”), to accompany him to the meeting. *Id.*

¹³ See *id.* (discussing location of all individuals at meeting). The third individual watched the meeting with Salem from a short distance away. *Id.*

¹⁴ See *id.* (referencing seeing drone strike).

¹⁵ See *id.* (addressing witness statement asserted by plaintiff). Witnesses stated “the first two strikes directly hit Salem, Waleed[,] and two of the three strangers. The third missile seemed to have been aimed at where the third visitor was located The fourth strike hit the [men’s] car.” *Id.* (omission in original) (alterations in original).

¹⁶ See *Jaber*, 861 F.3d at 244 (discussing plaintiffs’ assertion of claim).

¹⁷ See *id.* (discussing family’s attempts for official recognition of drone strike). On the evening of the drone strike, a “Yemeni official” spoke via telephone with several members of the bin Ali Jaber family to “convey personal condolences for the wrongful deaths of Salem and Waleed, but [he] offered no official acknowledgment of or redress for the strike.” *Id.* (alteration in original). The family continued to lobby Yemen and U.S. officials for official acknowledgment of the strike. *Id.* The Yemeni government “ordered the families receive the equivalent of around \$55,000 US in Yemeni currency” as a “condolence payment.” *Id.* “Later, a member of Yemen’s National Security Bureau offered a family member \$100,000 in U.S. dollars,” originally claiming the money was from the U.S. government. *Id.* When the family asked for the statement in writing, it was recanted. *Id.* The plaintiffs then turned to the courts for official recognition for the attack. *Id.*

¹⁸ See *id.* at 244 (addressing pre-trial motions filed by United States). “[T]he government successfully moved under the Westfall Act, 28 U.S.C. § 2679, to substitute the United States for the named defendants as to all counts except those under the TVPA.” *Id.*

¹⁹ See *id.* at 244–45 (discussing procedural posture of district court).

barring any claim.²⁰ The D.C. Circuit Court of Appeals affirmed the district court's holding on appeal.²¹

The political question doctrine determines questions that are beyond the scope of Article III of the United States Constitution.²² In application, a

²⁰ See *id.* at 244–45 (addressing barred claim). The district court granted the government's Fed. R. Civ. P. 12(b)(1) motion, holding that the plaintiff had “next friend” standing to bring the claim on Salem’s behalf, but the claim is “nonetheless barred on political question grounds.” *Id.* at 245. “The district court further stated, ‘[P]laintiffs’ claims would [also] face insurmountable barriers on the merits’ since ‘previous exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief’ and the TVPA ‘does not authorize suits against U.S. officials.’” *Id.* (alteration in original).

²¹ See *Jaber*, 861 F.3d at 250 (affirming district court’s holding).

²² See U.S. CONST. art. III, § 2 (“[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . [and] to Controversies . . .”); *Marbury v. Madison*, 5 U.S. 137, 170 (1803) (holding “[q]uestions, in their nature political . . . can never be made in this court.”); see also *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005) (stating jurisdictional issue must be addressed “before proceeding to the merits.”); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (holding Court is “bound to ask and answer” jurisdictional question); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (identifying jurisdictional analysis); *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006) (holding jurisdiction inappropriate). The political question doctrine concerns the limitations of the “case or controversy requirement of Article III.” *Bancoult*, 445 F.3d at 432. When considering if a case presents a non-justiciable political question, the court must accept all factual allegations asserted in the complaint as true. *Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 572 n.1 (D.C. Cir. 2003) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002)) (identifying standard of review). However, because jurisdictional elements are “not mere pleading requirements but rather an indispensable part of the plaintiff’s case,” they must be supported with evidence “in the same way as any other matter on which the plaintiff bears the burden of proof.” *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 13 (D.D.C. 2010) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)) (referencing scrutiny of facts). Due to the nature of the review, the factual allegations will be treated with greater scrutiny than normal under a Federal Rules of Civil Procedure 12(b)(6) standard. FED. R. CIV. P. 12(b)(6); *Obama*, 727 F. Supp. 2d at 13 (identifying standard for defense). To survive a 12(b)(6) motion to dismiss, the “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face,’” allowing for a court to “draw the reasonable inferences that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (referencing standard to survive motion to dismiss). The plausibility standard requires “more than a sheer possibility that the defendant has acted unlawfully.” *Ashcroft*, 556 U.S. at 678. Prior to considering whether a claim is barred by the political question doctrine, a court first must determine if the plaintiff has standing to bring the claim before going into “next friend” standing. See *Whitmore v. Arkansas*, 495 U.S. 149, 163–64 (1990) (identifying “next friend” standing). Traditional prerequisites for establishing next friend standing require:

First a “next friend” must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action. Second, the “next friend” must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a “next friend” must have some significant relationship with the

court must determine whether it has the appropriate jurisdiction to hear the claim.²³ In determining whether a claim falls within the political question doctrine, the Court uses a six factor analysis established in *Baker v. Carr*.²⁴ If a court determines at least one factor from *Baker* is present, then the political question doctrine bars the procedure to only an analysis of the claim on the merits.²⁵

real party in interest. The burden is on the “next friend” clearly to establish the propriety of his status and thereby justify the jurisdiction of the court.

Id. However, any claim presenting a political question will be barred under the political question doctrine. See *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1264 (D.C. Cir. 2006) (stating federal claim “may not be heard if it presents a political question”).

²³ See *Schlesinger*, 418 U.S. at 215 (holding political question doctrine concerns jurisdictional case or controversy requirement). When applying the analysis of the political question doctrine, the courts must examine where the government authority arises. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) (holding executive and legislative branches responsible for conduct of foreign relations). *Oetjen* was one of the Supreme Court’s first applications of the political question doctrine. *Id.*

²⁴ See *Baker v. Carr*, 369 U.S. 186, 210 (1962) (asserting purpose of political question doctrine). The Court outlined the contours of the political question doctrine:

Prominent on the surface of any case held to involve a political question is found [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.

Id. at 217. The courts need only find one factor is present to conclude the claim is barred under the political question doctrine. See *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005) (identifying application of doctrine). The formulation of the claim must be “inextricable from the case at bar” for a court to dismiss it as nonjusticiable. *Baker*, 369 U.S. at 217.

²⁵ See *Baker*, 369 U.S. at 217 (outlining factors to analyze); see also *Schneider*, 412 F.3d at 194 (holding only one factor needs to be present). The Supreme Court further stated that the doctrine excludes from judicial review, no matter how sympathetic the allegations may be, any controversy surrounding a political choice. *Schneider*, 412 F.3d at 194 (citing *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986)). The Court in *Japan Whaling Ass’n* held that the doctrine bars claims of “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.” 478 U.S. at 230. After the September 11, 2001 attacks on the United States, Congress passed a Joint Resolution stating:

That the President is authorized 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, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations[,] or persons.

Courts have been limited to reviewing battlefield decisions when applying the political question doctrine.²⁶ Historically, if a court determines the nature of a claim to be limited to a power specifically vested to a branch of government, the court will not review the merits of the claim.²⁷ The

Authorization for Use of Military Force, Pub. L. No. 107-40, §2(a), 115 Stat. 224 (2001) (outlining President's authority). One of the primary weapons used by the United States to combat terrorism abroad is the drone. See Daniel Byman, *Why Drones Work: The Case for Washington's Weapon of Choice*, FOREIGN AFFAIRS (July/Aug. 2013), <https://www.foreignaffairs.com/articles/somalia/2013-06-11/why-drones-work> [<https://perma.cc/29AU-UCZH>] (explaining use of drones); see also OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, *Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities* (July 1, 2016), <https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF> [<https://perma.cc/M7F8-8ZTW>] (reporting figures for period of January 20, 2009 to December 31, 2015). As the use of drones become more prolific, the procedures authorizing the force become more specific. Byman, *supra* note 25; see also Michael C. Horowitz et al., *Separating Fact from Fiction in the Debate Over Drone Proliferation*, 41 INT'L SECURITY 2, 7 (2016), https://www.belfercenter.org/sites/default/files/files/publication/isec_a_00257.pdf [<https://perma.cc/469J-JTNF>] (reiterating proliferation of drone use); see also Dan de Luce & Paul McLeary, *Obama's Most Dangerous Drone Tactic Is Here to Stay*, FOREIGN POL'Y (Apr. 5, 2016, 8:53 PM), <http://foreignpolicy.com/2016/04/05/obamas-most-dangerous-drone-tactic-is-here-to-stay/> [<https://perma.cc/HW6D-92GW>] (analyzing drone targeting policy).

²⁶ See *Haig v. Agee*, 453 U.S. 280, 292 (1981) (addressing “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”); see also *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (stating matters relating “to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”); *Al-Aulagi*, 727 F. Supp. 2d at 45 (citing *DaCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973)) (stating courts are “ill-equipped to assess the nature of battlefield decisions, or to define the standard for the government’s use of covert operations in conjunction with political turmoil in another country.”); *Schneider*, 412 F.3d at 197 (finding foreign policy and national security matters are for Executive Branch and Congress to decide).

²⁷ See *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (expressing where power originates). In *Gilligan*, Chief Justice Burger and the majority held:

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. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is the power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system

Id. (emphasis in original). Once the court identifies where the power originates, the court is then able to determine whether judicial review is appropriate. *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 21–24 (D.C. Cir. 1999) (identifying proper review of Executive Branch power). In *People’s Mojahedin Org. of Iran*, the court had to determine whether it was appropriate for the Secretary of State to designate a group as a “foreign terrorist organization” under the Antiterrorism and Effective Death Penalty Act. 182 F.3d at 18. The United States Court of Appeals for the District of Columbia Circuit held that it may constitutionally decide whether the Secretary of State followed the proper procedure in determining whether the foreign organization had engaged in terrorist activities. *Id.* at 25. However, the court could not review whether “the terrorist activity of the organization threatens the security of United States nationals or the national security

United States Supreme Court has identified a functional approach to distinguish between nonjusticiable claims and fully justiciable claims in order to analyze the political question doctrine.²⁸ However, a court will not bar a claim if the Constitution specifically contemplates a judicial role in the arena or if they are not asked to determine a political question in deciding the merits of a claim.²⁹

of the United States” because this question was nonjusticiable. *Id.* at 23. The court determined this issue presented a nonjusticiable political question because the determination of whether terrorist activities are a threat to the United States “are political judgments, ‘decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.’” *Id.* at 23 (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)); but see Kristen E. Eichensehr, Comment, *On Target? The Israeli Supreme Court and the Expansion of Targeted Killings*, 116 YALE L.J. 873, 873 (2007) (identifying terrorists as civilians who are “subject to attack only when they directly participate in hostilities”).

²⁸ See *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844–45 (D.C. Cir. 2010) (identifying functional approach). In *El-Shifa Pharm. Indus. Co.*, the United States conducted a retaliatory strike against a factory in Sudan, which was believed to be associated with the Al-Qaeda terrorist network and to be in the “production of materials for chemical weapons.” *Id.* at 838. The owner of the factory sued under the Federal Tort Claims Act, claiming that the strike was a mistake because the factory only produced medicine for Sudanese people. *Id.* at 839–40. The district court dismissed the claim because of the political question doctrine, and the D.C. Circuit affirmed. *Id.* at 840. During the *en banc* review, the court adopted a functional approach to distinguish justiciable claims from nonjusticiable claims. *Id.* at 844–45. The court distinguished the claims by identifying nonjusticiable claims as ones that require courts “to decide whether taking military action was ‘wise’ - - ‘a “policy choice and value determination constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch’ - - and [justiciable] claims [as] ‘[p]resenting purely legal issues’ such as whether the government had legal authority to act.” *Id.* at 842 (third alteration in original) (quoting *Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir. 2000) (Tatel, J., concurring), and quoting *Japan Whaling*, 478 U.S. at 230). The *El-Shifa* court held that the presented claims were barred by the political question doctrine because it asked the court “to decide whether the United States’ attack on the plant was mistaken and not justified” and “to determine the factual validity of the government’s stated reasons for the strike.” *Id.* at 844 (quotation omitted). The court further stated that “[i]f 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, and the plaintiffs ask us to do just that.” *Id.*; see also *Bancoult v. McNamara*, 445 F.3d 427, 437 (D.C. Cir. 2006) (“The courts may not bind the executive’s hands on [political question] matters . . . whether directly—by restricting what may be done—or indirectly—by restricting how the executive may do it.”).

²⁹ See *Al Bahlul v. United States*, 840 F.3d 757, 758–59 (D.C. Cir. 2016) (*en banc*) (affirming constitutional validity of Bahlul’s Guantanamo Bay detainment). The court provided judicial review to determine whether a legislative act regarding the law of war is appropriate. *Id.* at 758. Furthermore, if the court determines a claim does not require a political question because it implicates a statutory right, then the court will review the claim on its merits. *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (relying on precedent to determine political question doctrine applicability). The Court considered a statute that authorized the Department of State to record place of birth for a United States citizen born in Jerusalem as “Jerusalem, Israel,” for purposes of registration of birth or issuance of passport, at the request of the citizen. *Id.* at 192. The United States Embassy refused to do so when Zivotofsky’s mother requested the documents list Jerusalem, Israel as place of birth, and recorded it as Jerusalem. *Id.* at 192–93. The Court determined that the plaintiff was not asking the Court to determine the validity of the executive decision, but rather to

In *Ahmed Salem Bin Ali Jaber v. United States*, the court upheld the ruling of the district court and barred the Plaintiffs' claim under the political question doctrine.³⁰ The court first determined whether it had the jurisdiction to hear the claim.³¹ Following this analysis, the court held that a declaration that stated responsibility for the strike would constitute a political question.³² Finally, the court examined a number of public statements issued by President Bush and President Obama and determined that the Executive Branch did not concede authority to the judiciary to enforce the rules.³³

Judge Brown wrote a concurring opinion highlighting the issues that surround the political question doctrine.³⁴ The concurring opinion argued that the majority appropriately outlines the applicable authority, but failed to adapt the law surrounding the current conflict with changes in technology.³⁵ Judge Brown summarized the extent to which drone technology has been used in non-combat zones and its evolution over time.³⁶ Finally, she argued that the holding of *El-Shifa* is appropriate for the executive branch, but is not

vindicate the rights of the plaintiff. *Id.* at 195. Therefore, the claim was justiciable and not barred by the political question doctrine. *Id.*

³⁰ See 861 F.3d 241, 250 (D.C. Cir. 2017) (referencing court's holding).

³¹ See *id.* at 245 (addressing court's approach). The court outlined the appropriate authority in determining whether a claim is considered nonjusticiable. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). After outlining the factors that must be considered to determine whether a claim is nonjusticiable, the *Jaber* court noted that only one factor needs to be present for a claim to be barred by the political question doctrine. *Id.* at 245 (citing *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005)).

³² *Jaber*, 861 F.3d at 245–47 (holding question presented requires political question). The court examined whether it is appropriate to review whether a military strike was a mistake or was justified and determined this was a political question. *Id.*

³³ See *id.* at 249–50 (referencing public statements from Executive Branch).

³⁴ See *Jaber*, 861 F.3d at 250 (Brown, J., concurring) (arguing that majority fails to recognize flaws in doctrines with respect to changing technology).

³⁵ See *id.* (outlining technology change in warfare). Judge Brown identified that *Baker* is the appropriate authority to analyze the political question doctrine, but addresses that times have changed since this decision. *Id.* Identifying the evolution of asymmetric warfare as a problematic topic, Judge Brown stated that “the political question doctrine ensures that effective supervision of this wondrous new warfare will not be provided by U.S. courts.” *Id.* Further, Judge Brown concurs that, in the United States, “strict standing requirements, the political question doctrine, and the state secrets privilege confer such deference to the Executive in the foreign relations arena that the Judiciary has no part to play.” *Id.*

³⁶ See *id.* at 251–52 (referencing statistics and expansion of drone deployment). Judge Brown outlines the evolution from when the United States first began using drone strikes to the consistent changes over the years. *Id.* at 251. Over the years, the geographic scope and number of strikes has grown dramatically. *Id.*; see Byman, *supra* note 25 (referring to expanded drone use by administration). Judge Brown further identifies how the Central Intelligence Agency (“CIA”) and the Joint Special Operations Command (“JSOC”) have expanded their “signature strikes”—attacks where the government targets anonymous suspected militants based solely on their observed pattern of behavior. *Jaber*, 861 F.3d at 251 (Brown, J., concurring).

an adequate response for the CIA/JSOC targeted killing programs.³⁷ However, the majority opinion appropriately analyzed the plaintiffs' claim to determine the court is barred under the political question doctrine.³⁸

The court first analyzed whether the plaintiffs satisfied the standing requirement to bring the claim.³⁹ The court then appropriately moved to determine the question regarding jurisdiction.⁴⁰ The court correctly applied the six political question doctrine factors from *Baker* to determine whether

³⁷ See *Jaber*, 861 F.3d at 252 (Brown, J., concurring) (referencing inapplicability of political question doctrine). Justice Brown stated:

El-Shifa Pharmaceutical Industries Co. v. United States . . . sensibly holds that a court should not second-guess an Executive's decision about the appropriate military response—avoiding the need for boots on the ground, for example—to address a singular threat that might occur once or twice at widely separated intervals. Its doctrine, however, seems a wholly inadequate response to an executive decision—deployed through the CIA/JSOC targeted killing program—implementing a standard operating procedure that will be replicated hundreds if not thousands of times.

Id.

³⁸ See *id.* at 250 (referencing court's holding).

³⁹ See *Jaber*, 861 F.3d at 244–45 (majority opinion) (holding claim satisfied standing requirements). Prior to determining whether the plaintiffs' claims are barred, the court appropriately analyzed standing. *Id.*; see also *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (outlining requirements for “next friend” standing). Standing through “next friend” requires an “adequate explanation . . . why the real party in interest cannot appear on his own behalf . . .” as well as “the ‘next friend’ must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate.” *Whitmore*, 495 U.S. at 163. Furthermore, the “‘next friend’ must have some significant relationship with the real party in interest.” *Id.* at 164. Faisal bin Ali Jaber appropriately stood in for the Jaber family due to the fact that the true plaintiff was killed in a drone strike. *Jaber*, 861 F.3d at 243. However, if asked to decide a political question, courts have identified that a claim under the TVPA is barred under the political question doctrine. See *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1264 (D.C. Cir. 2006) (holding claims “like any other, may not be heard if it presents a political question.”). In *Jaber*, the district court identified, and the circuit court failed to further address, that “[P]laintiffs' claims would [also] face insurmountable barriers on the merits” since “previous exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief” and the TVPA “does not authorize suits against U.S. officials.” *Jaber*, 861 F.3d at 245 (citing *Ahmed Salem bin Jaber v. United States*, 165 F. Supp. 3d 70, 79–81 n.6 (2016)) (alterations in original).

⁴⁰ See *Jaber*, 861 F.3d at 245 (referencing court's analysis of jurisdiction). In determining jurisdiction, the court correctly stated “[t]he ‘first and fundamental question’ this Court is ‘bound to ask and answer’ is whether it has jurisdiction to decide this case.” *Id.* (quoting *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 94 (1998)). The *Jaber* court correctly applied the authority by analyzing the jurisdiction prior to deciding the case on the merits. See *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005) (identifying court must address jurisdiction “before proceeding to the merits.”). The purpose of the political question doctrine is to determine whether a claim is justiciable. See *Baker v. Carr*, 369 U.S. 186, 210 (1962) (discussing function of separation of powers regarding justiciability). The primary function of the political question doctrine is to uphold the separation of powers. *Id.* at 211.

the plaintiff's claims were barred.⁴¹ The court then stated that it must conduct a "discriminating analysis" of the case before determining whether the political question doctrine bars the plaintiff's claim.⁴²

After correctly determining the applicable political question doctrine law, the court examined the plaintiffs' claims.⁴³ The government relied on the opinion in *El-Shifa* to demonstrate that the political question doctrine barred the plaintiff's claim because it "call[ed] into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion."⁴⁴ The plaintiff asserted that

⁴¹ See *Jaber*, 861 F.3d at 245 (outlining *Baker* factors); *Baker*, 369 U.S. at 217 (outlining six factors of political questions to determine if court system is appropriate forum). The *Jaber* court further applied precedent to determine the court only needed to conclude that one factor was present. *Jaber*, 861 F.3d at 245; see *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005) (stating six factor list is disjunctive because "[t]o find a [nonjusticiable] political question, we need only conclude that one factor is present, not all."). In applying precedent, the *Jaber* court correctly concluded that the plaintiffs' claims required the court to determine a political question. *Jaber*, 861 F.3d at 246-47. The factors must be "inextricable from the case at bar" to require the court to dismiss the case. *Id.* at 245 (quoting *Baker*, 369 U.S. at 217).

⁴² See *Jaber*, 861 F.3d at 245-46 (analyzing standard for political question and claim by plaintiff). In determining the jurisdictional requirement, a court must apply the *Baker* factors to the specific claims of the plaintiff. *Id.* at 245; see *Baker*, 369 U.S. at 217 (referencing factor analysis); see also *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (expressing political question concerns "case or controversy requirement . . ."); *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006) (stating political question concerns "case or controversy requirement" of Article III of Constitution).

⁴³ See *Jaber*, 861 F.3d at 244-45 (analyzing plaintiffs' case before applying political question doctrine's factors). The court determined that the plaintiff was seeking a declaration stating the drone attack "that killed their relatives violated domestic and international law." *Id.* at 245. The government responded with the court's opinion in *El-Shifa* which required the court to apply the political question doctrine because the case called into question a determination reserved to another branch of government. *Id.* Under *El-Shifa*, the court must determine whether a claim is nonjusticiable by taking a functional approach. See *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836, 841 (D.C. Cir. 2010) (outlining functional approach to determine justiciability). The functional approach requires a court to determine whether a claim presents "purely legal issues" or determine if a claim is better reserved for "the halls of Congress." *Id.* at 842. The court in *Jaber* properly held the claims presented by plaintiff required the court to determine whether the drone strike in Khashamir was "mistaken and not justified." *Jaber*, 816 F.3d at 247 (quoting *El-Shifa*, 607 F.3d at 844). The *Jaber* court held this question is better reserved for "the halls of Congress" and barred under the political question doctrine. *Jaber*, 816 F.3d at 247. Furthermore, the political question doctrine also bars a claim under the TVPA. *Id.*; see also *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1264 (D.C. Cir. 2006) (stating a TVPA claim, "like any other, may not be heard if it presents a political question[.]"); *Schneider*, 412 F.3d at 197 (holding "recasting foreign policy and national security questions in tort terms does not provide standards for making or reviewing foreign policy judgments.").

⁴⁴ See *Jaber*, 861 F.3d at 246 (referencing *El-Shifa* holding where political question doctrine bars claims concerning other political branches). The functional test required under *El-Shifa* requires the court to examine the plaintiff's claim. *Id.* In doing so, the court is asked to interpret the professional judgment of the military. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (analyzing "[t]he complex, subtle, and professional decisions as to the . . . control of a military force are

when *El-Shifa* is read together with *Zivotofsky*, it allowed for the claim not to be barred by the political question doctrine.⁴⁵ To solidify the court's conclusion that the plaintiff's claim is barred, the court looked to executive statements to consider if the executive branch intended to concede power to the judiciary, and determined they did not because those statements set forth a legal analysis for drone strikes, but they did not concede authority to the

essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.”) (omission in original) (emphasis in original). Actions concerning military judgment are constitutionally reserved to the branches of government and appropriately to the legislative and executive branches to maintain a system of checks and balances. *Id.* The United States court system is ill-equipped to assess battlefield decisions. *See* *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 45 (D.D.C. 2010) (stating courts are ill-equipped “to assess the nature of battlefield decisions” or “to define the standard for the government’s use of covert operations in conjunction with political turmoil in another country.”). Congress authorized the President “to use all necessary and appropriate force” to defend the United States following the September 11, 2001 terrorist attacks. *See* Authorization for Use of Military Force, Pub. L. No. 107-40 § 2(a), 115 Stat. 224 (2001) (authorizing “all necessary and appropriate force”).

⁴⁵ *See Jaber*, 861 F.3d at 248–49 (reviewing *Zivotofsky* and applying decision to plaintiff’s claim). In *Zivotofsky*, the Court considered a statute that allowed for U.S. citizens born in Jerusalem to list their birthplace as “Jerusalem, Israel” on their birth registration or passports. *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012). The Court determined the claim was not barred by the political question doctrine because it did not ask them to affirm an executive branch decision. *Id.* at 195. The *Zivotofsky* case confirms there is no per se rule to render a claim nonjusticiable because it implicates foreign relations. *Jaber*, 861 F.3d at 248 (citing *Zivotofsky*, 566 U.S. at 195). Rather, the *Jaber* court reasoned the *Zivotofsky* holding affirmed they must determine if “[t]he federal courts are . . . being asked to supplant a foreign policy decision of the political branches with the courts’ own unmoored determination” or being tasked with a “familiar judicial exercise” of determining statutory interpretation. *Jaber*, 861 F.3d at 248 (citing *Zivotofsky*, 566 U.S. at 196). The court in *Jaber* distinguished *Zivotofsky* because they were not asked to interpret statutory language, but rather foreign policy judgments attributable to the executive branch. *Jaber*, 861 F.3d at 248–49.

judiciary.⁴⁶ The court appropriately held the plaintiffs' claims were barred by the political question doctrine and affirmed the district court's finding.⁴⁷

Judge Brown, in her concurring opinion, agreed with the outcome but expressed dismay in the system.⁴⁸ Throughout the concurring opinion, Judge Brown identified the proliferation of drone technology and drone strikes conducted by the United States around the world.⁴⁹ Judge Brown stated that *El-Shifa* applied to an Executive's decision about the appropriate military response, but incorrectly believed the doctrine should not apply to

⁴⁶ See *Jaber*, 861 F.3d at 249 (identifying court's analysis of executive statements). In reviewing the executive statements, the court first looked at statements regarding the legal analysis justifying drone strikes, which defined the outer limits of when strikes are appropriate. *Id.* (justifying legal conclusion of political question regarding executive statements); see also *Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities*, *supra* note 1 (addressing internal Executive policies for conducting drone strikes outside active hostilities). The *Jaber* court correctly determined that the executive branch did not intend to concede nor invite the judiciary to intrude upon its traditional roles. *Jaber*, 861 F.3d at 249. An executive administration may develop legal rules which they believe to govern their conduct, but it is the role of the Judiciary to "say what the law is." See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (outlining judiciary branch's role in United States government). However, the *Jaber* court appropriately outlined the reverse to also be true; "it is the Executive, and not a panel of the D.C. Circuit, who commands our armed forces and determines our nation's foreign policy." *Jaber*, 861 F.3d at 249. For these reasons, the court properly deemed the Plaintiffs' claims surrounding a drone strike in Yemen to be barred by the political question doctrine. *Id.* at 250.

⁴⁷ See *Jaber*, 861 F.3d at 250 (outlining holding affirming district court decision). The court concluded their opinion by writing that,

Under the political question doctrine, the foreign target of a military strike cannot challenge in court the wisdom of [that] military action taken by the United States. Despite their efforts to characterize the case differently, that is just what the [P]laintiffs have asked us to do. The district court's dismissal of their claims is [a]ffirmed.

Id. (quoting *El-Shifa*, 607 F.3d at 851) (alterations in original).

⁴⁸ See *Jaber*, 861 F.3d at 250 (Brown, J., concurring) (referencing agreement in theory but strain in application of political question doctrine and court's role). Justice Brown focused the application of the *Baker* factors to the new asymmetric warfare on the battlefield today and identified "conundrums that seem to defy solution." *Id.* By allowing for the political question doctrine to apply, it "insures that effective supervision of this wondrous new warfare will not be provided by U.S. courts." *Id.* Justice Brown further noted, unlike the United States, judicial intervention in policing executive powers is common in other jurisdictions around the world. *Id.*; see Eichensehr, *supra* note 27 (explaining that "terrorists are civilians under the law of armed conflict and thus are lawfully subject to attack only when they directly participate in hostilities."); but see *Gilligan*, 413 U.S. at 10 (identifying electoral accountability to uphold executive and legislative branches).

⁴⁹ See Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SEC. J. 283, 441 (2011) (discussing targeted killing abroad).

an executive decision deployed through the CIA/JSOC targeted killing programs.⁵⁰

The District of Columbia Court of Appeals determined whether the district court properly granted the government's motion to dismiss based on the political question doctrine. The court properly analyzed the jurisdictional requirements essential to the political question doctrine by applying the *Baker* factors. Furthermore, the court concluded that *El-Shifa*, the controlling precedent, required the court to affirm the decision of the district court. Although the concurring opinion outlined some drawbacks to the court's application of the doctrine, the correct application of the political question doctrine allows for powers to remain in their respective branches.

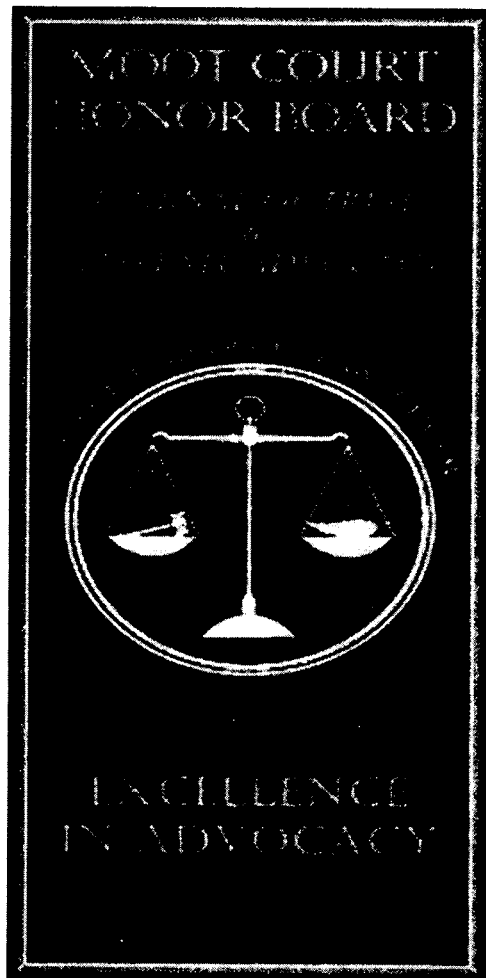
Stephen R. Harris

⁵⁰ See *Jaber*, 861 F.3d at 252 (Brown, J., concurring) (identifying concurring opinions main issue). Justice Brown opined that *El-Shifa* should not apply to targeted programs authorized through the executive branch but carried out through the CIA/JSOC. *Id.* However, Justice Brown failed to analyze "the complex, subtle, and professional decisions" of the military operations which are essentially professional military judgments reserved for the executive branch. *Id.* at 248; see *Gilligan*, 413 U.S. at 10 (holding military is controlled by legislative and executive branches); *Al-Aulagi*, 727 F. Supp. 2d at 45 (outlining courts inability "to assess the nature of battlefield decisions" or "to define the standard for the government's use of covert operations in conjunction with political turmoil in another country.").

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**SUFFOLK
JOURNAL OF
TRIAL & APPELLATE
ADVOCACY**

**Volume XXV
2019-2020**



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Subscription Price \$10.00

Per Issue \$5.00

SUFFOLK JOURNAL OF TRIAL & APPELLATE ADVOCACY is published biannually by the Suffolk University Law School Moot Court Honor Board, 120 Tremont Street, Boston, Massachusetts 02108.

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