CONSTITUTIONAL LAW — POLITICAL QUESTION DOCTRINE — D.C. CIRCUIT HOLDS STATUTORY CHALLENGE TO DRONE STRIKE IS NONJUSTICIABLE. — *bin Ali Jaber v. United States*, 861 F.3d 241 (D.C. Cir.), *cert. denied*, 138 S. Ct. 480 (2017).

"[A] function of the separation of powers,"[1] the political question doctrine is a "narrow exception" to the rule that courts are required to hear cases otherwise properly before them.[2] In *Baker v. Carr*,[3] the Supreme Court outlined six factors indicating the presence of a political question.[4] Concurring in the Court's most recent political question case, *Zivotofsky ex rel. Zivotofsky v. Clinton*,[5] Justice Sotomayor noted those factors have "generated substantial confusion."[6] But one facet of the doctrine has remained constant — the Court has never held a statutory challenge to executive action to be nonjusticiable.[7] Recently, in *bin Ali Jaber v. United States*,[8] the D.C. Circuit continued a contrary intracircuit trend[9] by holding that a statutory challenge to alleged extrajudicial killings in a drone strike was nonjusticiable.[10] The court erred by failing to grapple with the statutory nature of the claim and avoided clarifying the legal framework governing lethal counterterrorism operations.

Salem bin Ali Jaber (Salem), a Yemeni imam noted for criticizing al Qaeda ideology, traveled to Khashamir, a village in eastern Yemen, in 2012 to attend a family wedding.[11] After he delivered a sermon, three "local extremists" started looking for him.[12] Waleed bin Ali Jaber (Waleed), Salem's nephew and a local police officer, offered to accompany him to meet with the men.[13] A U.S. drone then fired four Hellfire missiles at the area.[14] The first two killed Salem, Waleed, and two of the men, while the remaining missiles killed the third man.[15] The attack

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1 Baker v. Carr, 369 U.S. 186, 217 (1962).

2 Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 195 (2012).

3 369 U.S. 186.

4 *Id.* at 217.

5 566 U.S. 189.

6 *Id.* at 202 (Sotomayor, J., concurring in part and concurring in the judgment).

7 *See* El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 856 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring in the judgment); Chris Michel, Comment, *There's No Such Thing as a Political Question of Statutory Interpretation: The Implications of* Zivotofsky v. Clinton, 123 YALE L.J. 253, 255 (2013).

8 861 F.3d 241 (D.C. Cir.), *cert. denied*, 138 S. Ct. 480 (2017).

9 *See, e.g.*, *El-Shifa*, 607 F.3d at 842–44; Harbury v. Hayden, 522 F.3d 413, 419–20 (D.C. Cir. 2008); Gonzalez-Vera v. Kissinger, 449 F.3d 1260, 1261 (D.C. Cir. 2006).

10 *bin Ali Jaber*, 861 F.3d at 245–50.

11 Complaint at 2, 13–14, Ali Jaber v. United States, 155 F. Supp. 3d 70 (D.D.C. 2016) (No. 15-0840).

12 *bin Ali Jaber*, 861 F.3d at 243.

13 Complaint, *supra* note 11, at 9, 15.

14 *bin Ali Jaber*, 861 F.3d at 244.

15 *Id.*

was allegedly a "signature strike," in which the government identifies targets based on behavioral patterns, such as cell phone usage.[16]

Faisal bin Ali Jaber (Faisal), a relative of Salem acting on behalf of Salem's and Waleed's estates, invoked next-friend standing and filed suit against U.S. executive officials in the D.C. District Court.[17] The plaintiffs sought a declaration that those officials committed extrajudicial killings in violation of the Torture Victims Protection Act[18] (TVPA) and customary international law (CIL), enforceable via the Alien Tort Statute[19] (ATS).[20] The government moved to dismiss, arguing that Faisal could not serve as next friend and that the case was nonjusticiable.[21]

Senior Judge Huvelle found that the plaintiffs met the requirements for next-friend standing, but agreed with the government on nonjusticiability. On standing, she found Faisal was an appropriate "next friend" and the Yemeni conflict would make appearing in the United States impracticable for the estate representatives.[22] On the political question issue, she first found that there were no judicially manageable standards to assess the imminence of threats, capture prospects, or the law of war requirement of proportionality.[23] Second, she found that deciding the case required a "policy determination . . . for nonjudicial discretion" — namely, deciding to use force in Yemen.[24]

The D.C. Circuit affirmed.[25] Judge Brown, writing for the panel,[26] first found that the plaintiffs challenged the type of executive decision found nonjusticiable in *El-Shifa Pharmaceutical Industries Co. v. United States*.[27] There, a Sudanese company filed an ATS claim against the United States for failing to provide compensation for an allegedly "mistaken" missile strike that destroyed its factory.[28] The court found the case nonjusticiable, distinguishing between claims questioning the

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16 Complaint, *supra* note 11, at 3.

17 *Id.* at 7–11. The United States was later substituted for the individual defendants on the Alien Tort Statute, 28 U.S.C. § 1350 (2012), claims. *bin Ali Jaber*, 861 F.3d at 244.

18 28 U.S.C. § 1350 note.

19 *Id.* § 1350.

20 Ali Jaber v. United States, 155 F. Supp. 3d 70, 73 (D.D.C. 2016).

21 *Id.* at 75, 77. The government also argued that the TVPA claim failed because the defendants were not acting under color of foreign law, Defendants' Memorandum of Points and Authorities in Support of Their Motion to Dismiss at 20–23, *Ali Jaber*, 155 F. Supp. 3d 70 (No. 15-0840), and that the court lacked subject matter jurisdiction under the ATS, *id.* at 24–27.

22 *Ali Jaber*, 155 F. Supp. 3d at 76–77.

23 *Id.* at 78.

24 *Id.* at 79 (quoting El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 845 (D.C. Cir. 2010) (en banc)).

25 *bin Ali Jaber*, 861 F.3d at 250.

26 Judge Brown was joined by Judges Srinivasan and Pillard.

27 607 F.3d 836; *bin Ali Jaber*, 861 F.3d at 246.

28 *bin Ali Jaber*, 861 F.3d at 246.

wisdom of military action, "a policy choice . . . constitutionally committed" to the political branches, and "legal issues such as whether the government had legal authority to act."[29] In the panel's view, the bin Ali Jabers questioned "the wisdom of [the] Executive's decision to commence military action — mistaken or not — against a foreign target," thus falling on the nonjusticiable policy side of the two poles.[30]

Next, the panel rejected the plaintiffs' reliance on *Zivotofsky*. Judge Brown interpreted *Zivotofsky* as "confirm[ing] no *per se* rule renders" foreign affairs cases nonjusticiable.[31] In her view, the Court there was not tasked with independently evaluating the Executive's position on Jerusalem, a discretionary policy decision, but instead was tasked with determining if a statute infringed on the Executive's Article II authority.[32] Situating the case in these terms, Judge Brown reasoned that the bin Ali Jabers' complaint required the court to make a policy decision.[33] Finally, the panel held that executive statements concerning international law were inapposite.[34] Even though the Executive may announce its interpretation of the relevant law, the panel noted that the Executive cannot "concede authority to the Judiciary to enforce those rules."[35]

Judge Brown also wrote a concurrence.[36] She noted that *El-Shifa* sensibly prohibited judicial second-guessing of one-off uses of force by the Executive.[37] By contrast, drone strikes are highly structured, "will be replicated hundreds . . . of times," and are a preferred tactic in modern conflicts.[38] In her view, "[a]ddressing these two . . . scenarios" with the same framework is impossible.[39] She also bemoaned the Executive's lack of accountability, claiming that executive self-policing is ineffectual and "congressional oversight is a joke."[40] She concluded by calling on the political branches to establish accountability mechanisms.[41]

The D.C. Circuit erred in holding that the bin Ali Jabers' complaint was nonjusticiable. *El-Shifa* did not bind the court because its analysis was significantly undermined by the Supreme Court's subsequent decision in *Zivotofsky*. *Zivotofsky*'s analytic framework confirmed, first, the need to distinguish a case's subject from the issue in dispute, and, second, that statutory cases will ordinarily be justiciable because statutory

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[29] *Id.* (quoting *El-Shifa*, 607 F.3d at 842).
[30] *Id.*
[31] *Id.* at 248.
[32] *Id.* at 248–49.
[33] *Id.* at 249.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 250 (Brown, J., concurring).
[37] *Id.* at 252.
[38] *Id.*
[39] *Id.*
[40] *Id.* at 253.
[41] *Id.*

interpretation is a core judicial task.[42] Properly applying *Zivotofsky*'s framework should have led the *bin Ali Jaber* panel to the opposite result. The plaintiffs did not question the wisdom of the strike; rather, they sought a declaration that the strike violated a statute. Ultimately, the court's erroneous holding avoided clarifying whether Congress has limited how the Executive conducts lethal counterterrorism operations. And the court upset separation of powers principles by refusing to independently determine the rights of the parties before it.

The political question doctrine plays a narrow role at the Court: since *Baker*, the Court has found only two claims nonjusticiable.[43] In those cases, the Court relied on the first two *Baker* factors — a textual commitment of the issue to a coordinate branch[44] and "a lack of judicially discoverable and manageable standards."[45] And in *Zivotofsky*, the Court mentioned only those factors.[46] Nonetheless, lower courts frequently invoke the doctrine, especially in national security cases.[47]

Two features of *Zivotofsky*'s approach illustrate how to apply the doctrine in statutory cases. First, *Zivotofsky* distinguished a case's subject matter, or a categorization of the circumstances giving rise to the dispute, from the issue to be adjudicated. In that case, the D.C. Circuit characterized the issue in terms of the recognition power — construing the court's task as reviewing "the [sovereign] status of Jerusalem."[48] But the issue to be adjudicated was whether the plaintiff could "vindicate his statutory right . . . to have Israel recorded on his passport."[49]

Second, as others have noted, *Zivotofsky*'s analysis indicates that the role for the political question doctrine is exceedingly small in statutory cases.[50] "The existence of a statutory right . . . is certainly relevant" to justiciability.[51] This is because analysis of the first *Baker* factor will be uniform for statutes: "there is . . . no exclusive commitment to the

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[42] *See* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012). Writing separately, Justice Sotomayor countered the implication that "no statute could give rise to a political question." *Id.* at 208 (Sotomayor, J., concurring in part and concurring in the judgment).

[43] Nixon v. United States, 506 U.S. 224, 229–38 (1993) (challenge to the Senate's impeachment trial procedures); Gilligan v. Morgan, 413 U.S. 1, 6–7 (1973) (request for continuing judicial surveillance of Ohio National Guard's training and operating procedures). The nonjusticiability of political gerrymandering claims has not commanded a majority of the Court. *See* Vieth v. Jubelirer, 541 U.S. 267, 281 (2004) (plurality opinion).

[44] *See Gilligan*, 413 U.S. at 6–7.

[45] *Nixon*, 506 U.S. at 228.

[46] *Zivotofsky*, 566 U.S. at 195. The Court made no mention of the remaining prudential factors. *See The Supreme Court, 2011 Term — Leading Cases*, 126 HARV. L. REV. 176, 314 (2012).

[47] *See* Stephen I. Vladeck, Essay, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1321–25 (2012); *see also* Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The "Political Question Doctrine" as a Justiciability Doctrine*, 29 J.L. & POL. 427, 428–30 (2014).

[48] Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1231 (D.C. Cir. 2009), *vacated*, 566 U.S. 189 (2012).

[49] *Zivotofsky*, 566 U.S. at 195.

[50] *See* Michel, *supra* note 7, at 259–60.

[51] *Zivotofsky*, 566 U.S. at 196.

Executive of" constitutional or statutory interpretation.[52] Likewise, under the second *Baker* factor, questions of legal interpretation will rarely "turn on standards that defy judicial application."[53] A statute providing for review of a self-judging constitutional provision may be nonjusticable.[54] But no such statute was involved in *El-Shifa* or *bin Ali Jaber*.

The *bin Ali Jaber* panel relied on *El-Shifa*, but that opinion was undermined by *Zivotofsky*. First, *El-Shifa* conflated the case's subject matter with the issue to be adjudicated. The plant owners filed suit under the ATS alleging that the President violated a duty to compensate victims of mistaken property destruction.[55] The subject matter was the use of force,[56] but the issue to be adjudicated was whether a cause of action should be recognized for the failure to provide compensation.

Second, *El-Shifa* held that reliance on a statute is irrelevant. The D.C. Circuit reasoned that "a statute providing for judicial review does not override Article III's requirement" of dismissing political questions.[57] But as the Court noted in *Zivotofsky*, the presence of a statute gets to the root of *Baker*'s textual commitment factor and the law/policy distinction.[58] One cannot assume, as the *El-Shifa* court did, that a case challenges a "discretionary foreign policy decision[]"[59] unless a determination is first made that the decision is discretionary. An executive action that contravenes the prohibition of a conduct-regulating statute is not discretionary, and the question of whether a statute supplies such a prohibition is a question of statutory interpretation for the courts.[60]

Distinguishing *El-Shifa* from *Zivotofsky* based on the jurisdictional nature of the ATS would be misguided. The *Zivotofsky* plaintiff claimed a clear statutory right to have Israel listed on his passport.[61] By contrast, the *El-Shifa* plaintiffs relied on the ATS,[62] a "jurisdictional

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[52] *Id.* at 197; *see also* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (reasoning that interpreting treaties and legislation is within the authority of the federal courts).

[53] *Zivotofsky*, 566 U.S. at 201 (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)).

[54] One hypothetical example would be a statute providing for review of impeachment procedures. *Cf.* Nixon v. United States, 506 U.S. 224, 231–32 (1993) (interpreting the Impeachment Clause as conferring exclusive authority on the Senate to develop impeachment trial procedures).

[55] El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 844 (D.C. Cir. 2010) (en banc).

[56] *See id.* at 844–45.

[57] *Id.* at 843. Even before *Zivotofsky*, Judge Kavanaugh suggested that statutory cases could not present political questions. *See id.* at 855 (Kavanaugh, J., concurring in the judgment).

[58] *See Zivotofsky*, 566 U.S. at 196.

[59] *El-Shifa*, 607 F.3d at 844.

[60] "Conduct-regulating" is used in contradistinction to "authority-granting." For example, Congress conferred authority on the Secretary of State to designate foreign terrorist organizations if she finds that a group's activities "threaten[] the security of United States nationals." 8 U.S.C. § 1189(a)(1) (2012). Authority-granting statutes do not necessarily present political questions. Challenges should be dismissed on the merits if a statute confers exclusive authority on the Executive. *See* Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

[61] *Zivotofsky*, 566 U.S. at 196.

[62] *El-Shifa*, 607 F.3d at 854–55 (Kavanaugh, J., concurring in the judgment).

statute."[63] One could argue that the ATS does not "directly regulate the Executive"[64] in the same way and thus *Zivotofsky*'s analysis should not apply. But this argument is unconvincing for two reasons. First, ATS jurisdiction is exercised over a narrow set of CIL norms "defined with a [high degree of] specificity,"[65] including norms against universally condemned conduct such as torture and extrajudicial killing.[66] The prohibition on extrajudicial killing represents a clear conduct-regulating norm. Second, courts must exercise caution in recognizing ATS causes of action to avoid "impinging on the discretion" of the political branches.[67] This reflects the very separation of powers motivating the political question doctrine. *Zivotofsky*'s reasoning should apply to ATS claims.[68]

Thus, the *bin Ali Jaber* panel should have held that it was not bound by *El-Shifa* in the wake of *Zivotofsky*; instead, it should have properly applied *Zivotofsky*'s analysis and reached the opposite result. First, while the case's subject matter was the use of force abroad, the issue to be adjudicated was whether the drone strike violated the TVPA and the CIL prohibition on extrajudicial killing.[69] Even assuming that *Zivotofsky*'s analysis should not apply to the ATS,[70] the TVPA provides a statutory cause of action. Second, applying the first two *Baker* factors to this issue leads to the conclusion that the claims are justiciable. The case required determining if the statutes apply to drone strikes, and if they do, determining if the statutes are constitutional.

This analysis reveals the panel's essential error. The court pointed to plaintiffs' allegations — for example, that "[n]o urgent military purpose" justified the strike[71] — and concluded that plaintiffs questioned a

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63 Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

64 *bin Ali Jaber*, 861 F.3d at 248.

65 *Sosa*, 542 U.S. at 725.

66 *See id.* at 731–32; Romero v. Drummond Co., 552 F.3d 1303, 1315–16 (11th Cir. 2008); Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242, 1250–51 (11th Cir. 2005) (per curiam).

67 *Sosa*, 542 U.S. at 727; *see also id.* at 727–28 (cautioning courts to be wary of "risks of adverse foreign policy consequences," *id.* at 728); Skinner, *supra* note 47, at 459–60.

68 A prior challenge to an anticipated lethal counterterrorism operation involved constitutional and ATS claims, and all the claims were held to be nonjusticiable. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 12, 52 (D.D.C. 2010). While *Zivotofsky*'s analysis suggests that the ATS claim should have been justiciable, that analysis does not apply to the constitutional claims.

69 *bin Ali Jaber*, 861 F.3d at 246.

70 Whether or not the ATS claim is justiciable, it would be barred because the United States holds sovereign immunity. *See, e.g.*, Tobar v. United States, 639 F.3d 1191, 1196 (9th Cir. 2011). But the government cannot be substituted as a defendant on the TVPA claim because substitution is not permitted where a claim alleges a violation of a federal statute. *See* 28 U.S.C. § 2679(b)(1), (2)(B) (2012). Unlike the ATS, which does not constitute a federal statute for purposes of § 2679 because it is jurisdictional, *see* Ali v. Rumsfeld, 649 F.3d 762, 775–76 (D.C. Cir. 2011), the TVPA creates a statutory cause of action, and thus the sovereign immunity bar does not apply.

71 *bin Ali Jaber*, 861 F.3d at 246 (quoting Complaint, *supra* note 11, at 4).

discretionary policy decision, or the "*wisdom*" of the strike decision.[72] But that conclusion "puts the cart before the horse."[73] If a conduct-regulating statute prohibits the Executive from carrying out strikes that constitute extrajudicial killings, then the action was not discretionary.[74]

The question before the court was therefore whether the TVPA limits how drone strikes are conducted. The TVPA's applicability to U.S. officials acting in concert with foreign state actors has not been addressed by the D.C. Circuit.[75] This is plainly an ordinary question of statutory interpretation. If the TVPA applies, the issue would center on the permissibility of the killings under international law.[76] The international framework applicable to counterterrorism operations is hotly contested.[77] But in recent years, domestic courts have entered the debate, filling gaps and crafting "domestic humanitarian law."[78]

The bin Ali Jabers raised a threshold question about the use of lethal force abroad, and addressing that question could have promoted the accountability Judge Brown viewed as being so deficient. A prerequisite for accountability is identifying standards. The Obama Administration's legal position was that the United States is in an armed conflict with al Qaeda, the Taliban, and associated forces,[79] and lethal force could be used to target those groups wherever they were subject to the laws of armed conflict.[80] By contrast, other authorities hold that a law

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[72] *Id.* (emphasis added).

[73] *Id.* at 247 n.1.

[74] *See* Al-Shimari v. CACI Premier Tech., Inc., 840 F.3d 147, 157 (4th Cir. 2016) ("[T]he military cannot lawfully exercise its authority by . . . engag[ing] in unlawful activity."); *see also* Salim v. Mitchell, 183 F. Supp. 3d 1121, 1128–30 (E.D. Wash. 2016). These cases involve contractors, but the reasoning equally applies to military and civilian superiors.

[75] One circuit found allegations that U.S. officials "encouraged and facilitated" foreign government actors insufficient because the TVPA requires the exercise of power under foreign law. Arar v. Ashcroft, 585 F.3d 559, 568 (2d Cir. 2009); *see also* Schneider v. Kissinger, 310 F. Supp. 2d 251, 267 (D.D.C. 2004), *aff'd on other grounds*, 412 F.3d 190 (D.C. Cir. 2005).

[76] 28 U.S.C. § 1350 note (2012) (defining extrajudicial killing to exclude "any such killing that, under international law, is lawfully carried out under the authority of a foreign nation").

[77] *E.g.*, Ashley Deeks, *Domestic Humanitarian Law: Developing the Law of War in Domestic Courts*, *in* APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES 133, 134–35 (Derek Jinks et al. eds., 2014); Jameel Jaffer, *Introduction* to THE DRONE MEMOS 40 (Jameel Jaffer ed., 2016).

[78] Deeks, *supra* note 77, at 134; *see also, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 629–31 (2006) (reasoning that conflict with al Qaeda constitutes a non-international armed conflict).

[79] The purported basis of the notion of "associated forces" within the concept of cobelligerency and the international law of neutrality is disputed. *Compare* Al-Bihani v. Obama, 590 F.3d 866, 873 (D.C. Cir. 2010) (dictum) (rejecting argument that law of neutrality applies to non-state actors), *with* Hamlily v. Obama, 616 F. Supp. 2d 63, 74–75 (D.D.C. 2009) (concluding the opposite). For a discussion of the application of the cobelligerency concept in the post-9/11 era, see generally Rebecca Ingber, *Co-Belligerency*, 42 YALE J. INT'L L. 67 (2017).

[80] *See, e.g.*, Press Release, White House, Office of the Press Sec'y, Remarks of John O. Brennan, "Strengthening Our Security by Adhering to Our Values and Laws," (Sept. 16, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an [https://perma.cc/MD8K-LBYZ]; Press Release,

enforcement model governs outside territorial areas of active conflict.[81] The bin Ali Jabers alleged Yemen was such an area at the time of the 2012 strike, directly raising the question.[82] The difference between these positions is cavernous — under the former, lethal force can be used to target members of the opposing group and civilian harm is more permissible; under the latter, lethal force is only permissible as a last resort when an actor poses an imminent threat of death or injury.[83] Assessments of executive accountability must address this dispute.

Instead of promoting accountability, the *bin Ali Jaber* court's approach contravenes separation of powers principles. The Executive is subject to different incentives than the judiciary, particularly when it comes to balancing individual rights and national security.[84] Independent judicial review would promote separation of powers principles by preserving the judicial role in legal interpretation. Moreover, as Judge Kavanaugh noted in his *El-Shifa* concurrence, nonjusticiability holdings in statutory cases imply that Congress cannot constrain the Executive.[85]

Judge Brown forcefully contended that an accountability gap exists with respect to drone strikes.[86] But that gap is partly of the court's own making: properly applying *Zivotofsky* would have forced the court to consider whether the TVPA imposes limits on drone strikes. By affirming on nonjusticiability grounds, the court not only shirked its duty to adjudicate the rights of the parties before it, but also missed the chance to take a step toward greater accountability by clarifying what legal standards govern those operations.

Office of the Legal Adviser, U.S. Dep't of State, Speech of Harold Hongju Koh, The Obama Administration and International Law (Mar. 25, 2010), https://2009-2017.state.gov/s/l/releases/remarks/139119.htm [https://perma.cc/4LGT-3RRB]. President Trump reportedly signed off on changes to the discretionary guidelines the Obama Administration imposed on the use of lethal force outside Executive-defined conflict zones. Charlie Savage, *Will Congress Ever Limit the Forever-Expanding 9/11 War?*, N.Y. TIMES (Oct. 28, 2017), https://nyti.ms/2yTrY7J [https://perma.cc/7PMZ-7P8U].

[81] *See* Int'l Comm. of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, No. 32IC/15/11, at 15 (Oct. 2015); Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SECURITY L. & POL'Y 343, 355 (2010).

[82] Complaint, *supra* note 11, at 28.

[83] *See* Jaffer, *supra* note 77, at 38–39; *cf.* McCann & Others v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) at 45–46 (1995) (describing the requirement under European human rights law that the right to life can only be deprived when necessary to protect against violence or effect arrest).

[84] *See* Deeks, *supra* note 77, at 155–60. The Executive is "directly self-interested" in interpreting the rules that govern how it will fight a conflict, *id.* at 156, and may be prone to putting less weight on individual rights when balancing against "real or perceived security threats," *id.* at 157.

[85] *See* El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 857 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring in the judgment); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 723–24 (2008).

[86] *bin Ali Jaber*, 861 F.3d at 252–53 (Brown, J., concurring).