IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AHMED SALEM BIN ALI JABER and ABDULLAH ABDULMAHMOUD BIN ALI JABER,

Plaintiffs,

v.

UNITED STATES OF AMERICA, BARAK OBAMA, LEON PANETTA, DAVID PETRAEUS & UNKNOWN DEFENDANTS ONE, TWO & THREE,

Defendants

Civil Action No. 1:15-cv-00840-ESH

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS

Dated: September 30, 2015

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Director

/s/ Elizabeth J. Shapiro
ELIZABETH J. SHAPIRO
STEPHEN M. ELLIOTT
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Tel: (202) 514-5302 Fax: (202) 616-8470
Email: Elizabeth.Shapiro@usdoj.gov

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 4

ARGUMENT 6

I. PLAINTIFFS LACK "NEXT FRIEND" STANDING TO BRING SUIT 6

A. Next Friend Standing Has Not Been Recognized Outside of the *Habeas Corpus* Context for Mentally Competent Adults 8

B. The Purported Next Friend Has Not Established that the Real Parties of Interest Lack Access to the Courts 9

II. PLAINTIFFS' CLAIMS PRESENT NON-JUSTICIBLE POLITICAL QUESTIONS 11

A. The Relief Sought by Plaintiffs Would Require the Court to Scrutinize National Security Determinations Committed to the Political Branches 13

B. The Relief Sought by Plaintiffs Would Also Require the Court to Review Discretionary National Security Decisions Outside of its Area of Expertise 16

III. PLAINTIFFS' TVPA CLAIMS WARRANT DISMISSAL 19

A. Plaintiffs Cannot Obtain Declaratory Relief under the TVPA 19

B. Defendants Did Not Act Under Color of Foreign Law 20

C. The TVPA Does Not Waive the Official Capacity Defendants' Sovereign Immunity 23

IV. PLAINTIFFS' ATS CLAIMS CAN ONLY BE BROUGHT UNDER THE FTCA, OVER WHICH THE COURT LACKS JURISDICTION 24

A. Plaintiffs Failed to Exhaust Their Administrative Remedies 27

B. The United States has Not Consented to Suit Under the FTCA For Claims Seeking Declaratory Relief 27

C. The United States Has Not Waived its Sovereign Immunity Under the FTCA Because the Alleged Torts Occurred in a Foreign Country 28

V. THE COURT SHOULD ALSO DECLINE TO GRANT DECLARATORY RELIEF AS A MATTER OF DISCRETION 30

CONCLUSION 33

TABLE OF AUTHORITIES

FEDERAL CASES

Achagzai v. Broad. Bd. of Governors,
__F. Supp. 3d __, 2015 WL 3647570 (D.D.C. June 12, 2015) 26, 27
Ahmed v. Bush,
2005 WL 6066070 (D.D.C. May 25, 2005) 10
**Al-Aulaqi v. Obama*,
727 F. Supp. 2d 1 (D.D.C. 2010) .... passim
Al-Aulaqi v. Panetta,
35 F. Supp. 3d 56 (D.D.C. 2014) 12
Ali v. Rumsfeld,
649 F.3d 762 (D.C. Cir. 2011) 27
Allen v. Wright,
468 U.S. 737 (1984) 6
Al-Maqaleh v. Gates,
604 F. Supp. 2d 205 (D.D.C. 2009), ... 10
Ass'n of Am. Railroads v. Surface Transp. Bd.,
237 F.3d 676 (D.C. Cir. 2001) 19
**Baker v. Carr*,
369 U.S. 186 (1962) .... passim
Bancoult v. McNamara,
445 F.3d 427 (D.C. Cir. 2006) 12, 14
Banner v. U.S.,
303 F. Supp. 2d 1 (D.D.C. 2004) 11
Celikgogus v. Rumsfeld,
920 F. Supp. 2d 53 (D.D.C. 2013) 26
Comm. on Judiciary v. Miers,
558 F. Supp. 2d 53 (D.D.C. 2008) 30
Davidson v. United States Dep't of State,
__F. Supp. 3d __, 2015 WL 4111308 (D.D.C. 2015) 20
Demosthenes v. Baal,
495 U.S. 731 (1990) 8
Doe v. Rumsfeld,
683 F.3d 390 (D.C. Cir. 2012) 20, 21
**El-Shifa Pharm. Indus. v. United States*,
607 F.3d 836 (D.C. Cir. 2010) .... passim
Escarria-Montano v. U.S.,
797 F. Supp. 2d 21 (D.D.C. 2011) 24
Fenstermaker v. Bush,
2007 WL 1705068 (S.D.N.Y. June 12, 2007) 11
Franconia Associates v. U.S.,
536 U.S. 129 (2002) 24
Franklin v. Massachusetts,
505 U.S. 778 (1992) 25
GAF Corp. v. United States,
818 F.2d 901 (D.C. Cir. 1987) 26, 27

Gonzalez-Vera v. Kissinger,
449 F.3d 1260 (D.C. Cir. 2006) 12
Haig v. Agee,
453 U.S. 280 (1981) 12
Harbury v. Hayden,
444 F. Supp. 2d 19 (D.D.C. 2006) 21
Harbury v. Hayden,
522 F.3d 413 (D.C. Cir. 2008) 24, 26, 29
Hatfill v. Gonzales,
519 F. Supp. 2d 13 (D.D.C. 2007) 20
Hubbard v. Administrator, Envtl. Prot. Agency,
982 F.2d 531 (D.C. Cir. 1992) 28
Japan Whaling Ass'n v. Am. Cetacean Soc'y,
478 U.S. 221 (1986) 11, 17, 18
**Jawad v. Gates*,
__F. Supp. 3d __, 2015 WL 4113336 (D.D.C. 2015) 21, 24, 26
Kokkonen v. Guardian Life Ins. Co. of Am.,
511 U.S. 375 (1994) 6
Lane v. Pena,
518 U.S. 187 (1996) 28
Lehman v. Lycoming County Children's Servs. Agency,
458 U.S. 502 (1982) 7
Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 7, 8
McNeil v. United States,
508 U.S. 106 (1993) 27
Mohamad v. Palestinian Auth.,
132 S.Ct. 1702 (2012) 20, 24
Mohamad v. Rajoub,
634 F.3d 604 (D.C. Cir. 2011) 20
Osborn v. Haley,
127 S. Ct. 881 (2007) 25
President v. Vance,
627 F.2d 353 (D.C. Cir. 1980) 30
Regan v. Wald,
468 U.S. 222 (1984) 12
Roum v. Bush,
461 F. Supp. 2d 40 (D.D.C. 2006) 23
Saleh v. Titan Corp.,
580 F.3d 1 (D.C. Cir. 2009) 21
Sanchez-Espinoza v. Reagan,
770 F.2d 202 (D.C. Cir. 1985) 25, 30, 31
Schneider v. Kissinger,
412 F.3d 190 (D.C. Cir. 2005) 12, 14
Schneider v. Kissinger,
310 F. Supp. 2d 251 (D.D.C. 2004) 22, 23

Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.,
549 U.S. 422 (2007) 6
Sloan v. Dep't of Housing & Urban Dev.,
236 F.3d 756 (D.C. Cir. 2001) 28
**Sosa v. Alvarez-Machain*,
542 U.S. 692 (2004) 24, 28, 29, 30
Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 6
The Prize Cases,
67 U.S. (2 Black) 635 (1863) 14
United States v. Navajo Nation,
556 U.S. 287 (2009) 23, 25, 27
United States v. Smith,
499 U.S. 160 (1991) 25
Warth v. Seldin,
422 U.S. 490 (1975) 7
Whitmore v. Arkansas,
495 U.S. 149 (1990) 7, 8, 9
Wilton v. Seven Falls Co.,
515 U.S. 277 (1995) 30
Zarmach Oil Services, Inc. v. U.S. Dep't of the Treasury,
750 F. Supp. 2d 150 (D.D.C. 2010) 12

FEDERAL STATUTES
28 U.S.C. § 1346(b) 28
28 U.S.C. § 1346(b)(1) 27
28 U.S.C. § 1350 .... 19, 21, 24
28 U.S.C. § 2242 8
28 U.S.C. § 2675(a) 27
28 U.S.C. § 2679(b)(1) 25
28 U.S.C. § 2679(d)(1) 26
28 U.S.C. § 2680(k) 28, 29
28 U.S.C. § 2674 28

U.S. CONSTITUTION
U.S. CONST., Art. I, § 8 14
U.S. CONST., Art. II, § 2 14

FEDERAL RULES
Fed. R. Civ. P. 12(b)(1) 19, 23, 24
Fed. R. Civ. P. 12(b)(6) 19, 20
Fed. R. Civ. P. 17(c)(2) 9

FEDERAL REGULATIONS
28 C.F.R. § 14.1 27
28 C.F.R. § 15.4 26

MISCELLANEOUS

Authorization for the Use of Military Force,
Pub. L. No. 107-40, 115 Stat. 224 (2002) 13

Torture Victim Protection Act of 1991,
Pub. L. No. 102-256, 106 Stat. 73 (1992) 19

Black's Law Dictionary (10th ed. 2014)... 19

INTRODUCTION

Plaintiffs Ahmed Salem bin Ali Jaber and Esam Abdullah Abdulmahmoud bin Ali Jaber ("plaintiffs"), two Yemeni nationals, attempt to sue the President and two former senior government officials for discretionary national security-related decisions and activities allegedly conducted during the course of their official duties. This Court lacks the power to hear the complaint, and should therefore dismiss the instant action for lack of subject matter jurisdiction or, alternatively, for failure to state a claim upon which relief can be granted.

In addition to the specific flaws in each of plaintiffs' stated claims for relief, plaintiffs' complaint suffers from two overarching jurisdictional defects. First, plaintiffs initiated this lawsuit through their purported "next friend," who has not demonstrated the constitutional standing to act in such a capacity. Other than alleging that they are not physically present in this country, plaintiffs wholly fail to establish the requisite inaccessibility to pursue a claim through a next friend. In this day and age, plaintiffs can pursue their case by communicating with their attorneys in the United States and Great Britain by telephone, email, or other means. Indeed, courts have recognized that foreign nationals need not be physically present in the United States to pursue litigation. Without a valid justification for why plaintiffs themselves lack access to the United States court system, the Court should dismiss this case on that basis alone.

Second, even if plaintiffs could pursue this case through their purported next friend, plaintiffs ask the Court to decide non-justiciable political questions over which this Court should not exert its jurisdiction. The crux of plaintiffs' argument consists of their allegation that the United States conducted an unlawful drone strike in Yemen that resulted in the deaths of their

relatives.[1] But all of Plaintiffs' claims would require the Court to address non-justiciable decisions in the realm of national security and foreign policy delegated to the political branches by the Constitution. Moreover, plaintiffs ask the Court to second-guess a series of complicated policy decisions allegedly made by the Executive regarding whether to conduct a counterterrorism operation. The Executive makes such decisions after, among other things, weighing sensitive intelligence information and diplomatic considerations, far afield from the judiciary's area of expertise. The Court should decline to second-guess the appropriateness of an alleged national security operation conducted by the political branches.

Aside from these overarching jurisdictional concerns, plaintiffs' first and second claims, predicated on the Torture Victim Protection Act ("TVPA"), fail to state a claim upon which relief can be granted. As an initial matter, the TVPA only allows for the award of monetary damages, not the declaratory relief sought by plaintiffs. In addition, the TVPA only provides a cause of action against individuals who acted under color of foreign law, and as a consequence, the D.C. Circuit has expressly held that TVPA suits cannot be brought against United States government employees or United States citizens, such as the defendants in this case. Plaintiffs, therefore, cannot pursue their claims under the TVPA for the conduct of an alleged counterterrorism operation authorized by the United States government under United States law.

Plaintiffs' remaining claims based on the Alien Tort Statute ("ATS") similarly fail. The Attorney General, through her designee, has certified under the Westfall Act that President Obama, former Secretary of Defense Leon Panetta, and former Director of the Central Intelligence Agency David Petraeus acted within the scope of their employment at the time of

---

[1] Defendants neither confirm nor deny whether the United States government conducted the counterterrorism operation alleged by plaintiffs. To dispose of this lawsuit, however, the Court need not reach the merits of plaintiffs' allegations.

the alleged incident out of which the claim arose. As a consequence, the United States is automatically substituted for the individual defendants, and can only be sued in tort under the Federal Torts Claim Act ("FTCA").

This Court, however, lacks subject matter jurisdiction to consider the FTCA claims against the United States that plaintiffs attempt to plead here. First, the FTCA requires litigants to exhaust their administrative remedies before filing suit in federal district court. Plaintiffs make no allegation in the Complaint indicating that they submitted an administrative claim for damages to the appropriate agency or otherwise attempted to exhaust their administrative remedies.

Second, even if plaintiffs had exhausted administrative remedies, their remaining claims would fail pursuant to principles of sovereign immunity. The FTCA permits only certain kinds of civil suits for monetary damages. Because the FTCA is the only jurisdictional basis for plaintiffs' claims, and it does not provide for any equitable remedy, including a declaratory judgment, the court lacks the authority to grant the relief plaintiffs request. To the extent plaintiffs rely on the Declaratory Judgment Act, that statute requires an independent basis for jurisdiction that the FTCA does not provide here.

Third, the FTCA does not authorize claims "arising in a foreign country" -- the so-called "foreign country exception" to the FTCA's waiver of sovereign immunity. But plaintiffs allege that their relatives died as a result of a drone strike suffered in Yemen. The Supreme Court has held that such allegations fall squarely within the foreign country exemption. Accordingly, even assuming exhaustion, each of plaintiffs' substantive tort claims should be dismissed.

Finally, as a matter of discretion, the Court should decline to grant the declaratory relief sought by plaintiffs. Plaintiffs seek relief under the Declaratory Judgment Act, asking the Court

to pronounce that the United States unlawfully conducted the alleged drone strike that resulted in the deaths of plaintiffs' relatives. In essence, plaintiffs ask the Court to stand in the shoes of the political branches, with the benefit of hindsight, and second-guess a series of complicated questions involving national security and foreign policy which in any event the government could not confirm or deny. Putting aside the political question doctrine, this Court has declined to conduct such an inquiry in the past in the exercise of its equitable discretion, and it should decide not to do so in this case as well.

BACKGROUND

The United States has publicly acknowledged its lawful use of unmanned aerial vehicles—commonly referred to as "drones"—to target terrorists posing an imminent threat to the country's national security. On March 25, 2010, Harold Hongju Koh, then the Legal Advisor for the Department of State, confirmed that the United States' "targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war." Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Speech at the Annual Meeting of the Am. Soc'y of Int'l Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm. Mr. Koh also explained that when the United States conducts lethal operations using unmanned aerial vehicles, "great care is taken to adhere to [law of war] principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum." *Id.* President Obama likewise affirmed in his remarks at the National Defense University that, although "heavily constrained," the United States has "taken lethal, targeted action against al[-]Qaeda and its associated forces, including with remotely piloted aircraft[.]" President Barack Obama, Remarks at the Nat'l Def. Univ. (May 23, 2013), *available at* https://www.whitehouse.gov/the-press-

office/2013/05/23/remarks-president-national-defense-university. President Obama stated that "America does not take strikes when we have the ability to capture individual terrorists," and prior to a strike, "there must be near-certainty that no civilians will be killed or injured[.]" *Id.* But President Obama acknowledged that "it is a hard fact that U.S. strikes have resulted in civilian casualties, a risk that exists in every war." *Id.*

With these public statements as backdrop, plaintiffs filed the instant lawsuit against the United States and President Barack Obama in their official capacities, as well as against former Secretary of Defense Leon Panetta and former Director of the Central Intelligence Agency David Petraeus, in their personal capacities.[2] *See* Compl. ¶¶ 35–41. Plaintiffs, through their purported next friend, allege that they act as representatives for the estates of Salem bin Ali Jaber and Waleed bin Ali Jaber—their deceased Yemeni relatives. *See* Compl. ¶¶ 26-34. Plaintiffs contend that their relatives were killed in Khashamir, Yemen, on August 29, 2012, by a drone strike conducted by the United States government, which was allegedly targeting individuals associated with al-Qaeda in the Arabian Peninsula ("AQAP"). *See* Compl. ¶¶ 4–13, 51–66.

The Complaint consists of six claims directed against the official capacity and personal capacity defendants.[3] *See* Compl. ¶¶ 97–117 & pp. 35–39. The first and second claims allege that defendants violated the TVPA by committing extrajudicial killings of the two Yemeni nationals. *See* Compl. ¶¶ 97–104 & p. 35. The third, fourth, fifth, and sixth claims, brought

---

[2] On July 14, 2015, the parties discussed, among other things, perfecting service of process and the time for responding to plaintiffs' complaint. *See* ECF No. 9. During this conversation, counsel for plaintiffs confirmed that plaintiffs brought their lawsuit against former Secretary of Defense Leon Panetta and former Director of the Central Intelligence Agency David Petraeus in their personal capacities, and undersigned counsel accepted service on their behalf.

[3] Plaintiffs also brought the six claims against three "unknown" defendants, presumably in their official capacities, who were purportedly "employed by or under the authority of the United States." Compl. ¶¶ 39–41. Undersigned counsel did not agree to accept service on their behalf, and, accordingly, they have not been joined as part of this action. *See* ECF No. 9.

under the ATS, allege that defendants' conduct violated various principles of international law, resulting in the wrongful deaths of the Yemeni nationals. *See* Compl. ¶¶ 105–117 & pp. 35–39. Plaintiffs seek a declaratory judgment that defendants were responsible for the alleged strike, and that the strike resulted in the wrongful death and extrajudicial killings of their relatives. *See* Compl. p. 40. For the reasons addressed below, plaintiffs' claims should be dismissed.

ARGUMENT

I. PLAINTIFFS LACK "NEXT FRIEND" STANDING TO BRING SUIT

The federal courts "are courts of limited jurisdiction," and it will be "presumed that a cause lies outside" the limited parameters of their authority. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). A plaintiff seeking to invoke the jurisdiction of a federal court bears the burden of establishing that the court's exercise of jurisdiction falls within the bounds of the Constitution. *Id.* When defendants, as in this case, raises an issue of subject matter jurisdiction, the Court must resolve the jurisdictional issue before it proceeds to the merits of the plaintiffs' claims. *See, e.g.*, *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007) ("[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction)[.]") (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–102 (1998)).

The constitutional separation of powers, as embodied in Article III of the Constitution, restricts the subject matter jurisdiction of the federal courts to the resolution of specific "'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984). One manifestation of the "case or controversy" limitation is the requirement of "standing," which demands that the plaintiff in federal court show "such a personal stake in the outcome of the controversy as to warrant his

invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (explaining that a litigant's standing to sue is "an essential and unchanging part of the case-or-controversy requirement"). The "irreducible constitutional minimum" of standing to sue requires the plaintiffs to allege: (1) a concrete and imminent "injury in fact" that is (2) "fairly traceable" to the challenged conduct and (3) likely to be redressed by a favorable judicial decision. *Defenders of Wildlife*, 504 U.S. at 560–61. The plaintiffs bear the burden of establishing each of the three elements. *Id.* at 561.

The Supreme Court has emphasized that next friend standing—which allows a third person to file a claim on someone else's behalf—is "by no means granted automatically to whomever seeks to pursue an action on behalf of another." *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990). Rather, consistent with the constitutional limits established by Article III, a litigant who asserts next friend standing bears the burden of "clearly . . . establish[ing] the propriety of his status and thereby justify[ing] the jurisdiction of the court." *Id.* at 164. To meet this burden, a purported next friend must satisfy "two firmly rooted prerequisites" to have standing:

> 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 real party in interest.

Id. at 163–64.

The next friend does not become a party to the case, "but simply pursues the cause on behalf of the [incompetent or unavailable party], who remains the real party in interest." *Id.* at 163. As a consequence, "the 'next friend' application has been uncommonly granted[.]" *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 523 (1982). "If there were

no restriction on 'next friend' standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of 'next friend.'" *Whitmore*, 495 U.S. at 164.

The plaintiffs' burden of establishing standing differs depending on the stage of litigation at which the issue is raised. *Defenders of Wildlife*, 504 U.S. at 561. General factual allegations may suffice at the pleading stage to establish standing, but standing must be established as a factual matter as the litigation progresses through the summary judgment phase and trial. *Id.* But even at the earliest stage of litigation, a case should be dismissed if the plaintiffs fail to establish standing based on the pleadings before the Court. *Id.* Indeed, in the context of next friend standing, the Court is not obligated to accept as true the next friend's bare assertion that the real party lacks access to the United States court system. *See Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 17 n.3 (D.D.C. 2010) (citing *Demosthenes v. Baal*, 495 U.S. 731, 736 (1990)). The courts have required that "claims pertaining to incompetency or inaccessibility have some support in the record." *Id.* For the reasons set forth below, Mr. Faisal bin Ali Jaber, the purported next friend alleged here, has not established next friend standing.

A. Next Friend Standing Has Not Been Recognized Outside of the *Habeas Corpus* Context for Mentally Competent Adults

The only circumstance in which the Supreme Court has accepted next friend standing is with writs of *habeas corpus* filed "on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek [habeas] relief themselves." *Whitmore*, 495 U.S. at 162. In fact, the Court in *Whitmore* noted that next friends are authorized to appear in the *habeas corpus* context pursuant to federal statute, *see* 28 U.S.C. § 2242, and expressly declined to decide whether "a 'next friend' may ever invoke the jurisdiction of a federal court absent congressional authorization[.]" *Whitmore*, 495 U.S. at 164. Given the

absence of any applicable statutory authorization in the present lawsuit, the Court should reject next friend standing on this basis alone.

In any event, the courts have historically only allowed next friends to prosecute actions on behalf of minors and adult mental incompetents. *See Whitmore*, 495 U.S. at 163 n.4. And the Federal Rules of Civil Procedure only provide that "[a] minor or an incompetent person who does not have a duly appointed representative may sue by a next friend." Fed. R. Civ. P. 17(c)(2). In contrast, Mr. Faisal bin Ali Jaber seeks to bring a next friend suit on behalf of two competent adults who want to pursue a lawsuit in federal court while living in a foreign country. This Court should not expand the concept of next friend standing beyond what any other federal court appears to have accepted or the Federal Rules of Civil Procedure expressly authorize.

B. The Purported Next Friend Has Not Established that the Real Parties of Interest Lack Access to the Courts

Even assuming that the Court could grant next friend standing in the present circumstances, Mr. Faisal bin Ali Jaber, the purported next friend, has not demonstrated the requisite "inaccessibility," such that the real parties of interest cannot pursue their lawsuit. *See Whitmore*, 495 U.S. at 163–64. Plaintiffs contend that that they cannot pursue their case on their own because "family, financial and employment circumstances make it impossible as a practical matter for [them] to travel to the United States to initiate or supervise this lawsuit in person." Compl. at ¶¶ 27, 30. In other words, plaintiffs allege that Mr. Faisal bin Ali Jaber has next friend standing because they cannot themselves physically travel to the United States. *Id.* Plaintiffs, however, conflate the concept of physical presence in this country and inaccessibility to the United States court system. Plaintiffs fail to explain why they could not authorize their United States and British attorneys via telephone or email to initiate this lawsuit, and similarly, they do not explain why they cannot communicate with their representatives by email and telephone

from Yemen during the course of these proceedings. In fact, Plaintiffs may be able to participate in any court hearings by telephone or possibly even video conference. *See Al-Maqaleh v. Gates*, 604 F. Supp. 2d 205, 228 (D.D.C. 2009), *rev'd and remanded on other grounds*, 605 F.3d 84 (D.C. Cir. 2010) ("Real-time video-conferencing provides a workable substitute for an in-court appearance. Indeed, that is the process being used in scores of Guantanamo *habeas* proceedings now taking place in this District Court, in which no Guantanamo detainee has been physically transferred here."). In sum, Plaintiffs cannot establish that they lack access to the United States court system simply because they lack the financial means to travel to this country and physically sit in the courtroom.[4]

Courts have recognized that physical presence in the United States is not a prerequisite to pursuing an action in federal court. In *Al-Aulaqi v. Obama*, this Court acknowledged that even Anwar al-Aulaqi—who at the time was hiding in Yemen—could pursue his case in federal district court without the use of a next friend. 727 F. Supp. 2d at 18 n.4. The Court explained that, "[t]he use of videoconferencing and other technology has made civil judicial proceedings possible even where the plaintiff himself cannot physically access the courtroom." *Id.* The Court further noted that al-Aulaqi could "communicate with attorneys via the Internet from his current place of hiding." *Id.* Similarly, district courts have not assumed that individuals detained at the Guantanamo Bay Detention Facility lack access to the United States judicial system. *See, e.g.*, *Ahmed v. Bush*, 2005 WL 6066070, at *1–2 (D.D.C. May 25, 2005) (ordering supplemental briefing on next friend standing where petition presumed that the detainee had "been denied

[4] Aside from plaintiffs' unsupported allegations, nothing in the record indicates that plaintiffs are unable to pursue their claims from Yemen through their attorneys in the United States and Great Britain. *See Al-Aulaqi*, 727 F. Supp. 2d at 17 n.3 ("This Court thus need not accept plaintiff's bald assertion that his son lacks access to courts if the record makes clear the contrary.").

access to the courts of the United States"); *Fenstermaker v. Bush*, 2007 WL 1705068, at *6 (S.D.N.Y. June 12, 2007) (holding that the purported next friend lacked standing to bring the case because, *inter alia*, he failed to "demonstrate that the Detainees cannot appear on their own behalf"). Accordingly, because plaintiffs have improperly relied on a "next friend" to prosecute their claims, the Court lacks subject matter jurisdiction and may dismiss the case on this ground alone.

II. PLAINTIFFS' CLAIMS PRESENT NON-JUSTICIBLE POLITICAL QUESTIONS

Even if standing could be established, plaintiffs' claims are nonetheless non-justiciable. The political question doctrine "arises from two constitutional principles: the separation of powers among the three coordinate branches of government and the inherent limits on judicial capabilities." *Banner v. U.S.*, 303 F. Supp. 2d 1, 9 (D.D.C. 2004) (Huvelle, J.) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)). The doctrine "excludes from judicial review those 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'y*, 478 U.S. 221, 230 (1986). In *Baker*, the Supreme Court "articulated six factors which guide the identification of a non-justiciable political question." *Banner*, 303 F. Supp. 2d at 9 n.9.

> 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.

Baker, 369 U.S. at 217.

The courts "owe a substantial measure of deference to the political branches in matters of foreign policy." *Zarmach Oil Services, Inc. v. U.S. Dep't of the Treasury*, 750 F. Supp. 2d 150, 155 (D.D.C. 2010) (Huvelle, J.) (quoting *Regan v. Wald*, 468 U.S. 222, 242 (1984)); *see also El-Shifa Pharm. Indus. v. United States*, 607 F.3d 836, 841 (D.C. Cir. 2010) (*en banc*); *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006). Such cases raise issues that "frequently turn on standards that defy judicial application" or "involve the exercise of a discretion demonstrably committed to the executive or legislature." *Baker*, 369 U.S. at 211. Thus, "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *El-Shifa Phar. Indus.*, 607 F.3d at 841 (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)); *see also Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1263–64 (D.C. Cir. 2006).

Of course, "[not] every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. For example, claims based on constitutionally protected interests may sometimes require the court to address the limits on the Executive's exercise of national security powers. *El-Shifa Pharm Indus.*, 607 F.3d at 841–42; *see Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 68–70 (D.D.C. 2014) (holding that the political question doctrine did not remove the Court's subject matter jurisdiction where relatives of Anwar al-Aulaqi sought damages for the taking of Anwar al-Aulaqi's life without regard to Fifth Amendment protections). The political question doctrine, likewise, does not prohibit the courts from reviewing "whether the Executive has exceeded the scope of a prescribed statutory authority or failed to obey the prohibition of a statute or treaty." *El-Shifa Pharm. Indus.*, 607 F.3d at 842. But the courts distinguish between claims challenging policy decisions made by the Executive and those presenting genuine legal issues; the political question doctrine prohibits the courts

from serving as a "forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security." *Id.*

A. The Relief Sought by Plaintiffs Would Require the Court to Scrutinize National Security Determinations Committed to the Political Branches

In this case, plaintiffs ask the Court to review in hindsight the Executive's alleged discretionary decisions touching upon matters of national security, which unquestionably raise political questions over which the Court lacks subject matter jurisdiction. In particular, plaintiffs' claims present non-justiciable political questions involving the United States government's authority to conduct counterterrorism operations. *See* Compl. ¶¶ 97–117 & pp. 35–39. The Authorization for the Use of Military Force ("AUMF"), passed by Congress, authorizes the President "to use all necessary and appropriate force" against al-Qaeda, the Taliban, and associated forces. Pub. L. No. 107–40 § 2(a), 115 Stat. 224 (2002). Moreover, the President may authorize the use of force against al-Qaeda, the Taliban, and associated forces under other legal bases in United States and international law that recognize the inherent right to national self-defense. *See, e.g.*, United Nations Charter Article 51, *available at* http://www.un.org/en/documents/ charter/chapter7.shtml ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence [sic] if an armed attack occurs against a Member of the United Nations[.]"). Plaintiffs improperly invite the Court to second-guess decisions allegedly made by the Executive in the course of approving counterterrorism operations pursuant to these authorities. As discussed further below, the political question doctrine weighs strongly against the Court engaging in such an analysis.

First and foremost, the Constitution expressly delegates matters of national security and foreign policy—like the purported counterterrorism operation challenged here—to the political branches, not the judiciary. *See Baker*, 369 U.S. at 217 ("Prominent on the surface of any case

held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department[.]"). There can be "no doubt that decision-making in the fields of foreign policy and national security is textually committed to the political branches of government."[5] *Schneider*, 412 F.3d at 194. Article I, Section 8 of the Constitution, enumerating powers of the national legislature, is "richly laden with delegation of foreign policy and national security powers." *Id.* (citing U.S. CONST., Art. I, § 8). Article II also gives the President authority in these areas, stating that "the President shall be Commander in Chief of the Army and Navy of the United States." U.S. CONST., Art. II, § 2. As the Supreme Court has noted, the President may act to protect the Nation from imminent attack and "determine what degree of force [a] crisis demands." *The Prize Cases*, 67 U.S. (2 Black) 635, 668, 670 (1863). In contrast, Article III, in defining the powers of the judicial branch, "provides no authority for policymaking in the realm of foreign relations or provision of national security." *Schneider*, 412 F.3d at 195; *see also Bancoult*, 445 F.3d at 433–34.

By entertaining the merits of plaintiffs' claims, moreover, the Court would risk reaching a conclusion different from the Executive about the propriety of the alleged counterterrorism operation. *See Baker*, 369 U.S. at 217 ("Prominent on the surface of any case held to involve a political question is found . . . the potentiality of embarrassment from multifarious pronouncements by various departments on one question."). At bottom, plaintiffs ask the Court to declare that the United States government acted unlawfully by conducting the purported drone strike. *See* Compl. pp. 35–40. Such a declaration would run counter to the conclusion

---

[5] U.S. CONST., Art. I, § 8 includes the power to provide for the Common Defence, *id.*, cl. 1; the power to "define and punish Piracies and Felonies committed on the High Seas and Offenses against the Law of Nations," *id.*, cl. 10; the power to "declare War" and make "Rules concerning Captures on Land and Water," *id.*, cl. 11; the power to "raise and support Armies . . . " and maintain a Navy, *id.*, cl. 13; and the power to "[t]o provide for calling forth the Militia to . . . repel Invasions," *id.*, cl. 15.

supposedly reached by the Executive that the alleged strike satisfied both domestic and international law, as well as applicable law of war principles. Indeed, the varying decisions would lead to the type of embarrassment the political question doctrine seeks to avoid, not to mention interference with the Executive's ability to present a "single-voiced statement of the Government's views." *Baker*, 369 U.S. at 211. Thus, the relief plaintiffs ultimately seek would pit the judiciary against the political branches of government in matters of national security and foreign policy, which is precisely the conflict that the political question doctrine seeks to avoid. *See infra* at II.B.

Finally, the Court cannot consider the merits of plaintiffs' claims without infringing upon the authority of the political branches to decide sensitive national security and foreign policy issues. *See Baker*, 369 U.S. at 217 ("Prominent on the surface of any case held to involve a political question is found . . . the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government[.]"). Plaintiffs ask the Court to conduct an inquiry into the propriety of an alleged drone strike years after the purported operation took place. To do so, however, the Court would need to, *inter alia*, assess highly classified intelligence products, weigh various diplomatic considerations, and examine policy determinations made by the Executive in the course of approving an alleged counterterrorism operation in a foreign country. In other words, plaintiffs invite the Court to stand in the shoes of the political branches—several years after the alleged operation—and critique decisions the Executive purportedly rendered pursuant to its constitutional authority. Plaintiffs' approach would not only open the flood gates for more foreign nationals to ask the district courts to review counterterrorism operations conducted abroad, it would, in essence, transform the judiciary into an independent arbiter of the propriety of national security decisions

committed to the political branches. Such an approach is the antithesis of affording respect to the coordinate branches of the government. *See El-Shifa Pharm Indus.*, 607 F.3d at 844 ("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.").

B. The Relief Sought by Plaintiffs Would Also Require the Court to Review Discretionary National Security Decisions Outside of its Area of Expertise

The specific arguments plaintiffs set forth in their first and second claims ask the Court to review policy determinations made by the Executive in the context of national security plainly outside of judicial discretion. *See* Compl. ¶¶ 97–104 & p. 35; *see also Baker*, 369 U.S. at 217 ("Prominent on the surface of any case held to involve a political question is found . . . the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion[.]"). Plaintiffs first argue that the alleged drone strike against AQAP defied the AUMF because the responsible government entity did not conduct the operation to "prevent any future acts of terrorism against the United States."[6] Compl. ¶ 98. In order to decide whether the Executive violated the AUMF, therefore, the Court would first need to determine if the government conducted the alleged strike to prevent future acts of terrorism, which constitutes a quintessential policy determination. *See El-Shifa Pharm. Indus.*, 607 F.3d at 843–44 (explaining that "whether the terrorist activity of foreign organizations constitutes threats to the United

[6] In a single sentence, plaintiffs state, without any authority, that the AUMF does not provide the United States government authority to conduct counterterrorism operations against AQAP because the organization was not in existence in 2001 when the President signed the AUMF. Compl. ¶ 98. The United States has determined that AQAP is an organized armed group that is either part of al-Qaeda, or is an associated force, or cobelligerent, of al-Qaeda that has directed armed attacks against the United States. *See* Testimony of Dep't of Defense General Counsel Stephen Preston, Senate Foreign Relations Comm., May 21, 2014, http://www.foreign.senate.gov/imo/media/doc/Preston Testimony.pdf. The propriety of the United States designating an organization as a terrorist belligerent aligned with al-Qaeda unquestionably involves political questions outside of this Court's expertise and purview and is certainly not reviewable through the instant suit.

States" are policy determinations "held to belong in the domain of political power not subject to judicial intrusion or inquiry"). Similarly, plaintiffs assert that the purported drone strike violated international law because the government cannot establish that the action was "'strictly unavoidable' in order to defend against an 'imminent threat of death.'" Compl. ¶ 103. Again, whether the purported strike was "strictly unavoidable" or involved an "imminent threat of death" present policy decisions committed to the Executive Branch. *See El-Shifa Pharm. Indus.*, 607 F.3d at 843. Time and again, the courts have explained that the Constitution entrusts the political branches, not the Judiciary, with such "policy choices and value determinations" in the realm of foreign policy and national security. *Japan Whaling Ass'n*, 478 U.S. at 230.

Plaintiffs' remaining claims also present non-justiciable policy questions committed to the political branches. *See* Compl. ¶¶ 105–117 & pp. 35–39. In their third, fourth, fifth, and sixth claims, plaintiffs contend that the alleged drone strike violated the laws of war regarding proportionality and distinction, which resulted in the wrongful death of their relatives. *Id.* Accordingly, the Court would need to review the Executive's purported conclusions that: (1) the government lacked alternatives to a lethal strike, such as, for example, capturing the targets, and; (2) the operation would not cause unintended collateral damage in the form of civilian casualties. *Id.* But such determinations would go to the very heart of the Executive's constitutional authority to make policy decisions regarding whether and when to conduct counterterrorism operations to protect the national security of the United States. Indeed, when considering these threshold questions, the Executive must weigh numerous factors outside of the judiciary's expertise and responsibility, like the imminence of the threat, the capabilities of the terrorist operatives, the assets of the United States in the geographic region, and possible diplomatic considerations. *See Japan Whaling Ass'n*, 478 U.S. at 230 ("The Judiciary is particularly ill

suited to make such [policy choices and value determinations], as “courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.”). In the final analysis, “the courts lack 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.*, 607 F.3d at 844.

In *El-Shifa Pharm. Indus.*, the D.C. Circuit concluded that it lacked the authority to decide similar political questions. *See* 607 F.3d at 840–51. The plaintiffs—owners of a Sudanese pharmaceutical company—sought monetary relief for the destruction of its factory following an American cruise missile attack, as well as declaratory relief that the United States erroneously associated the company with Osama bin Laden. *Id.* at 838–40. The D.C. Circuit concluded that under the political question doctrine, “the foreign target of a military strike cannot challenge in court the wisdom of retaliatory military action taken by the United States.” *Id.* at 851. The D.C. Circuit explained that the appropriateness of the missile strike, the underlying question posed by the plaintiffs, “is a quintessential ‘policy choice[ ] and value determination[ ] constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.’” *Id.* at 844–45 (citing *Japan Whaling Ass’n*, 478 U.S. at 230). “If the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President’s decision to launch an attack on a foreign target[.]” *Id.* at 844. Like the Sudanese pharmaceutical company in *El-Shifa Pharm. Indus.*, the Court cannot consider the appropriateness of the drone strike allegedly conducted by the United States government in Yemen to protect this country’s national security.

III. PLAINTIFFS' TVPA CLAIMS WARRANT DISMISSAL

Plaintiffs' first and second claims, grounded in the TVPA, should be dismissed for failure to state a claim, as well as lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1), (6). Plaintiffs argue that the alleged drone strike resulted in the "extrajudicial killings" of their relatives in violation of the TVPA. *See* Compl. ¶¶ 97–104 & p. 35. The TVPA provides that an individual, "who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages[.]" 28 U.S.C. § 1350, n. § 2(a). For the reasons discussed below, plaintiffs cannot use the TVPA to obtain declaratory relief against the United States, President Obama, or the former government officials named in the Complaint.

A. Plaintiffs Cannot Obtain Declaratory Relief under the TVPA

The TVPA provides only a civil remedy to seek monetary damages in the district courts, not the declaratory relief sought by plaintiffs. *See* Compl. at pp. 35, 40. As mentioned above, an individual who violates the TVPA "shall, in a civil action, be *liable for damages* to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death." 28 U.S.C. § 1350, n. § 2(a) (emphasis added). The preamble to the statute further explains that Congress intended the law to establish "a civil action for *recovery of damages* from an individual who engages in torture or extrajudicial killing." Torture Victim Protection Act of 1991, Pub. L. No. 102–256 (H.R. 2092), 106 Stat. 73 (1992) (emphasis added). *Cf. Ass'n of Am. Railroads v. Surface Transp. Bd.*, 237 F.3d 676, 680 (D.C. Cir. 2001) (concluding that the lower court erred in not considering a statute's preamble to resolve ambiguity in statutory text). Should there be any doubt about the scope of relief afforded by the TVPA, Black's Law Dictionary defines "damages" as "[m]oney claimed by, or ordered to be

paid to, a person as compensation for loss or injury[.]" Black's Law Dictionary 471 (10th ed. 2014). As a consequence, plaintiffs cannot obtain declaratory relief from the official or personal capacity defendants under the pretext of the TVPA where the statute only explicitly envisions monetary compensation. *Cf. Doe v. Rumsfeld*, 683 F.3d 390, 396–97 (D.C. Cir. 2012) ("[C]ongressional inaction also can inform our understanding of Congress's intent.").

Equally important, plaintiffs cannot obtain declaratory relief from the former government officials sued in their personal capacities. Plaintiffs seek declaratory relief from former Secretary of Defense Leon Panetta and former Director of the Central Intelligence Agency David Petraeus. *See* Compl. ¶¶ 37, 38. But this Court has recognized the well-established principle that "there is no basis for suing a government official for declaratory and injunctive relief in his or her individual or personal capacity." *Davidson v. United States Dep't of State*, __F. Supp. 3d __, 2015 WL 4111308, *8 (D.D.C. 2015). "[O]nly by acting as a government official (not as an individual acting personally), can a public official's compliance with a court decree remedy the governmental action, policy or practice that is being challenged." *Hatfill v. Gonzales*, 519 F. Supp. 2d 13, 19 (D.D.C. 2007). Thus, plaintiffs cannot seek declaratory relief from Mr. Panetta or Gen. Petraeus, who have been sued in their personal capacities, and the first and second counts of the Complaint must be dismissed as against them.

B. Defendants Did Not Act Under Color of Foreign Law

Plaintiffs also fail to state a claim under the TVPA against President Obama and the personal capacity defendants.[7] *See* Fed. R. Civ. P. 12(b)(6). Again, the TVPA is only applicable

[7] The TVPA only authorizes lawsuits against natural persons, not a country like the United States. *See Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012) (concluding that the TVPA only creates a cause of action against natural persons); *Mohamad v. Rajoub*, 634 F.3d 604, 608–09 (D.C. Cir. 2011) (same). Thus, as discussed in greater detail below, plaintiffs'

to individuals acting "under actual or apparent authority, or color of law, of any foreign nation[.]" 28 U.S.C. § 1350, n. § 2(a). By extension, the D.C. Circuit explained that "Congress deliberately 'did not . . . include as possible defendants either American government officers or private U.S. persons.'" *Doe v. Rumsfeld*, 683 F.3d 390, 396–97 (D.C. Cir. 2012) (quoting *Saleh v. Titan Corp.*, 580 F.3d 1, 16 (D.C. Cir. 2009); *accord Jawad v. Gates*, __F. Supp. 3d __, 2015 WL 4113336, at *7 (D.D.C. 2015) (ESH) (acknowledging that the TVPA does not allow a "cause of action against U.S. officials"), *appeal docketed*, No. 15-5250 (D.C. Cir. Sept. 9, 2015). Indeed, President George H.W. Bush—in the accompanying signing statement—expressly stated his belief that the TVPA does not apply to officials authorizing the sort of counterterrorism operation alleged by plaintiffs:

> I must note that I am signing the bill based on my understanding that the Act does not permit suits for alleged human rights violations in the context of United States military operations abroad or law enforcement actions. Because the Act permits suits based only on actions "under actual or apparent authority, or color of law, of any foreign nation," I do not believe it is the Congress' intent that H.R. 2092 should apply to United States Armed Forces or law enforcement operations, which are always carried out under the authority of United States law.

Statement by President George Bush Upon Signing H.R. 2092, 28 Weekly Comp. of Pres. Doc. 465 (Mar. 16, 1992); *see Harbury v. Hayden*, 444 F. Supp. 2d 19, 41 (D.D.C. 2006) ("At the time of the TVPA's signing, the 'under foreign color of law' requirement was understood to serve as an important limitation of the Act that would preclude its application to United States operations abroad."). Plaintiffs, therefore, cannot use the TVPA to bring their first and second claims against President Obama and former government officials because they would have acted under authority of United States law to conduct the alleged drone strike.

TVPA claim against the United States and President Obama fails because the statute does not act as a waiver of sovereign immunity.

Plaintiffs argue, unpersuasively, that President Obama and the personal capacity defendants acted under color of Yemeni law when the United States government purportedly conducted the drone strike. *See* Compl. ¶¶ 100–101. Plaintiffs specifically argue that the President of Yemen "personally approved every drone strike inside Yemen," and therefore, the United States government executed the strike "under color of Yemeni authority." Compl. ¶ 100. Plaintiffs miss the point. Even assuming Plaintiffs' characterization of the United States' diplomatic relationship with Yemen to be accurate, the United States government could only have conducted the alleged counterterrorism operation under color of United States law. *See* President Barack Obama, Remarks at the Nat'l Def. Univ. (May 23, 2013), *available at* https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university ("Under domestic law, and international law, the United States is at war with al-Qaeda, the Taliban, and their associated forces."). Even if the United States allegedly had consulted the Yemeni president out of respect for Yemen's territorial sovereignty, the strike itself would have been authorized by high-level United States government officials pursuant to the legal and policy authorities proscribed under United States law. *Id.* ("[O]ur actions are bound by consultations with partners, and respect for state sovereignty.").

In connection with a similar TVPA claim, this court in *Schneider v. Kissinger* concluded that a government official acted under United States law. *See* 310 F. Supp. 2d 251, 267 (D.D.C. 2004). The plaintiffs in *Schneider*—family members of a deceased Chilean military officer—filed a lawsuit based on covert actions allegedly directed by high-level United States officials in connection with an attempted coup in Chile. *Id.* at 253–54. The plaintiffs alleged that former National Security Advisor Dr. Henry Kissinger, acting at the behest of the President, instructed the CIA to conspire with a group of Chilean nationals to neutralize Schneider in an effort to

effectuate the coup. *Id.* at 255–56. When deciding the applicability of the TVPA, the Court determined that by "carrying out the direct orders of the President of the United States," Dr. Kissinger "was most assuredly acting pursuant to U.S. law[.]" *Id.* at 267. The Court explained that high-level government officials working in conjunction with the Chilean plotters did not change the calculus—Dr. Kissinger authorized the covert action pursuant to United States law, even though his foreign co-conspirators arguably kidnapped and killed Schneider under color of Chilean law. *Id.* Likewise, here, plaintiffs allege that the government of Yemen "approved" and "authoriz[ed]" the alleged U.S. strike,[8] Compl. ¶¶ 100-102. But such alleged cooperation does not mean that U.S. officials were not acting under color of U.S. law. As in *Schneider*, this Court should conclude that defendants here would have authorized the purported drone strike under United States law, notwithstanding plaintiffs' allegation that the government officials consulted the Yemeni president.

C. The TVPA Does Not Waive the Official Capacity Defendants' Sovereign Immunity

Finally, this Court lacks subject matter jurisdiction over plaintiffs' TVPA claims against the United States and President Obama. *See* Fed. R. Civ. P. 12(b)(1). Plaintiffs have failed to identify a statutory provision that, by waiving sovereign immunity, permits them to bring their first and second claims against the official capacity defendants. *See* Compl. ¶¶ 97–104 & p. 35. "The Federal Government cannot be sued without its consent." *United States. v. Navajo Nation*, 556 U.S. 287, 289 (2009); *see Roum v. Bush*, 461 F. Supp. 2d 40, 45 (D.D.C. 2006) ("In plain English, sovereign immunity means that citizens . . . cannot sue the federal government, agencies of the federal government, or employees of the federal government for acts they perform in their

[8] Plaintiffs specifically contend that the alleged strike that is the subject of the Complaint was launched as part of the "drone program" announced by President Obama at the National Defense University in May 2013. Compl. ¶ 70.

official capacities, unless the federal government has expressly agreed to be sued.”). Notwithstanding this basic principle, plaintiffs have failed to pinpoint a statute that permits them to sue the United States or President Obama for alleged “extrajudicial killings.” *See* Compl. ¶¶ 97–104 & p. 35. While plaintiffs suggest that the TVPA itself acts as such a waiver, this Court has recognized that the statute does not contain “language authorizing a lawsuit against the United States.” *Escarria-Montano v. U.S.*, 797 F. Supp. 2d 21, 24 (D.D.C. 2011); *see also Mohamad v. Palestinian Auth.*, 132 S.Ct. 1702, 1708 (2012) (holding that the TVPA only creates a cause of action against natural persons). “Waiver of the sovereign immunity of the United States cannot be implied but must be unequivocally expressed.” *Franconia Associates v. U.S.*, 536 U.S. 129, 141 (2002). Accordingly, plaintiffs’ TVPA claims against the official capacity defendants must also be dismissed.

IV. PLAINTIFFS’ ATS CLAIMS CAN ONLY BE BROUGHT UNDER THE FTCA, OVER WHICH THE COURT LACKS JURISDICTION

The Court should dismiss plaintiffs’ remaining tort claims for a lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). The third, fourth, fifth, and sixth claims, purportedly brought under the ATS, allege that defendants’ tortious conduct violated the Geneva Convention and various tenets of international law, resulting in the wrongful deaths of plaintiffs’ relatives. *See* Compl. ¶¶ 105–117 & pp. 35–39. The ATS provides that the 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.” 28 U.S.C. § 1350. But the ATS does not create a private right of action. *Sosa v. Alvarez-Machain*, 542 U.S. 692 at 724-29 (2004). Rather, to the extent these claims can proceed at all, they must proceed under the FTCA, which serves as the exclusive remedy for individuals seeking to sue government employees for tortious conduct purportedly committed while acting within the scope of their employment. *See Harbury v.*

Hayden, 522 F.3d 413, 416 (D.C. Cir. 2008); *Jawad*, __F. Supp. 3d __, 2015 WL 4113336 (D.D.C.) at *3-4.

Nor does the ATS provide a waiver of sovereign immunity. *Navajo Nation*, 556 U.S. at 289 ("The Federal Government cannot be sued without its consent."). While plaintiffs suggest that the ATS acts as such a waiver, the D.C. Circuit has held to the contrary. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985) (holding that the ATS "itself is not a waiver of sovereign immunity"). In fact, Judge Kavanaugh, in a concurring opinion, recognized that the ATS has never been "held to cover suits against the United States or United States Government officials."[9] *El-Shifa Pharm Indus.*, 607 F.2d at 858. In the absence of a waiver of sovereign immunity and a private right of action, plaintiffs' sole remedy in tort for the actions of current or former federal officials arising under the scope of their employment lies against the United States, under the FTCA.

The Federal Employees Liability Reform and Tort Compensation Act (commonly known as "the Westfall Act") grants federal employees absolute immunity from most claims arising from acts within the scope of their federal employment. *See* 28 U.S.C. § 2679(b)(1); *Osborn v. Haley*, 127 S. Ct. 881 (2007); *United States v. Smith*, 499 U.S. 160, 163 (1991).[10] Thus, the

---

[9] The D.C. Circuit has indicated that ATS claims seeking non-monetary relief might proceed against the head of an Executive agency, under the Administrative Procedure Act's waiver of sovereign immunity. *Sanchez–Espinoza*, 770 F.2d at 207. In this case, however, plaintiffs have not sued the head of an agency under the APA, and the President is not subject to the APA. *See Franklin v. Massachusetts*, 505 U.S. 778, 801 (1992); *Al-Aulaqi*, 727 F. Supp. 2d at 41 ("[The APA's] waiver of sovereign immunity is not available in suits against the President, since the President is not an 'agency' within the meaning of the APA.").

[10] The only two exemptions are actions brought for a violation of the constitution or of a federal statute. *See* 28 U.S.C. § 2679(b)(2); *Smith*, 499 U.S. at 166-67. Neither exception applies here, as plaintiffs are not U.S. persons and no violation of the constitution is alleged, and the law is clear that alleged violations of the ATS and international law do not constitute a violation of a

Attorney General may certify under the Westfall Act that government employees subject to suit acted within the scope of their employment "at the time of the incident out of which the claim arose." 28 U.S.C. § 2679(d)(1). Once the Attorney General proffers such a certification, "the tort suit automatically converts to an FTCA 'action against the United States' in federal court[.]" *Harbury*, 522 F.3d at 416; *accord Jawad*, 2015 WL 4113336, at *3.

Here, the Attorney General, acting through her designee, has certified under the Westfall Act that President Obama, Mr. Panetta, and Mr. Petraeus acted within the scope of their employment at the time of the alleged counterterrorism operation.[11] The Court, therefore, should re-style the ATS claims as claims brought against the United States under the FTCA. *See Harbury*, 522 F.3d at 416; *Celikgogus v. Rumsfeld*, 920 F. Supp. 2d 53, 56-57 (D.D.C. 2013) For the reasons discussed below, however, the Court lacks subject matter jurisdiction to entertain plaintiffs' FTCA claims. *See Achagzai v. Broad. Bd. of Governors*, __F. Supp. 3d __, 2015 WL 3647570, *2 (D.D.C. June 12, 2015) ("The FTCA is a 'limited waiver of the United States' sovereign immunity,' and, thus, 'absent full compliance with the conditions the Government has placed upon its waiver, courts lack jurisdiction to entertain tort claims against it.'" (quoting *GAF Corp. v. United States*, 818 F.2d 901, 904 (D.C. Cir. 1987)). Accordingly, Counts Three through Six of the Complaint should be dismissed.

A. Plaintiffs Failed to Exhaust Their Administrative Remedies

The Court lacks subject matter jurisdiction to consider plaintiffs' claims under the FTCA because their complaint nowhere alleges that they exhausted administrative remedies, a

---

United States statute within the meaning of the Westfall Act. *See Jawad, supra* at *5 (citing cases).

[11] The Attorney General has delegated her Westfall Act certification authority to the United States Attorneys and to the Directors of the Civil Division's Torts Branch. See 28 C.F.R. § 15.4.

prerequisite to a federal court's exercise of jurisdiction under the statute. *See Achagzai*, 2015 WL 3647570, *2–3 (dismissing case for lack of subject matter jurisdiction because the plaintiff failed to exhaust his FTCA claims). The FTCA provides that, "[a]n action shall not be instituted upon a claim against the United States . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency[.]" 28 U.S.C. § 2675(a); *see McNeil v. United States*, 508 U.S. 106, 113 (1993); *Ali v. Rumsfeld*, 649 F.3d 762, 775 (D.C. Cir. 2011). Accordingly, the FTCA required plaintiffs to file an administrative claim with the agency they purport was responsible for the alleged drone strike before bringing suit in this Court. *See* 28 C.F.R. § 14.1 (stating that under the FTCA the "terms Federal agency and agency . . . include the executive departments [and] the military departments"). Plaintiffs, however, fail to state in the Complaint that they attempted to make the requisite presentation to any government entity, let alone the agency it contends is responsible. *See generally* Compl. ¶¶ 1–117; *see Achagzai*, 2015 WL 3647570, *2 ("A jurisdictionally adequate presentment is one which provides to the appropriate agency (1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum-certain damages claim." (quoting *GAF Corp.*, 818 F.2d at 90)). Consequently, the Court must dismiss plaintiffs' FTCA claims for failure to exhaust their administrative remedies.

B. The United States has Not Consented to Suit Under the FTCA For Claims Seeking Declaratory Relief

The Court also lacks subject matter jurisdiction over plaintiffs' FTCA claims because under the FTCA, the United States has agreed to be sued for certain damages claims, but not for declaratory relief. *See* Compl. pp. 35–39, 40; *see also Navajo Nation*, 556 U.S. at 289 ("The Federal Government cannot be sued without its consent."). The FTCA authorizes federal district courts to hear "civil actions on claims against the United States, *for money damages*[.]" 28

U.S.C. § 1346(b)(1) (emphasis added). Thus, the plain language of the FTCA explicitly waives the United States' sovereign immunity only for lawsuits seeking monetary relief; the statute does not expressly allow a moving party to obtain a declaratory judgement against the United States. *See Lane v. Pena*, 518 U.S. 187, 192 (1996) (explaining that a waiver of sovereign immunity "must be unequivocally expressed in statutory text, and will not be implied").[12] Following this approach, plaintiffs cannot obtain declaratory relief from the United States under the guise of the FTCA where the statute only explicitly provides for monetary compensation.

C. The United States Has Not Waived its Sovereign Immunity Under the FTCA Because the Alleged Torts Occurred in a Foreign Country

Even if plaintiffs had exhausted administrative remedies, and even assuming that injunctive relief was available, the Court would still lack jurisdiction over plaintiffs' alleged tort claims as a result of the FTCA's foreign country exception. The FTCA waives the sovereign immunity of the United States with respect to "claims arising from certain torts committed by federal employees in the scope of their employment[.]" *Sloan v. Dep't of Housing & Urban Dev.*, 236 F.3d 756, 759 (D.C. Cir. 2001) (citing 28 U.S.C. §§ 1346(b), 2674). But the FTCA exempts, among other things, "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). The Supreme Court has held that the foreign country exception "bars all claims based on *any injury suffered in a foreign country*, regardless of where the tortious act or omission occurred." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004) (emphasis added).

For these reasons as well, plaintiffs' FTCA claims necessarily fail. Plaintiffs contend that defendants should be held responsible for the deaths of their family members that allegedly occurred as a result of a U.S. drone strike in Khashamir, Yemen. *See* Compl. ¶¶ 4–13, 51–66.

---

[12] *But see Al-Aulaqi*, 727 F. Supp. 2d at 41 n.11 ("Despite defendants' contention to the contrary, it does not appear that the FTCA's waiver of sovereign immunity for tort claims seeking money damages against the United States by implication precludes any injunctive relief.").

The United States, however, has not agreed to be sued under the FTCA for claims, like those alleged by Plaintiff, "arising in a foreign country." 28 U.S.C. § 2680(k). The Supreme Court has confirmed that the foreign country exception encompasses *all* torts suffered in a foreign country, which would include the deaths of plaintiffs' relatives that allegedly occurred in Yemen. *See Sosa*, 542 U.S. at 712 (holding that the FTCA did not apply when the abduction giving rise to the claim occurred in Mexico); *accord Harbury*, 522 F.3d at 416 (concluding that the foreign country exception foreclosed an FTCA claim brought by the widow of a rebel fighter killed in Guatemala by the Guatemalan military). Thus, the foreign country exception forecloses Plaintiffs' FTCA claims.

Moreover, the Supreme Court in *Sosa* also firmly rejected the so-called "headquarters doctrine," *see* 542 U.S. at 700–12, thereby foreclosing any argument that the alleged tort occurred in the United States where U.S. government personnel allegedly triggered the strike. *See* Compl. ¶ 35 (asserting that the United States "plans, authorizes and carries out lethal drone strikes . . . through facilities and personnel located within the District of Columbia and elsewhere in the continental United States"). Prior to the Supreme Court's decision in *Sosa*, some courts had concluded that the "headquarters doctrine" allowed tort claims to proceed under the FTCA where negligent acts or omissions in the United States proximately caused harm in a foreign country. *Id.* at 701 & n.2. In *Sosa*, however, the Court explained that Congress, at the time it drafted the foreign country exception, understood a claim "arising in a foreign country" to be a claim for an injury or harm occurring in a foreign country, regardless of whether an act or omission causing the harm occurred in the United States. *Id.* at 703–12. Otherwise, district courts would be forced to apply foreign law—the place where the injury occurred—which legislative history of the FTCA indicated Congress sought to avoid with the foreign country

exception. *Id.* at 707–08. Thus, courts look exclusively to where the alleged injury was "suffered," not where it was authorized or initiated. *Sosa*, 542 U.S. at 712; *Jawad*, *supra* at *6. Plaintiffs' alleged injuries were undeniably suffered in Yemen. Compl. ¶¶ 51-61 (describing deaths in Khashamir, Yemen). Accordingly, the Court lacks subject matter jurisdiction to consider plaintiffs' FTCA claims, all of which fall within the FTCA's foreign country exception.

V. THE COURT SHOULD ALSO DECLINE TO GRANT DECLARATORY RELIEF AS A MATTER OF DISCRETION

Even if the Court disagrees with all of the foregoing grounds for dismissal, the Court should nevertheless decline to reach the merits of plaintiffs' claims as a matter of discretion. The sole relief plaintiffs seek is a declaratory judgment under the Declaratory Judgment Act. *See* Compl. pp. 35–40. The Supreme Court explained that the Declaratory Judgment Act "created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants[.]" *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995). And, "it is well settled that a declaratory judgment always rests within the sound discretion of the court." *President v. Vance*, 627 F.2d 353, 364 n.76 (D.C. Cir. 1980). Although the D.C. Circuit has recognized a series of relevant considerations for assessing whether to grant declaratory relief, "[t]here are no dispositive factors." *Comm. on Judiciary v. Miers*, 558 F. Supp. 2d 53, 95 (D.D.C. 2008). In fact, this Court has declined to grant declaratory relief solely because the claims touched upon sensitive national security and foreign policy matters. *See Al-Aulaqi*, 727 F. Supp. 2d at 42 (declining to declare as a matter of discretion that the United States could not target Anwar al-Aulaqi because to do so would "prohibit military and intelligence activities against an alleged enemy abroad"); *Sanchez-Espinoza*, 770 F.2d at 207–08 (deciding not to declare as a matter of discretion that the United States government cannot support the contras in Nicaragua because doing so would interject the Court in a "sensitive a foreign affairs matter").

For all of the reasons that this Court should dismiss this case based on the political question doctrine, the Court should decline to reach the merits of plaintiffs' claims as a matter of equitable discretion. At bottom, plaintiffs ask the Court to assume the role of the political branches, second-guessing—with the benefit of hindsight—the Executive's alleged decision to conduct a counterterrorism operation in a foreign country. Such a review would require the Court to, among other things, assess classified intelligence products, balance sensitive diplomatic considerations, and evaluate competing policy considerations about the prudence of the alleged strike. All of these activities would compel the Court to immerse itself in complicated matters of foreign policy and national security, far removed from the Judiciary's traditional expertise. And should this Court determine that it can provide a declaratory judgment, district courts will be inundated with similar claims from foreign nationals alleging that the United States government conducted allegedly unlawful counterterrorism or military operations. As such, even if the Court rejects every other ground for dismissal addressed above, it should decline to grant the requested declaratory relief as a matter of discretion. *See Sanchez-Espinoza*, 770 F.2d at 208 (holding in a case where the plaintiffs sought, *inter alia*, declaratory and injunctive relief with respect to United States support for the Nicaraguan Contras that "whether or not this is . . . a matter so entirely committed to the care of the political branches as to preclude our considering the issue at all, we think it at least requires the withholding of discretionary relief").

CONCLUSION

For all the reasons set forth above, the Court should dismiss this case in its entirety.

Dated: September 30, 2015

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Director

/s/ Elizabeth J. Shapiro
ELIZABETH J. SHAPIRO
STEPHEN M. ELLIOTT
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Tel: (202) 514-5302
Fax: (202) 616-8470
Email: Elizabeth.Shapiro@usdoj.gov

Counsel for Defendants