DEFINE THE AUMF OR ELSE DRONE ON: THE D.C. CIRCUIT'S INCOMPLETE WORK IN *BIN ALI JABER V. UNITED STATES*[*]

INTRODUCTION

The terrorist attacks of September 11, 2001 occurred almost seventeen years ago, but their consequences continue to be felt around the world. The United States remains engaged across the globe, particularly in Southwest and Central Asia, in a "war on terrorism."[1] Whatever consequences are felt at home, the human toll is felt deeply abroad, as exemplified by the litigants of *Bin Ali Jaber v. United States*.[2] As part of the War on Terror, the United States has been conducting a quasi-secret program of missile strikes fired from unmanned aerial vehicles ("UAVs") (also known as "drones") at suspected terrorists since at least November 2001.[3] The plaintiffs, Salem and Waleed bin Ali Jaber, were not suspected terrorists, but in August 2012, they were killed after being caught in the crossfire of a U.S. missile strike.[4]

When surveyed, fifty-eight percent of Americans approved of the drone program.[5] The reason for approval is unclear; likely, the relatively low cost (both in tax dollars and in soldiers' lives) makes it seem preferable to "boots on the ground" alternatives.[6] But the program is not without controversy. Some commentators worry that the United States may begin to deliver lethal force more liberally since the lives of American service-members are not as immediately

1. *See* Remarks on Arrival at the White House and an Exchange with Reporters, 2 PUB. PAPERS 1114, 1116 (Sept. 16, 2001).

2. 861 F.3d 241 (D.C. Cir. 2017), *cert denied*, 138 S. Ct. 480 (2017) (mem.).

3. *Id.* at 250–51 (Brown, J., concurring).

4. *Id.* at 243–44 (majority opinion).

5. *Id.* at 252 n.1 (Brown, J., concurring) (citing Pew Research Center survey data at *Public Continues to Back U.S. Drone Attacks,* PEW RES. CTR. (May 28, 2015), http://www.people-press.org/2015/05/28/public-continues-to-back-u-s-drone-attacks/ [https://perma.cc/Y9B3-QPP5]).

6. Daniel L. Bynam, *Why Drones Work: The Case for Washington's Weapon of Choice*, BROOKINGS (June 17, 2013), https://www.brookings.edu/articles/why-drones-work-the-case-for-washingtons-weapon-of-choice/ [https://perma.cc/7MVF-BXGA].

at stake.[7] Others are made uncomfortable by the program's secrecy, particularly considering the fact that some of its victims have been American citizens.[8] The executive branch has attempted to clarify the scope of the program and provide reassurances of internal oversight,[9] but not all are satisfied.[10]

Given this worry and controversy, a lawsuit over the legality of one such drone strike would seem to be an event of public interest. After the deaths of Salem and Waleed, the bin Ali Jaber family filed suit in U.S. federal court, alleging the errant missile attack was an extrajudicial killing that qualified for relief under U.S. law.[11] The U.S. Court of Appeals for the D.C. Circuit, without any consideration of the merits of the claim, dismissed it upon a finding that it presented a "political question"—meaning that the court system is not an appropriate forum in which to hear the case.[12]

This Recent Development argues that the D.C. Circuit reached the correct outcome despite its incomplete reasoning. Part I explains the background of the political question doctrine, particularly as it relates to national security actions litigated in the D.C. Circuit and further provides the facts and reasoning of *Bin Ali Jaber*. Part II discusses how the 2001 Authorization for Use of Military Force ("AUMF")[13]—the statutory authorization for the initial 2001 invasion of Afghanistan that has since been frequently cited as authorization for other "War on Terror" military actions—should have been applied in the case as part of a more thorough analysis of the issues.

7. *See The National Security Law Podcast: Episode 26: The Impenetrable Podcast Unit*, at 25:30–26:30 (July 11, 2017) (downloaded using iTunes). *The National Security Law Podcast* is a weekly podcast on current national security law issues hosted by University of Texas School of Law professors Bobby Chesney and Steve Vladeck. It is worth noting that Professor Chesney also reminds us that removing the weapon operator from the point of action goes back at least as far as the English longbow. *Id.*

8. *See* Cora Currier, *Everything We Know So Far About Drone Strikes*, PROPUBLICA (Feb. 5, 2013, 11:50 AM), https://www.propublica.org/article/everything-we-know-so-far-about-drone-strikes [https://perma.cc/4UBR-8LUC].

9. *See* Remarks at National Defense University, 2013 DAILY COMP. PRES. DOC. 5 (May 23, 2013).

10. *Bin Ali Jaber*, 861 F.3d at 253 (Brown, J., concurring) ("[D]espite an impressive number of executive oversight bodies, there is pitifully little oversight within the Executive.").

11. Complaint at 7, Bin Ali Jaber v. United States, 155 F. Supp. 3d 70 (D.D.C. 2016) (No. 1:15-CV-840).

12. *Bin Ali Jaber*, 861 F.3d at 250 (majority opinion). "Political question" traces its routes to *Baker v. Carr*, 369 U.S. 186 (1962). The presence of factors such as a "textually demonstrable constitutional commitment of the issue to a coordinate political department" or a "lack of judicially discoverable and manageable standards for resolving [the case]" are deemed to render the case nonjusticiable. *Baker*, 369 U.S. at 217.

13. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2012)).

Part III then re-analyzes the case with this standard as the starting point. While ultimately reaching the same conclusion as the D.C. Circuit, Part III provides a more thorough and more sustainable approach to future cases involving issues of national security. This more complete analysis, if adopted, would provide a pathway toward a more appropriate role for the judiciary in the debate over the War on Terror and perhaps motivate the executive and legislative branches to more thoughtfully consider their own oversight of the war.

I. BACKGROUND

A. Political Question Precedent in the D.C. Circuit

Holding that a case presents a political question renders it "nonjusticiable," meaning that a federal court cannot hear that case.[14] The seminal case on the modern political question doctrine is *Baker v. Carr*.[15] That case concerned legislative apportionment and voting rights,[16] but, in dicta, it addressed other issues that typically raise political questions. One such issue is foreign policy and, here, its more pertinent sub-issue, military operations.[17] However, foreign affairs are not per se nonjusticiable.[18] A number of factors may be used to find whether dismissal as a political question is appropriate, including:

> (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;

14. *See Baker*, 369 U.S. 186 at 209 ("[T]heir suit presented a 'political question' and was therefore nonjusticiable.").

15. 369 U.S. 186 (1962).

16. *Id.* at 187–88.

17. *See id.* at 211–14; *see also* Haig v. Agee, 453 U.S. 280, 292 (1981) ("[I]n regard to the conduct of foreign relations [and] the war power . . . [s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." (citing Harisiades v. Shaghnessy, 342 U.S. 580, 589 (1952)).

18. *Baker*, 369 U.S. at 211.

> or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[19]

Two of the D.C. Circuit's prior cases are important to understanding the application of the political question doctrine to foreign policy and military actions. Both concern tort claims arising from the collateral damage to civilians caused by the foreign policy decisions of the executive branch and both are cited favorably in *Bin Ali Jaber*.[20]

The first is *Gonzales-Vera v. Kissinger*,[21] in which Chilean nationals brought suit against Henry Kissinger (in his former capacity as National Security Advisor and Secretary of State) for violating the Torture Victim Protection Act ("TVPA")[22] by "aid[ing] and abett[ing] . . . known human rights violators . . . in the Chilean terror apparatus."[23] The TVPA extends federal jurisdiction to cover tort claims by aliens who have suffered torture, extrajudicial violence, or killing under the color of foreign law.[24] The district court held that the case was justiciable, but dismissed it on other grounds.[25] The D.C. Circuit affirmed the dismissal, but on the ground that the case presented a nonjusticiable political question and affirmed the dismissal on those grounds.[26] In the court's analysis, Kissinger's covert support of the Pinochet regime in Chile was a matter of foreign policy, an area "textually committed to a coordinate branch of government."[27] The court did note, however, that a TVPA claim against a government official could stand if the official's act was "so removed from his official duties that it cannot fairly be said to represent the policy of the United States."[28]

The D.C. Circuit also discussed the political question doctrine as it relates to military actions in *El-Shifa Pharmaceutical Industries Co. v. United States*.[29] That case involved a U.S. cruise-missile strike

19. Bin Ali Jaber v. United States, 861 F.3d 241, 245 (D.C. Cir. 2017) (quoting *Baker*, 369 U.S. at 217).

20. *Id.* at 247.

21. 449 F.3d 1260 (D.C. Cir. 2006).

22. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2012)).

23. *Gonzales-Vera*, 449 F.3d at 1261.

24. *See* Torture Victim Protection Act § 2, 106 Stat. at 73.

25. *Gonzalez-Vera*, 449 F.3d at 1261.

26. *Id.* at 1264–65.

27. *Id.* at 1263 (quoting one of the *Baker v. Carr* factors as stated in *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005)).

28. *Id.* at 1264.

29. 607 F.3d 836 (D.C. Cir. 2010).

against a pharmaceuticals factory in Sudan in 1998.[30] The attack was part of a retaliatory response to the bombing of U.S. embassies in Tanzania and Kenya by the terrorist organization al-Qaeda; the factory was alleged to have had financial ties to al-Qaeda and to have engaged in chemical weapons production.[31] The plaintiffs sued the federal government under the Federal Tort Claims Act ("FTCA"),[32] claiming that they had no such terrorist ties and that the destruction of the factory was an unjustified destruction of property.[33] The court distinguished between a claim that a government act was *illegal* and a claim that a government act was *unwise*.[34] That is, the plaintiffs' claim challenged the *merits* of the government's decision to launch the missile strike, not the government's *authority* to launch the missile strike.[35] The D.C. Circuit held that a merit-based inquiry would require the creation of unmanageable standards for evaluating whether the president had correctly analyzed intelligence, acted on sufficient information, or selected the proper course of action from among a range of available military responses.[36] This unworkable standard placed the case within the second of the six factors laid out in *Baker*—a lack of judicially discoverable and manageable standards for resolving it.[37] Therefore, the court dismissed the claim as a political question.[38]

Gonzales-Vera and *El-Shifa* both illustrate how quickly a case linked to national security can face the barriers of justiciability. The court's concern with second-guessing the executive branch on national security decisions brought both cases to a dismissal before

30. *Id.* at 838.

31. *Id.*

32. 28 U.S.C. § 1346(b) (2016). The FTCA provides a limited waiver of sovereign immunity for tort claims against the federal government. *See* § 1346(b)(2).

33. *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 839–40. Plaintiffs also asserted a defamation claim related to government statements linking them to terrorists. *See id.* at 840. This is less significant for our purposes as that allegation was dubious as a cognizable claim regardless of political question considerations. *See id*. at 853 (Kavanaugh, J., concurring).

34. *Id.* at 842 (majority opinion); *see also* Gonzales-Vera v. Kissinger, 449 F.3d 1260, 1263–64 (D.C. Cir. 2006) Matters of foreign policy are textually committed to the Executive and Congress, but an act beyond their constitutional or statutory authority would necessarily fall outside of this textual commitment. Therefore, to avoid political question obstacles in such cases, a claim should assert that the political branches could not legally act as they did.

35. *See El-Shifa*, 607 F.3d at 844.

36. *See id.* at 845–46.

37. *See id.* at 846 ("We could not decide this question without first fashioning out of whole cloth some standard when military action is justified."); Baker v. Carr, 369 U.S. 186, 217 (1962).

38. *El-Shifa*, 607 F.3d at 851.

consideration of the merits. Moreover, the D.C. Circuit considered *El-Shifa* to be the controlling precedent in *Bin Ali Jaber*.[39]

B. Bin Ali Jaber

Bin Ali Jaber would fare no better in federal court than the plaintiffs in *Gonzales-Vera* and *El-Shifa*. After a review of the facts of *Bin Ali Jaber*, the D.C. Circuit affirmed the trial court's dismissal of the case as a political question.[40] The plaintiff's claim arose from events in Khashamir, Yemen in August 2012.[41] Salem and Waleed bin Ali Jaber were at a mosque during a wedding celebration when three other men (alleged to have been al-Qaeda fighters in the Arabian Peninsula fighters) arrived.[42] An American drone appeared overhead and fired a series of missiles at the group, resulting in the deaths of the five men.[43] After the missile attack, the Yemeni government made several offers of monetary compensation to the bin Ali Jaber family.[44] Dissatisfied with these offers, Faisal bin Ali Jaber (Salem's brother-in-law and Waleed's uncle) brought suit for declaratory relief in the U.S. District Court for the District of Columbia.[45]

The suit alleged that the attack was a "signature-strike"—an attack in which the U.S. government targets unidentified persons that fit a pattern of threatening activity—and that Salem and Waleed were collateral damage of that attack.[46] The plaintiff further alleged that this attack was an extrajudicial killing under color of Yemeni authority, and thus, a violation of the TVPA.[47] The plaintiff sought only declaratory relief.[48] The district court dismissed the suit as a political question, and the plaintiff appealed.[49]

The D.C. Circuit framed the political question doctrine as a jurisdictional matter that must precede any consideration of the merits.[50] The court applied the six factors from *Baker* above and

39. Bin Ali Jaber v. United States, 861 F.3d 241, 250 (D.C. Cir. 2017).
40. *Id.*
41. *Id.* at 243.
42. *Id.* at 244; Brief for Appellees at 3, Bin Ali Jaber v. United States, 861 F.3d 241 (D.C. Cir. 2017) (No. 16-5093).
43. *Bin Ali Jaber*, 861 F.3d at 244.
44. *Id.*
45. Complaint, *supra* note 11, at 9.
46. *Id.* at 3, 22.
47. *Id.* at 40.
48. *Id.*
49. *Bin Ali Jaber*, 861 F.3d at 245.
50. *Id.*

applied the same reasoning used in *El-Shifa Pharmaceutical Industries Co. v. United States*, which held that the political question doctrine should bar any claim that "call[s] into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion."[51] The court in *Bin Ali Jaber* found that any judgment of the appellant's claims would require judicial second-guessing of the Executive's military decision-making.[52] The court held that this put bin Ali Jaber's case squarely within the ambit of *El-Shifa*'s holding that it is improper for the courts to hear cases questioning the wisdom of military decisions, and, consequently, the court affirmed the trial court's dismissal of the suit.[53]

Following this terse dismissal of the claim, Judge Brown—author of the opinion of the court—added her own concurring opinion in which she admonished Congress's and the Executive's oversight (or lack thereof) of the drone program and the War on Terror more broadly.[54] "Our democracy is broken" she concluded, expressing great frustration that the covert program of alleged extrajudicial killing would continue to bring litigants such as bin Ali Jaber to the courthouse doors, but that "precedent and constitutional constraints" would keep those doors firmly shut.[55] Judge Brown's concurrence is a striking coda to an otherwise cursorily handled case, and it serves as a jumping off point for deeper analysis of the meaning of *Bin Ali Jaber*.

II. THE UNANSWERED QUESTION: THE 2001 AUMF AS IT RELATES TO *BIN ALI JABER*

The D.C. Circuit concluded that *Bin Ali Jaber* presented a nonjusticiable political question, but the opinion was muddled as to why. The court stated that foreign policy is a matter committed to the political branches,[56] but overlooked the Supreme Court's clear statements that a case's implication of matters of foreign policy neither renders a case automatically nonjusticiable nor does it abrogate the judiciary's duty and power to interpret federal law.[57]

51. *Id.* at 246 (quoting El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 842 (D.C. Cir. 2010)).

52. *Id.* at 246–47.

53. *See id.* at 250.

54. *Id*. at 252–53 (Brown, J., concurring) ("[I]f judges will not check this outsize power, then who will? . . . [C]ongressional oversight is a joke—and a bad one at that.").

55. *Id.* at 253.

56. *See id.* at 247 (majority opinion).

57. *See* Baker v. Carr, 369 U.S. 186, 211 (1962); Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230–31 (1984). The D.C. Circuit actually made reference to these

The federal law directly relevant to *Bin Ali Jaber*, the 2001 AUMF has provided the legal underpinning for much of the War on Terror since the 9/11 attacks.[58] It would be entirely appropriate to interpret its meaning and scope and apply that interpretation to cases concerning the proper use of military force against suspected terrorists in Central and Southwest Asia. This section will discuss the scope of that statute, the judiciary's ability to interpret and apply it to cases like *Bin Ali Jaber*, and the likelihood that the AUMF authorized the government's actions in *Bin Ali Jaber*.

A. The 2001 AUMF and Its Scope

Only days after the 9/11 attacks, Congress authorized military action against those responsible through the passage of the AUMF.[59] As of May 2016, the AUMF had been cited thirty-seven times by the Executive as justification and authorization for various military actions.[60] These actions have taken on a geographic scope far beyond the Taliban and al-Qaeda in Afghanistan, where post-9/11 military action began.[61] The actual text of the AUMF is brief but broad:

> [T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[62]

Successive administrations have added expanded interpretations to the scope and meaning of the statute. In short, it has been generally

points but seemed to impliedly assert that there were no relevant statutes or procedures to review. *See Bin Ali Jaber*, 861 F.3d at 248–49.

58. *See* MATTHEW WEED, CONG. RESEARCH SERV., 7-4589, PRESIDENTIAL REFERENCES TO THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE IN PUBLICLY AVAILABLE EXECUTIVE ACTIONS AND REPORTS TO CONGRESS 2 (2016) ("The 2001 AUMF is primarily an authorization to enter into and prosecute and armed conflict against Al Qaeda and the Taliban in Afghanistan.").

59. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 (2012)).

60. WEED, *supra* note 58, at 2.

61. *See, e.g.*, *id.* at 24. This part of Weed's research report includes a table of the President's periodic reports to Congress on military action purportedly authorized by the AUMF. The June 2012 report by the President to Congress includes all of U.S. Central Command's area of responsibility, which stretches from North Africa to Central Asia. *See Area of Responsibility*, U.S. CENT. COMMAND https://www.centcom.mil/AREA-OF-RESPONSIBILITY [https://perma.cc/8L3L-7G5R].

62. Authorization for the Use of Military Force, § 2(a), 115 Stat. at 224.

asserted by the Executive that the AUMF is "primarily an authorization to enter into and prosecute an armed conflict against Al Qaeda and the Taliban in Afghanistan," an authorization to fight these groups outside Afghanistan, and to fight groups that are affiliated with these groups as "co-belligerents" (they cannot "just share similar goals, objectives, or ideologies").[63] The executive branch has also asserted that the AUMF should not be construed as a limitation on the inherent war powers of the president to act with military force in appropriate situations that may lay beyond the reach of the AUMF.[64]

The overarching question that relates to application of the 2001 AUMF (and any exercise of military force, for that matter) is the legality of the government's action. This is true even in the political question context. While the doctrine may prevent courts from reaching the merits of disputes best resolved by the political branches, it does not allow the courts to avoid their basic role in interpreting the Constitution and federal law.[65] An act by the government outside the bounds of its constitutional or statutory authority may be reviewed, and only an act that is within these bounds may be properly barred from review.[66]

Federal courts have explicitly contemplated whether the AUMF is a proper legal basis for executive action in the War on Terror.[67] Much of this judicial review has been focused on detention authority. The courts are much more hesitant, however, to incorporate the AUMF (or war powers generally) into their rulings on claims regarding use of lethal force. Compare the gusto with which the Supreme Court entered the fray in the detention context in *Hamdi v. Rumsfeld*[68] or *Boumediene v. Bush*[69]—it is the "duty and authority of the Judiciary to call the jailer to account"[70]—to the terse refusals of the D.C. Circuit in the context of use of force in *El-Shifa*, in which the court stated that the plaintiffs could not "point to [any] comparable

63. WEED, *supra* note 58, at 2.

64. *Id. See generally* U.S. CONST. art. II (granting the President the power of "Commander in Chief" of military forces).

65. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

66. *See* El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 842 (D.C. Cir. 2010).

67. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 517–18 (2004) (declining to rule on Article II powers and holding that the AUMF gives authorization for long-term military detention of enemy combatants).

68. 542 U.S. 507, 516–19 (2004).

69. 553 U.S. 723, 736–87 (2008).

70. *Id.* at 745.

constitutional commitment to the courts for review of a military decision to launch a missile at a foreign target."[71] This is a problem in the context of political question analysis because it has led to decisions in which courts have swiftly stated a claim is nonjusticiable without ever bothering to first determine whether the government's action was, in fact, within its powers. Moreover, the courts have tipped their hand in this hesitation, often alluding to the distinction between what is legal and what is prudent without then deciding where between that distinction a given case lies.[72]

B. The Applicability of the 2001 AUMF to Modern Use of Force Litigation

Failure to adequately answer the initial question of legality leaves the law surrounding the political question doctrine and the use of military force murky. Judges may worry that attempting to define the scope of the AUMF will create precedent for further challenges to that scope, placing the government's ability to confidently carry out national security policy at risk. However, this worry is unfounded for two reasons. First, the plentiful litigation challenging national security actions over the past two decades referenced throughout this Recent Development (such as *El-Shifa*, *Al-Shimari*, *Hamdi*, and *Bin Ali Jaber*) belies the notion that the courts are saving the Executive or Congress any time or headaches. Second, a clearer definition of the war-making authority of the government will actually strengthen decision-makers' confidence that they are acting lawfully.

At the outset, it should be said that the federal courts enjoy at least as great of a constitutional grant of jurisdiction over cases concerning the law of use of military force as they do over cases concerning the law of military detention. In *Boumediene*, the Supreme Court relied on the Suspension Clause[73] to assert its power to review a petition for a writ of habeas corpus filed by a military detainee held at Guantanamo Bay.[74] The government's choice to detain the petitioner involved sensitive military and national security decision-making, but the Court intervened all the same.[75] While the

71. *El-Shifa*, 607 F.3d at 849.

72. *See, e.g.*, *id.* at 842. The claim that there is greater constitutional authority to adjudicate unlawful detention claims than there is to adjudicate unlawful use of force claims is somewhat specious. *See infra* Section II.B.

73. U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended.").

74. *See Boumediene*, 553 U.S. at 739.

75. *See id.* at 733–34 (finding that the Government detained petitioners by "interpreting the AUMF" and "determin[ed] [them] to be enemy combatant[s]").

Constitution may not contain a comparable "missile-strike clause,"[76] it does reference the war powers of Congress and the Executive.[77] Like the Suspension Clause, these provisions are not explicit as to the role of the judiciary, but rather are grants of or limitations on, the power of Congress and the Executive. Take as another example *Ex parte Garland*,[78] where the Court stated that the pardon power lies solely in the executive branch,[79] but nonetheless, it heard the case and interpreted the law.[80] The Court regularly asserts its power to say what the law is[81] in interpreting the reach and meaning of the various (sometimes exclusive) grants of power to the political branches, and it can do the same by interpreting the war powers and statutes that flow from them.

There is ample precedent for the courts adjudicating matters concerning war powers or if there even is an ongoing "war."[82] At the lowest level of authority, the military's own courts (created under the auspice of Article I rather than Article III)[83] have defined the scope of "wartime" for the purpose of prosecuting certain military offenses.[84] At the highest level, the Supreme Court has ruled on the constitutionality of military matters ranging from the Civil War blockade of Southern ports in *The Prize Cases*[85] to the classification of U.S. citizens aligned with Nazi Germany as enemy combatants to be tried by military commission in *Ex parte Quirin*.[86] Similarly, the D.C. Circuit has itself alluded to the underlying authority for the

76. *See El-Shifa*, 607 F.3d at 849 ("[P]laintiffs can point to no comparable constitutional commitment to the courts for review of a military decision to launch a missile at a foreign target.").

77. *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To declare War."); *id.* art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States.").

78. 71 U.S. (4 Wall.) 333 (1867).

79. *Id.* at 380.

80. *Id.* at 381 (holding that Congress could not limit the reach of the president's pardon power and that petitioner could not be punished for crimes duly pardoned).

81. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is.").

82. *See generally* Steven I. Vladeck, *War and Justiciability*, 49 SUFFOLK U. L. REV. 47, 47 (2016) (explaining that a line of cases adjudicating war powers exists from the early days of the Republic until an abrupt shift during the Vietnam War).

83. *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces."); *see also Military Courts*, FED. JUD. CTR., https://www.fjc.gov/history/courts/military-courts [https://perma.cc/4T7S-AGEH].

84. *See, e.g.*, United States v. Shell, 23 C.M.R. 110, 114 (C.M.A. 1957) (holding that a "time of war" can exist without a formal declaration from Congress).

85. The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 635–36 (1862).

86. 317 U.S. 1, 25–27 (1942).

government's war-making actions.[87] In *Gonzales-Vera*, the court declared that foreign policy was a realm "textually committed to a coordinate branch of government."[88] The reasoning in *El-Shifa* also highlighted the government's asserted compliance with the War Powers Resolution before launching its retaliatory missile strike.[89]

The D.C. Circuit, however, stops short of complete analysis when national security and military action intersect with the political question doctrine. Assertions about "textual commitment" like in *Gonzales-Vera* are too general and perhaps tautological. A political question is not raised merely by observing that a government action is within the sphere of a political branch.[90] The court in *El-Shifa* itself emphasized that "the presence of a political question in these cases turns not on the nature of the government conduct under review but more precisely on the question the plaintiff raises."[91] The court went on to say "[a]ccordingly, we have declined to adjudicate claims seeking only a determination whether the alleged conduct should have occurred."[92] Nonetheless, whether the military action in question flowed from the government's authorized powers was not fully addressed.[93] The political branches of government cannot act outside the authority the Constitution (or a statute flowing from the Constitution) has given them, even in matters of national security.[94] In short, these cases should preliminarily analyze from where the government draws its authority to act, only considering the questions of judicially manageable standards if the act was authorized (albeit, still potentially tortious).[95]

87. *See* El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 842 (D.C. Cir. 2010); Gonzales-Vera v. Kissinger, 449 F.3d 1260, 1263 (D.C. Cir. 2006).

88. *Gonzalez-Vera*, 449 F.3d at 1263.

89. *See El-Shifa*, 607 F.3d at 838.

90. *See* Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 194–95 (2012) (explaining that political question analysis rests on the precise question asked and holding that the lower court improperly dismissed Zivotofsky's claim because the precise question was not "the political status of Jerusalem," but "whether [Zivotofsky] may vindicate his statutory right"). It will be shown that *Bin Ali Jaber* also did not quite answer all of the right questions. *See infra* Part III.

91. *El-Shifa*, 607 F.3d at 842.

92. *Id.* (quoting Harbury v. Hayden, 522 F.3d 413, 420 (D.C. Cir. 2008)).

93. *See* Complaint, *supra* note 11, at 28 (alleging specifically that the government lacked such authority in this case).

94. *See, e.g.*, *Ex parte* Quirin, 317 U.S. 1, 25 (1942) (explaining that detentions ordered by the President in a time of war would not be set aside without "the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted").

95. This framework has been given some voice already by *Al-Shimari v. CACI Premier Tech, Inc.*, 840 F.3d 147 (4th Cir. 2016). The Fourth Circuit held that the political question doctrine could not bar what had been an unlawful act and remanded the case to the district court for further proceedings. *Id.* at 151. However, in analyzing the issue of

If there is to be a legal underpinning to government action in the War on Terror, the best place to start is the 2001 AUMF. It is already cited frequently as the authorizing statute for many actions by the Executive.[96] The Supreme Court has found that it creates the authority necessary for the Executive to detain enemy combatants.[97] Additionally, though its most important provision is a mere sixty words long,[98] it is a cleaner and simpler authority than the hotly contested vagaries of the executive branch's inherent war powers under Article II.[99] Lastly, at over sixteen years old, it is long overdue for analysis and application outside the military detention context.

C. The 2001 AUMF Authorized the Government's Actions in Bin Ali Jaber.

The proper starting place for analysis in *Bin Ali Jaber* is deciding whether the 2001 AUMF authorized the government's action. While the specific *conduct* of foreign relations is an area considered committed to the coordinate political branches,[100] interpreting the AUMF is a matter of interpreting the reach of a statute authorizing such conduct, which is clearly within the competence of the Judiciary.[101] Statutory interpretation also has long established judicial standards and is so basic to the functions of the courts that it far outweighs any potential to embarrass or disrupt the political branches or their decisions.[102] This Recent Development advocates for a slightly novel theory that would place a small portion of the scope of power question ahead of the political question determination. Working under the assumption that if the federal government is a

lawfulness, the Fourth Circuit may have gotten ahead itself. The circuit court seemed to imply that the district court should analyze the merits of the claim (involving alleged acts of torture by military contractors at Abu-Ghraib prison) rather than analyze whether the defendants were acting under the authority of a lawful military intervention in a foreign country. *See id.* at 157–58. In fact, the D.C. Circuit interpreted the Fourth Circuit's opinion that way, saying the Fourth Circuit had "put[] the cart before the horse." Bin Ali Jaber v. United States, 861 F.3d 241, 247 n.1 (D.C. Cir. 2017); *see also infra* Part III (discussing the facts of *Al-Shimari* as an example of unlawful government action).

96. *See* WEED, *supra* note 58, at 2.

97. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 517–18 (2004).

98. Authorization for the Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 (2012)).

99. *Cf.* 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, 693 (2008) (asserting that the past fifty years of scholarly debate on executive war powers has focused on "inherent" powers found in Article II of the Constitution).

100. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

101. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

102. *See id.*

government of limited powers, the textual commitment of war powers to it is not without limit, and the location of that limit should be determined before dismissing a matter as beyond the judiciary's power to resolve.

Since its enactment in 2001, the AUMF has been used at least thirty-seven times to justify military action, including both use of force and non-lethal military action such as detention of enemy combatants.[103] In June 2012, the Executive submitted a report on its continuing actions under the authority of the AUMF; this report included operations by special operations forces in U.S. Central Command's area of responsibility and "cooperation with the Yemeni government and direct military action in Yemen against Al-Qaeda in the Arabian Peninsula."[104] Al-Qaeda in the Arabian Peninsula ("AQAP") has been designated a Foreign Terrorist Organization by the U.S. Department of State since January 19, 2010.[105] As the name implies, it is likely a branch or affiliate of the Al-Qaeda organization responsible for the 9/11 attacks.

Given the known facts, the missile strike in *Bin Ali Jaber* likely falls within the authorizations of the AUMF. The government's action in *Bin Ali Jaber* was to fire missiles from an unmanned aircraft with the intent to kill three suspected terrorists in Yemen,[106] and the suspected terrorists were alleged to have been affiliated with AQAP.[107] The attack occurred sometime in August 2012.[108] Yemen is within the geographic area of responsibility of U.S. Central Command.[109] The statute authorizes "appropriate force against those nations, organizations, or persons [the president] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." It is generally agreed by the U.S. government and others that the 9/11 attacks were carried out by al-Qaeda, harbored at the time in Afghanistan.[110] AQAP is both an affiliate of

103. WEED, *supra* note 58, at 2.

104. *Id.* at 24.

105. Press Release, Bureau of Countering Terrorism & Violent Extremism, U.S. Dep't of State, Designations of Al-Qa'ida in the Arabian Peninsula (AQAP) and Senior Leaders (Jan. 19, 2010), https://www.state.gov/J/CT/RLS/OTHER/DES/266658.HTM [https://perma.cc/UVN8-BVPH].

106. *See* Bin Ali Jaber v. United States, 861 F.3d 241, 244 (D.C. Cir. 2017).

107. Brief for Appellees, *supra* note 42, at 3.

108. *See Bin Ali Jaber*, 861 F.3d at 243.

109. *Area of Responsibility*, *supra* note 61.

110. *See* THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORK GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 3 (2016), https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf [https://perma.cc/59M8-S83S].

al-Qaeda and a named belligerent in the Executive's War Powers Report to Congress on the AUMF in June 2012.[111] Furthermore, the strike occurred within the area of responsibility for U.S. Central Command and was classifiable as a counterterrorism operation.[112] As such, any attack by U.S. forces against such targets in Yemen falls within the reach of the AUMF. This is not to say that compliance with the AUMF is necessarily the endpoint of analysis in this or any similar case. Other concerns could remain. It is conceivable that a missile strike could violate the law of armed conflict, such as by indiscriminately subjecting civilians to lethal force (for example, razing the entire town to target a few terrorists).[113] For the purposes of this Recent Development, it will be assumed that the strike that killed the bin Ali Jabers was sufficiently proportional and discriminating.

III. THE BENEFITS OF A MORE COMPLETE VERSION OF *BIN ALI JABER*

Given the conclusions in Part II that the 2001 AUMF granted sufficient statutory authority for the executive branch to carry out drone strikes in Yemen against AQAP, this Part will consider what a more complete analysis in *Bin Ali Jaber* might have looked like. This more complete analysis would still involve the issue of justiciability but in a well-reasoned way that might provide a more satisfactory answer as to the legality of the U.S. government's actions. Moreover, this Part will show how *Bin Ali Jaber* could have better built on the reasoning behind *Gonzales-Vera* and *El-Shifa* to provide the D.C. Circuit with a more useful canon for the political question in the national security context.

111. *See* WEED, *supra* note 58, at 24.

112. *Id.*; *see also Area of Responsibility*, *supra* note 61. CENTCOM's geographic area of responsibility was one of the Executive's parameters in defining the scope of its authority in its report to Congress on determinations made about enemy forces under the AUMF's authorizations.

113. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51, June 8, 1977, 1125 U.N.T.S. 3. The concept of proportionality in warfare as it relates to the United States is somewhat complicated by the fact that the United States is a signatory of Protocol I but has never ratified it. *See* UNITED NATIONS, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3586&clang=_en [https://perma.cc/R3W9-GUDC]. There are domestic law alternatives though, such as prosecuting war crimes under military law. *See, e.g.*, 10 U.S.C. § 918 (2016) (Art. 118 of the Uniform Code of Military Justice, creating criminal penalties for murders committed by service-members).

The clear starting point would be the AUMF analysis in Part II above. The government's constitutional or statutory authority to act with military force in Yemen would be demonstrated as a general proposition, and the court's analysis of it as a preliminary issue would be demonstrated as properly justiciable. In doing so, the court could have more completely applied *El-Shifa's* holding that the government's judgment in an otherwise legal military action should not be judicially second-guessed.[114] *El-Shifa* suffered from something of an over-presumption of legality, referencing but not really explaining or applying the Executive's assertion of constitutional authority to act in retaliation to attacks or statutory authority to use force per the War Powers Resolution.[115] Still, *El-Shifa* did contemplate a court's ability to consider claims against a government that had acted outside its authority.[116] The D.C. Circuit even said as much in *Bin Ali Jaber*, but it let the idea go, stating that the plaintiff's claims only questioned the prudence rather than the legality of the government's actions.[117] Even having stated it must accept all allegations in the plaintiff's complaint as true,[118] the court overlooked the allegation by the plaintiffs that the missile strike could not be properly authorized by the 2001 AUMF.[119] This was a direct challenge to the *legality* and not merely the *wisdom* of the attack, but the court did not address it. Conducting a proper analysis of the AUMF's applicability to the missile strike would have removed much doubt about it as a legal, if tragically errant, act.

Only after the missile strike was established as an act under legitimate government authority would it have been appropriate to move into political question analysis. The court would have been within its rights to observe that this was now a claim based solely on whether the strike was "mistaken and not justified."[120] This would require review and adjudication of decision-making in foreign policy and military force, a realm "textually committed to a coordinate branch of government."[121] This ultimately leads to the same result, but now, to borrow a phrase, the D.C. Circuit can avoid putting the

114. *See* El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 844 (D.C. Cir. 2010).
115. *See id.* at 838.
116. *See id.* at 842.
117. Bin Ali Jaber v. United States, 861 F.3d 241, 246 (D.C. Cir. 2017).
118. *Id.* at 243.
119. Complaint, *supra* note 11, at 28.
120. *Bin Ali Jaber*, 861 F.3d at 247 (quoting *El-Shifa*, 607 F.3d at 844).
121. Gonzales-Vera v. Kissinger, 449 F.3d 1260, 1263 (D.C. Cir. 2006).

cart before the horse.[122] That the claim does not involve justiciable legal questions, or at least fails in any such claims, is now actually clearly settled, and the court can then properly address what is nonjusticiable.

A relevant question that remains is what a truly unauthorized act would look like. Stated another way, there must be some set of facts that would be sufficient for a litigant like bin Ali Jaber to have his day in court. While there were significant legal differences with *Bin Ali Jaber*, *Al-Shimari v. CACI Premier Tech., Inc.*[123] provides a useful illustration. In that case, the plaintiffs were suing a military contractor for alleged involvement in prisoner abuses at the Abu-Ghraib prison in Iraq.[124] The Fourth Circuit's analysis of the case was messy, but it correctly observed that the political question doctrine does not preclude hearing cases in which the government acts outside the scope of its constitutional or statutory authority (as opposed to acts of mere imprudence).[125] No constitutional grant of war powers and no Congressional authorization by statute permitted the government or its agents to engage in torture and abuse serving no discernable military purpose.

The analogy is not perfect, but following the example provided in a case like *Al-Shimari*, one can see factual differences that might have moved bin Ali Jaber's claim out from under the political question doctrine. If it could be plausibly alleged that a drone operator deliberately and without orders targeted civilians, the strike would no longer be the result of a military judgment of the government acting with Congressional authorization, and the question of illegality would be raised as in *Al-Shimari*.[126] A more realistic scenario—and a closer

122. *See Bin Ali Jaber*, 861 F.3d at 247 n.1 (referring to the Fourth Circuit's analysis of political question doctrine in *Al-Shimari v. CACI Premier Tech, Inc.*, 840 F.3d 147 (4th Cir. 2016)).

123. 840 F.3d 147 (4th Cir. 2016). A difference worth noting is that the government was not a named party to the case.

124. *Id.* at 151.

125. *Al-Shimari*, 840 F.3d at 159. As stated in Section II.B the Supreme Court has heard and decided cases that would have been treated as political questions in more recent years. The Prize Cases concerned the capture of a ship by the Union blockade in the Civil War. The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 635–36 (1862). Under the D.C. Circuit's *Bin Ali Jaber* analysis, the cases would have been dismissed without discussion as they implicated the government's military decision to create the blockade in the first place. Instead, the Court analyzed the legal justification for the blockade and found it constitutional. For that reason, I see *Al-Shimari* not as sea change, but as attempting to return to long standing practice of first finding the explicit government authority to act before moving on to other matters.

126. *See also* Gonzales-Vera v. Kissinger, 449 F.3d 1260, 1264 (D.C. Cir. 2006) (noting that a TVPA claim against a government official could stand if the official's act was "so

question—is if the intended targets of the strike were persons who, while armed and dangerous in some regard, showed no intention of threatening the U.S. or its interests and were not members of a group affiliated with or linked to the Afghan Taliban or al-Qaeda. They could perhaps even be a terrorist group the world would be better without, but not one that the government could plausibly assert was an enemy of the United States. This would remove the strike from the umbrella of the AUMF[127] and place serious doubt on other justifications such as self-defense or a preemptive strike (areas of Article II authority that this Recent Development sets aside for now).[128] Without the authority to act, the Executive could not claim that this was a matter "textually committed" to a political branch (as it is "committed" to no one), and the suit might survive the political question doctrine.

This brings us to a final benefit of settling the question of legality through the AUMF: it would do more to address the concerns of Judge Brown's concurrence. Judge Brown was worried that we face a future in which the Executive wields incredible lethal power, but with poor internal oversight and purely partisan oversight from Congress.[129] While declaring all this lethal power legal might seem an odd way to address this perceived problem, one must remember that when something is legal, something else is illegal. The courts have emphatically stated that the Executive and Congress are limited by what power flows from the Constitution, nothing more, nothing less.[130] While this missile-strike in Yemen against AQAP is likely constitutional under the statutory authority granted by Congress in the AUMF, a court ruling on the issue would send a signal that it is willing to say a missile-strike somewhere else or against someone else (perhaps against the Assad regime in Syria, for example) does not pass constitutional muster. The government's judgment within the bounds of its authority would stay out of the courtroom, but there would be boundaries.

removed from his official duties that it cannot fairly be said to represent the policy of the United States").

127. *See* Authorization for the Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 (2012)) (authorizing military force "against those nations, organizations, or persons [that] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001").

128. *See supra* Section II.B.

129. *See* Bin Ali Jaber v. United States, 861 F.3d 241, 252–53 (D.C. Cir. 2017) (Brown, J., concurring).

130. *See Ex parte* Quirin, 317 U.S. 1, 25 (1942).

CONCLUSION

While the D.C. Circuit was likely correct in its ultimate judgment that the central claims presented in *Bin Ali Jaber* were nonjusticiable political questions, it came to that conclusion a little too quickly. It is within the competence of federal courts to consider questions of constitutional and statutory interpretation, including the ways that those interpretations relate to the use of military force. This venerable tradition was present in times of great national crisis, like the Civil War and World War II, and it can be applied to the War on Terror just as well.

The D.C. Circuit could, and should, have ruled on the legality of drone strikes in Yemen against AQAP targets under the 2001 AUMF. Finding such legal authority for the strikes would have built upon and more properly applied the court's precedents in *Gonzales-Vera* and *El-Shifa*, without attempting to adjudicate the (probably unmanageable) merits of the claims in *Bin Ali Jaber*. Most importantly, a decision that actually defined the scope of the 2001 AUMF would have shaken some dust off of the ageing oversight architecture of the American national security apparatus. It would have been an assurance to everyone the courts will not stand idly by if the President or Congress step beyond the constitutional bounds of their war powers. And that is an assurance with which the world can rest a little easier.

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