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Drones and the U.S. Courts

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DRONES AND THE U.S. COURTS

Richard D. Rosen[†]

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I. INTRODUCTION

In 2008, then-Senator Barack Obama promised that, if elected President, he would bring the war in Afghanistan to al Qaeda sanctuaries in Pakistan.¹ President Obama has kept that promise, engaging al Qaeda and Taliban leaders in Pakistan with drones. While President Bush also employed drones, the number has risen dramatically under President Obama—reaching 117 in 2010 alone, more than double the number during the entire Bush presidency.² Using Predator drones capable of carrying Hellfire missiles and the larger Reaper, which can carry both Hellfire missiles and laser-guided bombs,³ the United States has killed over

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1. Senator Barack Obama, Address at Fayetteville Technical Community College: The World Beyond Iraq (Mar. 19, 2008), *available at* <http://my.barackobama.com/page/community/post/samgrahamfelsen/gGBFrl>.

2. See Bill Roggio & Alexander Mayer, *Charting the Data for U.S. Airstrikes in Pakistan, 2004–2011*, LONG WAR J., <http://www.longwarjournal.org/pakistan-strikes.php> (last updated Mar. 11, 2011) (showing a chart entitled “Number of US Airstrikes in Pakistan 2004–2011” that illustrates the increased number of airstrikes since President Obama took office).

3. *U.S. Intensifies Drone Strikes in Pakistan*, 16 INT’L INST. STRATEGIC STUD., cmt. 36, Oct. 2010, at 1, *available at* <http://www.iiss.org/publications/strategic->

1,800 leaders of Taliban, al Qaeda, and allied groups.⁴ The nation has also employed drones outside the Afghanistan theater, targeting al Qaeda in such places as Yemen and Somalia.⁵

The United States's use of drones has generated considerable debate over the lawfulness of such targeted killings under international law.⁶ Assuming that using drones to target suspected terrorists and insurgents violates international law,⁷ do the actual or potential victims have remedies in U.S. courts? In other words, may prospective targets seek injunctive or declaratory relief to forestall such strikes, and do the victims of such attacks have realistic claims against the United States or its officials for personal injuries and property damage sustained in the attacks?

Last year, the American Civil Liberties Union (ACLU) and the Center for Constitutional Rights (CCR) sought to enjoin and declare unlawful a prospective attack against Anwar al-Aulaqi, the Yemen-based, American-born al Qaeda leader.⁸ Al-Aulaqi is

comments/past-issues/volume-16-2010/october/us-intensifies-drone-strikes-in-pakistan/.

4. See Roggio & Mayer, *supra* note 2 (chart entitled "Civilian v. Taliban/al Qaeda Deaths in U.S. Airstrikes in Pakistan" illustrates the increased number of Taliban/al Qaeda deaths since President Obama took office).

5. Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT'L & COMP. L. 1, 18–19 (2011); Mary Ellen O'Connell, *The International Law of Drones*, 14 AM. SOC. OF INT'L L. 1 (Nov. 12, 2010), available at http://asil.org/files/2010/insights/insights_101112.pdf.

6. See, e.g., Kenneth Anderson, *Predators Over Pakistan*, WKLY. STANDARD, Mar. 8, 2010, available at <http://www.weeklystandard.com/articles/predators-over-pakistan>; Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. L.J. 145 (2010); Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt, ed., forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144; Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237 (2010); Afsheen John Radsan, *Loftier Standards for the CIA's Remote-Control Killing* (William Mitchell Coll. of Law Legal Studies Research Papers Series, Paper No. 2010-11, May 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1604745.

7. The State Department justifies drone strikes as consistent with the nation's inherent right to self-defense. Moreover, it deems those targeted to be members of armed belligerent groups, thereby constituting lawful targets under the law of war. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Keynote Address at the Annual Meeting of the American Society of International Law, The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/1/releases/remarks/139119.htm>.

8. Anthony D. Romero & Vincent Warren, Editorial, *Sentencing Terrorism Suspects to Death—Without Trial*, WASH. POST, Sep. 3, 2010, at A-19, available at

reportedly the spiritual adviser to Major Nidal Hassan, the U.S. Army officer accused of murdering thirteen people at Fort Hood, Texas, in November 2009,⁹ and Hassan is believed to have directed Umar Farouk Abdulmatallab in his attempt to blow up a U.S. airline jet on Christmas Day, 2009.¹⁰ Suing on behalf of al-Aulaqi's father, the ACLU and CCR charged that the United States' policy of targeted killing violated al-Aulaqi's Fourth and Fifth Amendment rights as well as international law.¹¹ Then, in late 2010, Pakistani victims of U.S. drone strikes announced their intention to sue the United States for the damages incurred during the attacks.¹²

II. JUSTICIABILITY

Two components of justiciability impose virtually insurmountable barriers to lawsuits challenging the nation's policy of targeted killings: standing and the political question doctrine.

Standing is particularly problematic for those who seek to sue on behalf of suspected al Qaeda or Taliban members who might be or have been the targets of U.S. drones. As a constitutional condition on federal jurisdiction, standing requires a plaintiff to demonstrate a concrete and particularized injury resulting from a defendant's allegedly illegal conduct.¹³ Parties whose putative harm is undifferentiated from all others lack standing,¹⁴ and an interest in a problem or expertise with regard to a particular issue is insufficient to confer standing.¹⁵ Thus, absent a client who is or

<http://www.washingtonpost.com/wp-dyn/content/article/2010/09/02/AR2010090204463.html>.

9. REP. TO S. COMM. ON FOREIGN RELATIONS, 111th CONG., *Al Qaeda in Yemen and Somalia: A Ticking Time Bomb 9* (Comm. Print 2010), available at <http://foreign.senate.gov/reports/>.

10. *Nine Years After 9/11: Confronting the Terrorist Threat to the Homeland: Hearing before the S. Comm. on Homeland Sec. and Gov't Affairs*, 111th Cong. 5 (2010) (statement of Michael E. Leiter, Director, National Counterterrorism Center).

11. Complaint for Declaratory and Injunctive Relief at 9-10, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 1:10-cv-01469).

12. Chris Brummitt, *Victim of Drone Attack Wants to Put CIA on Trial*, DALLAS NEWS, Dec. 24, 2010, at 12A, available at <http://ece.dallasnews.com/news/nation-world/world/20101224-victim-of-drone-attack-wants-to-put-cia-on-trial.ece>; Article, *Pakistani Tribesman Sues U.S. Over Drone Strike Deaths*, AL ARABIYA NEWS CHANNEL, Nov. 30, 2010, <http://www.alarabiya.net/articles/2010/11/30/128007.html>.

13. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

14. *Lance v. Coffman*, 549 U.S. 437, 442 (2007); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-22 (1974).

15. *Schlesinger*, 418 U.S. at 226; see also *Valley Forge Christian Coll. v. Ams.*

was a target of a drone strike, those opposed to the nation's targeted-killing policy will be unable to challenge the policy in federal court.¹⁶ Unless al Qaeda or Taliban members are willing *personally* to seek relief, which usually means turning themselves in to U.S. authority (an unlikely event),¹⁷ the lawsuit will be dismissed.

Moreover, even if an al Qaeda or Taliban member personally seeks prospective relief to prevent an anticipated attack, absent evidence that he is an *actual* target, he will lack standing to sue.¹⁸ Standing requires that the harm suffered by a plaintiff be actual or imminent, not merely conjectural or speculative.¹⁹ Because the specific targets of drone strikes are highly classified and subject to the state secrets privilege,²⁰ a purported al Qaeda or Taliban member will be unable to establish beyond mere conjecture and speculation that he is—in fact—a prospective target.²¹

As a matter of prudential concern, the federal courts also generally refuse to permit one party to assert the rights of another party who is not before the court.²² The Supreme Court has recognized a narrow exception to this rule, requiring that the party before the court demonstrate why the real party-in-interest cannot appear in his or her own behalf and that the lawsuit is in the best interests of the real party-in-interest.²³ With regard to al Qaeda or Taliban leaders, those seeking either to block a drone strike or seeking damages for strikes that have occurred may be incapable of finding clients who meet these prerequisites to third-party standing. For example, in *Al-Aulaqi v. Obama*,²⁴ the district court refused to permit the father of Anwar al-Aulaqi to sue on his son's behalf (1) because he was unable to show that his son was unable to vindicate his own rights before the court by peacefully turning himself in to

United for Separation of Church & State, Inc., 454 U.S. 464, 486 (1982).

16. See *Lujan*, 504 U.S. at 561–62.

17. See Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 442 (2009).

18. See *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644, 656 (6th Cir. 2007), *cert. denied*, 552 U.S. 1179 (2008).

19. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

20. Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss at 46, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-1469), 2010 WL 3863135 [hereinafter *Opp'n to Pl.'s Mot.*].

21. See *Am. Civil Liberties Union*, 493 F.3d at 655–56.

22. *Allen v. Wright*, 468 U.S. 737, 751 (1984); see *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

23. *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990).

24. 727 F. Supp. 2d 1 (D.D.C. 2010).

U.S. authorities;²⁵ and (2) because of his son's implicit disinterest in seeking access to American courts, by such statements as "[i]f the Americans want me, [they can] come and look for me."²⁶

Even if a plaintiff establishes standing to sue, the political question doctrine will almost certainly block judicial review of the nation's targeted-killing policy. The Supreme Court, in *Baker v. Carr*,²⁷ delineated the attributes of political questions, finding that they involve at least one of the following six factors:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable or 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 the 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.²⁸

The quintessential political question case is one challenging a military or foreign policy decision,²⁹ which necessarily implicates virtually every *Baker* factor, particularly the constitutional commitment of the issues to Congress and the President and the lack of judicially discoverable or manageable standards for deciding the issues.³⁰ Thus, federal courts have refused to review damages claims arising out of cruise missile strikes against a suspected al Qaeda chemical-weapons plant in the Sudan,³¹ losses suffered because the United States mined a Nicaraguan harbor,³² injuries

25. *Id.* at 17–20.

26. *Id.* at 20–23 (alterations in original).

27. 369 U.S. 186 (1962).

28. *Id.* at 217 (numbers added); *see also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803).

29. *See, e.g.*, *Gilligan v. Morgan*, 413 U.S. 1, 10 (1976); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918); *Amy Warwick*, 67 U.S. (2 Black) 635, 670 (1862); *cf.* *Holder v. Humanitarian Law Proj.*, 130 S. Ct. 2705, 2727–28 (2010) (deference to Congress and the executive in matters relating to national security and foreign policy).

30. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 44–45 (D.D.C. 2010).

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

32. *Chaser Shipping Corp. v. United States*, 649 F. Supp. 736, 739 (S.D.N.Y.

incurred from U.S. actions in connection with the Soviet Union's shoot down of a Korean airliner,³³ damages sustained because of U.S. involvement in the Chilean coup,³⁴ injuries caused by the U.S.-supported Guatemalan army,³⁵ property lost from the creation of a U.S. naval base on Diego Garcia,³⁶ and deaths caused by equipment sold to Israel under the military-sales program.³⁷ Similarly, courts have refused to review the legitimacy of the Government's combat operations in Cambodia,³⁸ mining of Vietnam's Haiphong Harbor,³⁹ decision to go to war in Iraq,⁴⁰ placement of cruise missiles in Great Britain,⁴¹ and testing of nuclear weapons.⁴²

While not all cases implicating foreign or military policies are nonjusticiable,⁴³ a complaint that seeks to preclude the United States from engaging a particular military target or to enjoin the President from employing a particular weapons system is at the core of the political-question doctrine,⁴⁴ especially because drones are the only effective means of reaching al Qaeda and the Taliban

1986), *aff'd*, 819 F.2d 1129 (2nd Cir. 1987), *cert. denied*, 487 U.S. 1243 (1988).

33. *In re Korean Air Lines Disaster of Sep. 1, 1983*, 597 F. Supp. 613, 616–17 (D.D.C. 1984).

34. *Gonzales-Vera v. Kissinger*, 449 F.3d 1260, 1264 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 1206 (2007); *Schneider v. Kissinger*, 412 F.3d 190, 195–96 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1069 (2006).

35. *Harbury v. Hayden*, 522 F.3d 413, 421 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 195 (2008).

36. *Bancoult v. McNamara*, 445 F.3d 427, 433, 435–36 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 1166 (2007).

37. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 981–84 (9th Cir. 2007).

38. *Holtzman v. Schlesinger*, 484 F.2d 1307, 1311–12 (2nd Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *Drinan v. Nixon*, 364 F. Supp. 854, 856 (D. Mass. 1973).

39. *DaCosta v. Laird*, 471 F.2d 1146, 1147–48, 1155 (2nd Cir. 1973).

40. *Great Prince Michael v. United States*, 260 F. Supp. 2d 23, 26–27 (D.D.C. 2003).

41. *Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332, 1338–40 (S.D.N.Y. 1984), *aff'd*, 755 F.2d 34 (2nd Cir. 1985).

42. *Pauling v. McNamara*, 331 F.2d 796, 799 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 933 (1964).

43. *See, e.g., Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229–30 (1986).

44. *See, e.g., Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 47–49, 52 (D.D.C. 2010); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (en banc); *Gonzales-Vera v. Kissinger*, 449 F.3d 1260, 1264 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 1206 (2007); *Schneider v. Kissinger*, 412 F.3d 190, 195–96 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1069 (2006); *In re Korean Air Lines Disaster of Sep. 1, 1983*, 597 F. Supp. 613, 616–17 (D.D.C. 1984); *Chaser Shipping Corp. v. United States*, 649 F. Supp. 736, 739 (S.D.N.Y. 1986), *aff'd*, 819 F.2d 1129 (2nd Cir. 1987), *cert. denied*, 487 U.S. 1243 (1988).

in their Pakistani sanctuaries.⁴⁵

III. SOVEREIGN IMMUNITY: DAMAGE CLAIMS AGAINST THE UNITED STATES

To the extent drone victims seek damages for personal injury or property damage from the United States, they must demonstrate that Congress has waived the government's sovereign immunity for such claims.⁴⁶ Two statutes constitute the principal waivers of the United States' sovereign immunity from monetary claims—the Federal Tort Claims Act (FTCA) and the Tucker Act.⁴⁷ Neither affords a basis for money damages for the victims of drone attacks.

The FTCA provides a limited waiver of sovereign immunity for the negligent or wrongful acts or omissions of federal employees acting within the scope of their employment.⁴⁸ Absent the FTCA, sovereign immunity would deprive federal courts of jurisdiction over most tort claims against the federal government.⁴⁹ The FTCA does not, however, encompass all tort claims, expressly excepting certain classes of claims, including those that would be brought by the targets of drone attacks.⁵⁰ Where an exception applies, Congress has not waived the sovereign immunity of the United States, thereby depriving the federal courts of jurisdiction over the excepted claim.⁵¹

Of particular relevance, the FTCA excludes claims “arising out of combatant activities of the military or naval forces” in time of

45. See Brian Glyn Williams, *The CIA's Covert Predator Drone War in Pakistan, 2004–2010: The History of an Assassination Campaign*, 33 *STUD. CONFLICT & TERRORISM*, 871, 877–80 (2010).

46. *Lane v. Pena*, 518 U.S. 187, 192 (1999); *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 33–34 (1992).

47. Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–80 (2006); Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491 (2006 & Supp. 2008). Specialized statutory waivers also exist, such as the Foreign Claims Act, 10 U.S.C. § 2734 (2006). Generally, however, combat claims are not cognizable under the Act. *Id.* § 2734(b)(3).

48. 28 U.S.C. §§ 1346(b), 2671–80 (2006).

49. *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475–76 (1994); *Richards v. United States*, 369 U.S. 1, 6 (1962).

50. 28 U.S.C. § 2680 (2006).

51. See, e.g., *U. S. Aviation Underwriters, Inc. v. United States*, 562 F.3d 1297, 1299 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 622 (2009); *Riley v. United States*, 486 F.3d 1030, 1032 (8th Cir. 2007). *But cf.* *Williams v. Fleming*, 597 F.3d 820, 823 (7th Cir. 2010) (exceptions are mandatory rules of decision, not restrictions on a court's subject-matter jurisdiction).

war,⁵² claims based on injuries suffered in a foreign country,⁵³ and claims for most intentional torts.⁵⁴ The FTCA also bars claims based upon the performance or failure to perform a discretionary function,⁵⁵ that is, a decision based upon public policy.⁵⁶ Any one or all of these exceptions would be fatal to a claim for damages from a drone attack. Such attacks may implicate combatant activities,⁵⁷ they always occur in foreign countries, and most are intentional in character. Moreover, the strikes involve discretion at the highest levels of the government based upon considerations of public policy.⁵⁸

The Tucker Act affords a possible avenue of relief for property lost by drone victims under the Fifth Amendment's Takings Clause.⁵⁹ The Tucker Act is a jurisdictional statute⁶⁰ that waives sovereign immunity for (inter alia) non-tort money claims founded upon the Constitution.⁶¹ The Tucker Act itself does not afford a substantive basis for monetary relief.⁶² Instead, a plaintiff must identify a constitutional provision that—when violated—may be fairly interpreted as mandating compensation from the

52. 28 U.S.C. § 2680(j). The exception applies even in the absence of a formal declaration of war, and it bars lawsuits for both deliberate and accidental actions. *Koohi v. United States*, 976 F.2d 1328, 1333–34 (9th Cir. 1992).

53. 28 U.S.C. § 2680(k); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

54. 28 U.S.C. § 2680(h) excludes such intentional torts as assault and battery. The act includes an “exception to the exception” for the acts or omissions of federal investigative or law enforcement officers, which is seemingly inapposite in the case of drone strikes. *Id.*

55. 28 U.S.C. § 2680(a).

56. *See United States v. Gaubert*, 499 U.S. 315, 323 (1991).

57. It is widely reported that the CIA, as well as the military, operates drones. *See, e.g., Drones II: Second Hearing on Drone Warfare Before the Subcomm. On Nat'l Security and Foreign Affairs of the H. Comm. On Oversight and Gov't Reform*, 111th Cong. (2010) (statement of Hina Shamsi, Senior Advisor to the Project on Extrajudicial Executions, Center for Human Rights and Global Justice, New York University School of Law). Whether the CIA falls within the military and naval forces under these circumstances is unclear. *See Richard Henry Seamon, U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 735 (2006); *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009) (combatant activities exception preempts tort claim against government contractor for abusive treatment of detainees in Iraq).

58. *See Koh, supra* note 7.

59. “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

60. 28 U.S.C. § 1346(a)(2) (2006). The district courts have concurrent jurisdiction with the Court of Federal Claims (“COFC”) over Tucker Act claims not exceeding \$10,000. *Id.* The COFC has exclusive jurisdiction over claims exceeding \$10,000. *See* 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (2006).

61. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983).

62. *See United States v. Testan*, 424 U.S. 392, 398 (1976).

government.⁶³

The Takings Clause is such a provision;⁶⁴ however, it is inapplicable to claims for property lost during drone attacks unless the plaintiff is either a U.S. citizen or a foreign national with some substantial connection to the United States.⁶⁵ Moreover, courts have refused to recognize takings claims for property damaged or destroyed during combat operations⁶⁶ or where the property belongs to an enemy.⁶⁷ Consequently, those who lose property during drone attacks will find no solace in a Tucker Act claim.

IV. PERSONAL IMMUNITIES & NON-COGNIZABLE CLAIMS: TORT SUITS AGAINST INDIVIDUALS

Those targeted by drones may sue federal officials in their individual capacities for the damages suffered, either alleging a common law tort, a violation of international law, or a violation of the Constitution.⁶⁸ None is likely to be successful.

First, under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), the exclusive remedy for tort claims against individual federal officials acting within the scope of their employment is an FTCA suit against the United States.⁶⁹ The Westfall Act excepts two types of claims: those for violations of the Constitution and those brought under a statute that authorizes a lawsuit against the individual.⁷⁰ Neither common law torts nor claimed violations of international law, under (for

63. See *United States v. Connolly*, 716 F.2d 882, 886–87 (Fed. Cir. 1983) (no compensation mandated by the First Amendment), *cert. denied*, 465 U.S. 1065 (1984); *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967) (awarding no compensation for “commercial injury resulting from a failure or wrong done in the course of the regulatory process”).

64. See *Preseault v. I.C.C.*, 494 U.S. 1, 11–12 (1990); *United States v. Causby*, 328 U.S. 256, 267 (1946).

65. *Atamirzayeva v. United States*, 524 F.3d 1320, 1326–29 (Fed. Cir. 2008), *cert. denied*, 129 S. Ct. 1315 (2009); *Doe v. United States*, 95 Fed. Cl. 546, 567, 574–76 (2010).

66. *United States v. Caltex, Inc.*, 344 U.S. 149, 152–56 (1952); *Juragua Iron Co. v. United States*, 212 U.S. 297, 305–08 (1909); *United States v. Pac. R.R.*, 120 U.S. 227, 239–40 (1887); *Perrin v. United States*, 4 Ct. Cl. 543, 547–49 (1868).

67. See *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1365 (Fed. Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005); see also *Amy Warwick*, 67 U.S. (2 Black) 635, 674 (1863) (defining “enemies’ property”).

68. See *supra* note 12 and accompanying text.

69. 28 U.S.C. § 2679(b)(1) (2006).

70. *Id.* § 2679(b)(2).

example) the Alien Tort Statute,⁷¹ fall within an exception to the Westfall Act.⁷² Thus, upon certification by the Attorney General that a defendant federal employee responsible for a drone strike was acting within the scope of employment, the employee will be dismissed from the action and the United States will be substituted in his or her place.⁷³ Thereafter, the case proceeds under the FTCA, with all of the attendant limits on FTCA claims, including the exceptions for combatant activities, claims arising in foreign countries, intentional torts, and discretionary functions.⁷⁴ If the exceptions apply, the case is dismissed.⁷⁵

Second, some have suggested the possibility of *Bivens* actions⁷⁶ for the victims of drone attacks; that is, a damages claim against federal officials for violating constitutional rights.⁷⁷ Constitutional tort claims are specifically excepted from the Westfall Act;⁷⁸ nevertheless, these lawsuits face several barriers. As an initial matter, noncitizen victims of overseas drone strikes have no con-

71. 28 U.S.C. § 1350 (2006).

72. The Alien Tort Statute (ATS) is purely jurisdictional in character (*Sosa v. Alvarez-Machain*, 542 U.S. 692, 713–14 (2004)) and does not authorize lawsuits against federal officials individually. See, e.g., *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 116 (D.D.C. 2010); *Rasul v. Myers*, 512 F.3d 644, 660 (D.C. Cir. 2008), *vacated and remanded*, 129 S. Ct. 763 (2008), *reinstated in relevant part*, 563 F.3d 527, 528 n.1 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 527 (2010); *In re Iraq and Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 112 (D.D.C. 2007); *Schneider v. Kissinger*, 312 F. Supp. 2d 251, 267 (D.D.C. 2004), *aff'd on other grounds*, 412 F.3d 190 (D.C. Cir. 2005); *Alvarez-Machain v. Sosa*, 266 F.3d 1045, 1053–54 (9th Cir. 2001), *aff'd in relevant part*, 331 F.3d 604, 631–32 (9th Cir. 2003) (en banc), *rev'd on other grounds*, 542 U.S. 692, 712 (2004); see generally Elizabeth A. Wilson, *Is Torture All in a Day's Work? Scope of Employment, the Absolute Immunity Doctrine, and Human Rights Litigation Against U.S. Federal Officials*, 6 RUTGERS J.L. & PUB. POL'Y 175, 194–96 (2008). Further, the ATS does not waive the federal government's sovereign immunity. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985).

73. 28 U.S.C. § 2679(d) (2006).

74. See generally 28 U.S.C. § 2674 (2006).

75. *United States v. Smith*, 499 U.S. 160, 166 (1991); *Sobitan v. Glud*, 589 F.3d 379, 389 (7th Cir. 2009), *cert. denied*, 131 S. Ct. 73 (2010); *Harbury v. Hayden*, 522 F.3d 413, 417 (D.C. Cir. 2008). Moreover, if a plaintiff has not filed an administrative claim with the federal agency whose activities caused the plaintiff's injury or loss, the court must dismiss the lawsuit. 28 U.S.C. § 2675(a); *McNeil v. United States*, 506 U.S. 106, 113 (1993).

76. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (recognizing tort damages claim for violation of constitutional rights).

77. See *Murphy & Radsan*, *supra* note 17, at 440 (proposing that such a claim be based upon violations of “the Fifth Amendment on a ‘shock the conscience’ theory or because [the attack] constituted excessive force under the Fourth Amendment”).

78. 28 U.S.C. § 2679(b)(2)(A).

stitutional rights.⁷⁹ While the Supreme Court in *Boumediene v. Bush*⁸⁰ held that the Suspension Clause reaches alien detainees confined at Guantanamo Bay, a territory over which the United States exercises de facto sovereignty,⁸¹ its decision was carefully circumscribed and neither extended the reach of habeas corpus beyond Guantanamo⁸² nor recognized that aliens outside the United States (including Guantanamo) enjoy substantive constitutional protections.⁸³ Nor did the Court “disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause.”⁸⁴

Even if the Constitution has universal extraterritorial application, a *Bivens* remedy for constitutional violations connected with the use of drones would still be unavailable. In *Bivens*, the Court recognized limits on the remedy, most notably the existence of special factors that may counsel hesitation against such a remedy in the absence of affirmative action by Congress.⁸⁵ The lower

79. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 1013 (2010); see also George D. Brown, *Accountability, Liability, and the War on Terror—Constitutional Tort Suits as Truth and Reconciliation Vehicles*, 63 FLA. L. REV. 193, 212 (2011) [hereafter Brown, *Accountability, Liability and the War on Terror*]. Anwar al-Aulaqi is unique in that he is an American citizen, see *supra* note 8; however, it is unclear whether even al-Aulaqi would enjoy the full panoply of constitutional protections abroad. See *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 101 (D.D.C. 2007) (citing *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)); but cf. *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 969 (N.D. Ill. 2010) (recognizing constitutional rights of U.S. citizens allegedly subjected to cruel and degrading treatment during detention in Iraq); *Kar v. Rumsfeld*, 580 F. Supp. 2d 80, 83 (D.D.C. 2008) (same).

80. 553 U.S. 723 (2008).

81. *Id.* at 771.

82. *Id.*; see *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (Suspension Clause inapplicable to detainees at Bagram Air Base, Afghanistan).

83. *Boumediene*, 553 U.S. at 798; see also Curtis A. Bradley, 104 AM. J. INT’L L. 146, 149–50 (2010) (reviewing KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* (2009)).

84. *Rasul*, 563 F.3d at 529.

85. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971) (noting questions of federal fiscal policy, situations where a congressional employee merely acted in “excess of the authority delegated to him by the Constitution,” and explicit congressional declarations that victims cannot recover money damages); see also *Wilkie v. Robbins*, 551 U.S. 537, 550, 554 (2007) (describing *Bivens*’s two-part remedy test, first, “whether any alternative, existing process for protecting the interests” exists, and if not, second, “weighing reasons for and against the creation of a new cause of action”); *Carlson v. Green*, 446 U.S. 14, 18 (1980) (noting officials who “enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them

courts have found special factors to exist in *Bivens* lawsuits against “military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad.”⁸⁶ Given the Supreme Court’s “reluctan[ce] to extend *Bivens* liability ‘to any new context or new category of defendants,’”⁸⁷ it is highly unlikely that the Court will recognize constitutional tort claims by foreign nationals who are victims of drone strikes in the nation’s war with al Qaeda and the Taliban.⁸⁸

Finally, even if the courts recognized a *Bivens* remedy for the victims of drone attacks, federal officials responsible for the strikes would be immune from suit. All public officials enjoy at least a qualified immunity from constitutional tort claims.⁸⁹ “The doctrine of qualified immunity protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”⁹⁰ Foreign nationals who are victims of drone attacks currently have no constitutional rights;⁹¹ consequently, at least until such rights are clearly established, federal officials will qualify for immunity from *Bivens* claims arising

might be inappropriate”).

86. *E.g.*, *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 112 (D.D.C. 2010) (citing to the controlling case of *Rasul*, 563 F.3d at 532 n.5 (relying on *Sanchez-Espinoza* and holding that the “danger of obstructing U.S. national security policy” is a special factor)); *Arar v. Ashcroft*, 585 F.3d 559, 573–81 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 103–07 (D.D.C. 2007) (ruling that, essentially because “military affairs, foreign relations, and national security are constitutionally committed to the political branches of our government,” the judiciary should let Congress determine “whether a damages remedy should be available”); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208–09 (D.C. Cir. 1985).

87. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)).

88. *See* George D. Brown, “Counter-Counter-Terrorism via Lawsuit”—*The Bivens Impasse*, 82 S. CAL. L. REV. 841, 848 (2009) (raising criticisms against Congress that it, not the courts, should act to “address[] the questions only it can usefully answer”).

89. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (excepting, from the Executive Branch, prosecutors (and similar officials) and executive officers engaged in adjudicative functions, both which receive absolute immunity); *Butz v. Economou*, 438 U.S. 478, 507 (1978). The President enjoys an absolute immunity from damages liability “predicated on his official acts.” *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

90. *Pearson v. Callahan*, 555 U.S. 223 (2009) (quoting *Harlow*, 457 U.S. at 818).

91. *See supra* notes 79–84 and accompanying text.

from such attacks.⁹²

V. STATE SECRETS: THE DEATH KNELL OF DRONE CASES

Assuming a complaint survives the jurisdictional, justiciability, immunity, and other hurdles to lawsuits challenging U.S. drone policy, the state secrets doctrine is likely to bring the suit to a quick end.⁹³ Under the doctrine, the United States may prevent the disclosure of information in judicial proceedings if there is a reasonable danger of revealing military or state secrets.⁹⁴ Once the privilege is properly invoked and a court is satisfied that release would pose a reasonable danger to secrets of state, “even the most compelling necessity cannot overcome the claim of privilege.”⁹⁵

Not only will the state secrets doctrine thwart plaintiffs from acquiring or introducing evidence vital to their case,⁹⁶ it could result in dismissal of the cases themselves. Under the doctrine, the courts will dismiss a case either because the very subject of the case involves state secrets,⁹⁷ or a case cannot proceed without the privileged evidence or presents an unnecessary risk of revealing

92. See, e.g., *Rasul v. Myers*, 563 F.3d 527, 530 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2010) (“No reasonable government official would have been on notice that plaintiffs had any Fifth Amendment or Eighth Amendment rights.”); *Kar v. Rumsfeld*, 580 F. Supp. 2d 80, 85 (D.D.C. 2008) (“Kar’s problem . . . is that his right to a probable cause hearing was not clearly established with sufficient specificity to overcome the defendants’ qualified immunity.”); see also *Murphy & Radsan*, *supra* note 17, at 443–44 (commenting that the qualified immunity standards are “hazy, and a court applying them would tend to defer to the executive on matters of military judgment”).

93. See *Murphy & Radsan*, *supra* note 17, at 443 (“The state-secrets privilege poses another barrier to *Bivens*-style actions.”); see also *Brown, Accountability, Liability and the War on Terror*, *supra* note 79, at 227–29 (“A plaintiff might successfully navigate all these threshold obstacles and still not reach the merits. A significant obstacle, particularly in suits involving the war on terror, is the state secrets privilege.”).

94. *United States v. Reynolds*, 345 U.S. 1, 7 (1953); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079 (9th Cir. 2010).

95. *Reynolds*, 345 U.S. at 11.

96. For example, information about the intended targets of a drone strike or the intelligence, including classified sources, upon which the strike was (or will) be based falls within the privilege. Indeed, even an acknowledgment that the nation employs drones to kill terrorists in friendly countries may be protected. See *Opp’n to Pl.’s Mot.*, *supra* note 20, at 48–50; see *supra* notes 20–21, and accompanying text.

97. *Tenet v. Doe*, 544 U.S. 1, 11 (2005); *Weinberger v. Catholic Action of Haw./Peace Educ. Proj.*, 454 U.S. 139, 146–47 (1981); *Totten v. United States*, 92 U.S. 105, 106–07 (1875).

protected secrets.⁹⁸ Employing drones as a weapons platform against terrorists and insurgents in an ongoing armed conflict implicates both the nation's military tactics and strategy as well as its delicate relations with friendly nations.⁹⁹ As such, lawsuits challenging the policy cannot be tried without access to and the possible disclosure of highly classified information relating to the means, methods, and circumstances under which drones are employed.

VI. CONCLUSION

The instinctive reaction of most lawyers to a party's unlawful actions is to turn to the courts for redress. Although the lawfulness of U.S. policy of attacking al Qaeda and Taliban leaders with drones is contentious, the controversy must be resolved through the political process and outside the courts.

98. *Jeppesen*, 614 F.3d at 1077, 1089; *El-Masri v. United States*, 479 F.3d 296, 308–10 (4th Cir. 2007), *cert. denied*, 552 U.S. 947 (2007).

99. *Opp'n to Pl.'s Mot.*, *supra* note 20, at 51–55; *see generally* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1299 (2007).