[ORAL ARGUMENT NOT SCHEDULED]

No. 19-5328

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BILAL ABDUL KAREEM,

Plaintiff-Appellant,

v.

GINA HASPEL, et al.

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiffs below were Bilal Abdul Kareem and Ahmad Muffaq Zaidan. Only Mr. Kareem is an appellant before this Court. Defendants below were Donald J. Trump, in his official capacity as President of the United States; Michael R. Pompeo, in his official capacity as the Director of the Central Intelligence Agency (now substituted by Gina Haspel); James Mattis, in his official capacity as Secretary of Defense (substituted by Mark T. Esper); John F. Kelly, in his official capacity as Secretary of Homeland Security (substituted by Chad F. Wolf as Acting Secretary); Jefferson B. Sessions, III, in his official capacity as Attorney General (substituted by William P. Barr); Dan Coats, in his official capacity as Director of National Intelligence (substituted by John Ratcliffe); H.R. McMaster, in his official capacity as National Security Adviser (substituted by Robert C. O'Brien); the U.S. Departments of Defense, Homeland Security, and Justice; the Central Intelligence Agency; and the United States of America.

No amici appeared in district court. Amici in this Court are William Bowring, James Brady, William Broaddus, Brenner Fissell, Robert Johnson, Michael O'Hare, Eugene Oliver, Eugene Reavey, David Shapiro, Harry Shorstein, David Stetler, and Stephen Travers.

B. Rulings Under Review

The ruling under review is the September 24, 2019 order of the district court (Collyer, J.), dismissing plaintiff's complaint. The order is reprinted at JA 202-15 and is published at 412 F. Supp. 3d 52. An earlier order in the case dismissing some of Kareem's claims is reproduced at JA 87-116 and published at 317 F. Supp. 3d 8.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel is not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ Brad Hinshelwood
Brad Hinshelwood

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STATEMENT OF JURISDICTION

Plaintiff's complaint invoked the jurisdiction of the district court under 28 U.S.C. § 1331 to decide his Administrative Procedure Act claims. JA 17. The district court issued a final judgment dismissing plaintiff's complaint on September 24, 2019. JA 216. Plaintiff filed a notice of appeal on November 21, 2019. Dkt. No. 31; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1) Whether plaintiff has pled standing to challenge his purported placement on a list of targets where he alleges only that he was in the vicinity of various explosions while in an active combat zone.
2) Whether the district court correctly concluded that the state secrets privilege precludes litigation of plaintiff's suit.
3) Whether plaintiff's claim, which asks the district court to prescribe and supervise procedures the Executive Branch must follow before launching a strike abroad, presents a nonjusticiable political question.

STATEMENT OF THE CASE

A. Background

Plaintiff Bilal Abdul Kareem is a U.S. citizen who works as a journalist in Syria for "On the Ground Network," a news channel that provides "access to the views of … anti-Assad rebels." JA 21. Plaintiff "posts interviews with rebel fighters on social

media outlets," and "is one of the only Western journalists in the region given access to these individuals to interview them." *Id.*

Plaintiff alleges that during this work, he "has narrowly missed being hit by military strikes" on five separate occasions. JA 21. Four of these alleged strikes occurred in June 2016. Plaintiff alleges that the first of these strikes took place in Idlib City, when he and others "heard aircraft approaching" and an airstrike hit the building in which his channel's office was located. JA 22. The second alleged strike occurred when "drones buzzing above" struck an area where plaintiff and his cameraman had been standing shortly before. *Id.* In the third alleged strike, "[t]he vehicle of Kareem and his staff was struck and destroyed by a drone-launched Hellfire missile." *Id.* The fourth alleged strike also involved the network office in Idlib City, when a "missile" hit the building where the office was located. JA 22-23. The fifth alleged strike, which occurred in August 2016, took place in an area that "had recently changed hands from government control to rebel hands." JA 23. As plaintiff and others from his network were driving, a "huge blast" went off "only yards away from the car." *Id.*

"Upon information and belief," Kareem alleges that he "was the specific target" of each of these strikes, and that "those strikes were carried out as a result of Kareem's inclusion" on a list of targets for U.S. military action. JA 23. Plaintiff alleges that this list is the "result of a 'process' in which targets are nominated by one or more defendants, and their inclusion on the Kill List is confirmed through a series

of meetings and discussions among defendants." JA 24. The complaint contains allegations about the operation of this list based on a Presidential Policy Guidance issued in 2013 and subsequently declassified.[1] JA 24-25. In particular, plaintiff alleges that the Guidance sets out certain "preconditions" for the use of lethal force, and that he has never met any of these preconditions. JA 25. Plaintiff also contends that certain targeting decisions are made with the use of metadata collected from various electronic devices, and that he "frequently us[es] a variety of recording equipment and radio devices" while interacting with individuals he covers. JA 21; *see* JA 24-25. Plaintiff further alleges that he was never notified of his inclusion on this list or provided an opportunity to challenge his inclusion on the list, and that no administrative process exists to challenge his alleged inclusion. JA 25-26.

B. Prior Proceedings

1. Plaintiff brought suit in March 2017, contending that his alleged inclusion on a list of targets for lethal force violated the Administrative Procedure Act.[2] Plaintiff asserted six claims, arguing (1) that his inclusion on the list is arbitrary and capricious because he does not pose a threat to U.S. persons or national security and is not a member or supporter of a terrorist group, JA 28; (2) that his inclusion on the

[1] This document was not attached to plaintiff's complaint, but is available on the Department of Justice's website. *See* https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download.

[2] Plaintiff was joined by a co-plaintiff, Ahmad Muaffaq Zaidan. Zaidan's claims were dismissed for lack of standing, JA 95-98, and he did not appeal.

list violates various federal statutes, a treaty, and Executive Order No. 12,333, JA 28-29; (3) that his inclusion on the list exceeds the authority granted in the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), JA 29; (4) that he was not given notice of his inclusion on the list or an opportunity to challenge his inclusion in violation of the Administrative Procedure Act, JA 30; (5) that his inclusion on the list violates his First Amendment rights, JA 30-31; and (6) that his inclusion on the list violates his Fourth and Fifth Amendment rights, JA 31. Plaintiff sought a declaration that his inclusion on the list is unlawful, an injunction barring the government from including him on the list without providing additional procedural protections, and an injunction requiring the government to remove him from the list and stop targeting him for lethal action. JA 31-32.

2. The government moved to dismiss, asserting that plaintiff failed to plead standing to bring his challenges and that his claims presented non-justiciable political questions. Although the district court narrowed plaintiff's claims in response to this motion, it did not dismiss the suit.

The district court first concluded that plaintiff had sufficiently alleged standing. The district court recognized that plaintiff's allegations rested on the assertion that "he was the victim of five near-miss attacks within a three-month period in 2016," JA 98, and did not dispute that such attacks are common in active combat zones, like Syria, where multiple combatants are active at a given moment. But the court concluded that the combination of plaintiff's allegations that "the United States

engages in targeted drone strikes"; that he has been in the vicinity of attacks, one of which was alleged to involve a drone; that he is a journalist who is in contact with "rebel or terrorist organizations"; and that a Hellfire missile was involved in one strike established "more than a sheer possibility" that plaintiff was targeted for U.S. action. JA 99 (quotation omitted); *see* JA 100.

Turning to the application of the political question doctrine, the district court recognized that under this Court's decision in *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (en banc), it could not "delve into the propriety or merit" of any decision to target plaintiff. JA 110. The court thus dismissed plaintiff's statutory claims, as well as his APA claim that the government's action was arbitrary and capricious, which would require the court to determine whether plaintiff was properly targeted. The court likewise recognized that the Presidential Policy Guidance on which plaintiff relied for his arbitrary and capricious claim "fails to provide a judicially manageable standard" for assessing targeting and lethal force decisions because it "provides no test or standard that must be satisfied" before targeting occurs. JA 108.

The district court nevertheless permitted plaintiff's claims that his placement on the list violated his First, Fourth, and Fifth Amendment rights to proceed. The court believed those claims were different because they involved "a timely assertion of [plaintiff's] due process rights under the Constitution to be heard before he might be included on the Kill List and his First Amendment rights to free speech before he

might be targeted for lethal action due to his profession." JA 114. The court distinguished *El-Shifa* and other cases finding targeting decisions abroad to be non-justiciable political questions, concluding that plaintiff sought prospective relief rather than "a ruling that a strike by the U.S. military was mistaken or improper," that *El-Shifa* did not involve a constitutional claim, and that the relevant decisions about targeting are "made by the principals of U.S. defense agencies or the President in Washington" rather than in a military theater abroad. JA 113-15.[3]

3. After the district court's decision on the motion to dismiss, the government informed plaintiff and the court that it was considering whether to invoke the state secrets privilege. JA 143-44. The court urged the parties to consider whether the case could be settled by having plaintiff submit to the government a written statement outlining information explaining that he is not "a combatant or an enemy of the United States." JA 144-45; *see* JA 153-55. The government agreed to review such a statement, but plaintiff declined to provide one. JA 160, 164-66, 171, 203.

The government then invoked the state secrets privilege and again moved to dismiss. Along with its motion to dismiss, the government submitted public affidavits from then-Acting Secretary of Defense Patrick Shanahan and then-Director of National Intelligence Dan Coats addressing the invocation of the privilege. JA 182-

[3] The district court separately dismissed the President as a defendant "because the President is not an agency within the meaning of the APA." JA 102. Plaintiff has not appealed that determination.

201. The government also submitted *ex parte* and *in camera* declarations from those officials that provided the district court with additional information relevant to the assertion of the privilege. Those documents have been provided to this Court in a supplemental *ex parte* and *in camera* appendix concurrently with the filing of this brief.

4. The district court granted the motion to dismiss, concluding that the state secrets privilege was properly invoked and that exclusion of the privileged evidence precluded further litigation of plaintiff's claims.

The court first held that the government had "satisfied the three procedural requirements for invoking the state secrets privilege" by asserting the privilege on behalf of the United States, after personal consideration by the agency heads responsible for the relevant information. JA 205.

The district court explained that plaintiff sought discovery into three topics: (1) whether the United States has targeted plaintiff for lethal force and, if so, on what basis; (2) the process the government used to target plaintiff, and what process would be used in the event he remains a target; and (3) whether the United States attempted to kill plaintiff through the attacks described in the complaint. JA 207. On reviewing the public and classified declarations, the court found "that the information [plaintiff] asks for constitutes privileged state secrets because there is a reasonable danger that disclosing such information would endanger national security." JA 207 (quotation omitted). The court noted that disclosure could "hinder the United States' military operations in Syria," that compelling the government to reveal whether it has

collected information related to a particular individual or the content of any such information would pose a threat to intelligence sources and methods, and that an individual might be able to alter his activities or otherwise evade detection or capture based on that knowledge. JA 207-08.

The district court concluded that the complaint must be dismissed in light of the unavailable information. JA 213. As the court observed, because plaintiff could not establish "whether he was targeted by lethal force," he could not "show[] a concrete injury amounting to either a specific present objective harm or a threat of specific future harm," and thus could not establish standing. JA 214 (quotation omitted). Nor could plaintiff obtain information about "what information was considered in reaching the alleged decision to target him," which would be necessary to litigate his claims. *Id.* Because "[t]he totality of the issues to be litigated surrounds the alleged decision to target [plaintiff] but all such information is privileged as state secrets and will not be disclosed by the United States," the court concluded dismissal was the only appropriate course. *Id.*

The district court rejected each of plaintiff's arguments against application of the privilege. First, the court rejected the assertion that the significance of plaintiff's asserted due process right precluded application of the privilege. JA 209. The court observed that "the privilege has the serious potential [to] defeat[] worthy claims for violations of rights that would otherwise be proved," but noted that the government had "not invoked the privilege lightly but has instead engaged in months of

consideration before filing its motion supported by reasoned declarations from the heads of the agencies responsible for the information," and explained that the significance of the right at issue had led the court to "take a thorough and questioning look at the reasons presented by the United States for invoking the privilege." *Id.* (quotation omitted). And the court observed that this Court and others have applied the privilege to claims asserting violations of constitutional rights. JA 209-10.

The district court next rejected plaintiff's contention that the court should require disclosure of the information under the framework of the Classified Information Procedures Act, which applies in criminal cases. JA 210-12. The district court noted that in criminal cases, "[t]he United States may either proceed with the indictment and disclose the information or forego prosecution by dismissing the charges," but that "the Supreme Court has held when the government is not the movant in a civil case the rationale applied in criminal cases is not applicable." JA 211; *accord* JA 212-13.

Finally, the district court also rejected plaintiff's argument that the privilege could not be invoked here because the United States previously disclosed information about targeted strikes, recognizing that this Court had already held that "[t]he government is not estopped from concluding in one case that disclosure is permissible while in another case it is not." JA 212 (quoting *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978)). Thus, "a previous U.S. disclosure that an individual had been targeted for

lethal action does not mean that it has waived its right, as a state secret, to refuse to disclose the who, why, and how it might identify future targets." *Id.*

Based on these conclusions, the district court entered final judgment dismissing plaintiff's complaint. JA 216. Plaintiff appealed, and on appeal contests only the district court's dismissal of his Fifth Amendment due process claim—not his First and Fourth Amendment claims.

SUMMARY OF ARGUMENT

I. Plaintiff lacks standing to pursue this suit. Plaintiff alleges that he was in the vicinity of five near-misses in Syria—a nation with an ongoing civil war. But he alleges no facts specifically linking the United States to those attacks. The most he offers is an unsupported assertion that one attack involved a type of missile used by the United States, among other countries. And he likewise fails to plausibly allege that any of these attacks, even if attributable to the United States, actually targeted him. Plaintiff's theory is that he uses electronic devices in interviewing various Syrian rebels, and that the United States makes use of metadata from electronic devices in targeting decisions, so therefore it must be plausible that he has been targeted. Those allegations, which could be made by any number of people who have possessed electronic devices in Syria while near rebels, are at most "merely consistent with" standing, and fall "short of the line between possibility and plausibility." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).

II. Even if plaintiff had plausibly alleged standing, the state secrets privilege forecloses litigation of his due process claim. Plaintiff does not contest that the procedural requisites of the privilege were met, and he does not appear to dispute that dismissal is the only appropriate course if the information covered by the privilege is removed from the case. Instead, he contends that the privilege should not apply at all because of the nature and importance of his claim. But "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake," *United States v. Reynolds*, 345 U.S. 1, 11 (1954), and this Court has already rejected the suggestion "that the privilege evaporates in the presence of an alleged constitutional violation," *In re Sealed Case*, 494 F.3d 139, 143 (D.C. Cir. 2007). Similarly, plaintiff's attempt to recast his suit as a criminal case, in which the government would be required to disclose certain information, ignores that the rationale of criminal cases "has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented." *Reynolds*, 345 U.S. at 12. And plaintiff's contention that the district court should have employed procedures under which state secrets would be disclosed to him and his counsel is fundamentally inconsistent with the privilege; once the privilege is properly invoked, the information covered by it is removed from the case, and is not disclosed for consideration "even by the judge alone, in chambers." *Id.* at 10.

III. Even if plaintiff had standing and could avoid application of the state secrets privilege, his claim would present non-justiciable political questions. As this Court has explained, "[i]f the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (en banc). The district court correctly applied this principle in dismissing several of plaintiff's claims, but believed it could prescribe the appropriate process to use in advance of "the President's decision to launch an attack on a foreign target" through a due process claim. But the process the Executive Branch employs in determining whether and when to engage in strikes against enemy targets cannot be assessed without reference to judgments about the particular threat a target poses, the necessity of military action, and a host of other considerations constitutionally entrusted to the political branches. Because courts "lack the 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" and cannot "elucidate the … standards that are to guide a President when he evaluates the veracity of military intelligence," *id.* at 844, 846, courts cannot prescribe the process by which the President and other responsible officials make judgments about whether a particular strike is warranted.

STANDARD OF REVIEW

This Court reviews a district court's determination that a plaintiff has standing and the applicability of the political question doctrine de novo. *Starr Int'l Co. v. United States*, 910 F.3d 527, 533 (D.C. Cir. 2018); *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011). The Court also reviews legal determinations about the state secrets privilege de novo, *Molerio v. FBI*, 749 F.2d 815, 820 (D.C. Cir. 1984), but reviews for abuse of discretion the district court's conclusion that the government's affidavits adequately invoke the privilege, *In re Sealed Case*, 494 F.3d 139, 144 (D.C. Cir. 2007).

ARGUMENT

I. Plaintiff's General Allegations That He Was Near Explosions In A War Zone Are Insufficient to Establish Standing.

Plaintiff's standing is based on general allegations that, while conducting interviews in rebel-held territory in Syria in an effort to provide "access to the views of … anti-Assad rebels," JA 21, he was in the vicinity of multiple explosions. Because of these explosions and his allegation that the United States engages in targeted airstrikes abroad, plaintiff believes that the United States has targeted him, and thus may attempt to do so in the future. The district court believed that plaintiff had established standing because he alleged "that the United States engages in targeted drone strikes, that he has been the near victim of a military strike on five occasions (at

least one of which included the use of a drone), and that he is a journalist who is often in contact with rebel or terrorist organizations." JA 99.

These allegations provide no factual matter linking the United States to the explosions, much less facts supporting the inference that it is plausible that the United States has ever targeted him with lethal force.

Because plaintiff's complaint "seeks prospective declaratory and injunctive relief, he must establish an ongoing or future injury that is certainly impending." *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015) (quotation omitted). To survive a motion to dismiss based on standing, the complaint "must state a plausible claim that the plaintiff has suffered an injury in fact fairly traceable to the actions of the defendant that is likely to be redressed by a favorable decision on the merits." *Humane Soc'y of the U.S. v. Vilsack*, 797 F.3d 4, 8 (D.C. Cir. 2015). The court thus applies the same standard as "in reviewing dismissals for failure to state a claim." *Arpaio*, 797 F.3d at 19. Under that standard, the court "accept[s] the well-pleaded factual allegations as true and draw[s] all reasonable inferences from those allegations in the plaintiff's favor," but "'[t]hreadbare recitals of the elements of [standing], supported by mere conclusory statements, do not suffice.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The court does "not assume the truth of legal conclusions" and does not "'accept inferences that are unsupported by the facts set out in the complaint.'" *Id.* (quoting *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 732 (D.C. Cir. 2007)). This standard demands "more than a sheer possibility" that

plaintiff has shown standing: "Where a complaint pleads facts that are 'merely consistent with'" standing, "it 'stops short of the line between possibility and plausibility.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

Here, plaintiff's standing to pursue his suit hinges on the premise that he faces an "actual or imminent, not conjectural or hypothetical" injury, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), because of his inclusion on a list of individuals targeted for lethal action by the United States government. Plaintiff contends that he has previously been targeted by the United States with lethal force on five occasions in Syria, and that he therefore faces a "certainly impending" prospect of future attacks by the United States. *Arpaio*, 797 F.3d at 19 (quotation omitted). Thus, as the district court recognized, plaintiff's standing turns on whether he has plausibly alleged that the various near-misses he experienced in Syria are the result of U.S. efforts to target him with lethal force.

Plaintiff's allegations do not plausibly link the United States to any of the attacks he experienced, much less support the inference that the United States has ever targeted him with lethal force. Plaintiff alleges that he works for a news organization, and that in this role, he frequently interviews rebels opposed to the Syrian government in rebel-held territory. JA 21. In particular, the news network he works for has as an "objective" "provid[ing] … access to the views of the anti-Assad rebels." *Id.* Plaintiff alleges that while carrying out this work, he was in the vicinity of

five explosions between June and August 2016. Two of those explosions are described as airstrikes that hit the offices of the news network for which plaintiff works. JA 22. Another explosion occurred on a street where plaintiff had recently been filming with his crew. *Id.* Another is described as a "huge blast" that occurred near plaintiff's car in an "area [that] had recently changed hands from government control to rebel hands." JA 23. And another explosion destroyed a vehicle near plaintiff while he was "sitting in a pick-up truck, parked under a tree," near others from his staff. JA 22. For this attack, plaintiff alleges (without elaboration or support) that the weapon used was a "drone-launched Hellfire missile." *Id.*

Plaintiff does not allege that he was able to identify the United States as the source of any of these attacks. The only assertion even approaching an allegation of this type is the claim that one attack involved a "drone-launched Hellfire missile." JA 22. The basis for this assertion is not clear. Plaintiff alleges that he saw a drone in the area some time before the explosion, but does not allege that he was able to determine that the drone was armed or what types of weapons it carried, much less that he saw the drone fire any missile: he was "sitting in a pick-up truck, parked under a tree" when the explosion occurred. *Id.* But in any event, plaintiff does not allege (nor could he) that the United States is the only nation that uses the Hellfire missile system; that system is employed by numerous U.S. allies. Plaintiff's dubious assertion that a Hellfire missile was involved in this attack thus does not suffice to make it plausible that the United States carried out the attack.

Even if plaintiff could link the United States to any one of the explosions described in his complaint, he has failed to allege anything supporting the inference that the United States targeted him. Alongside the general allegations about the explosions he witnessed—where other individuals were uniformly present—plaintiff alleges that the United States engages in "lethal strikes targeted at individuals" abroad, using drones and other weapons. JA 23-24. Plaintiff also alleges that the United States collects "metadata" related to certain electronic devices, and considers that metadata in making targeting decisions. JA 24-25. He alleges that he uses "a variety of recording equipment and radio devices" in conducting his work. JA 21.

Taking all these allegations as true, plaintiff's theory is that because the United States engages in airstrikes abroad, anyone who uses an electronic device, is in the vicinity of multiple explosions in a war zone, and has had some contact with "local militants," JA 21, has plausibly alleged that the United States has targeted them. On that basis, hundreds, if not thousands, of individuals in Syria alone could plausibly allege that they are the targets of U.S. attacks. That set of allegations pleads at most "facts that are merely consistent with" an injury in fact, and thus "stops short of the line between possibility and plausibility." *Iqbal*, 556 U.S. at 678 (quotation omitted).

The implausibility of plaintiff's attempt to link the United States to the attacks he experienced is underscored by the uncontested realities of the Syrian conflict. Plaintiff does not dispute that his work takes place in a country with an active and ongoing civil war between government forces and the rebel groups whose views

plaintiff documents. Nor does plaintiff dispute that the rebel forces are made up of disparate, sometimes feuding organizations; that the government is supported by an array of organizations, such as Hezbollah; and that multiple foreign militaries, such as Iranian, Turkish, and Russian forces, have provided military support. *See generally* Carla A. Humud et al., Cong. Research Serv., RL33487, *Armed Conflict in Syria: Overview and U.S. Response* 8-11 (2017).[4] The mere fact that plaintiff has been in the vicinity of explosions in this context is probative of nothing more than the dangers of reporting from a country in the throes of an ongoing civil war.

The conclusion that plaintiff has plausibly alleged standing here would be particularly inappropriate for another reason. The Supreme Court has recognized that part of the "context-specific task" of "[d]etermining whether a complaint states a plausible claim for relief," *Iqbal*, 556 U.S. at 679, includes considering the relative likelihood of various explanations for behavior. For example, in *Twombly*, allegations in a complaint "consistent with" the alleged unlawful conduct "did not plausibly suggest an illicit accord" because they were "not only compatible with, but indeed w[ere] more likely explained by" other behavior. *Iqbal*, 556 U.S. at 680. Similarly, in *Iqbal*, the Court took note of "more likely explanations" in examining why a complaint failed to cross the plausibility threshold. *Id.* at 681; *accord id.* at 682 (noting "obvious alternative explanation" for the alleged misconduct).

[4] https://www.hsdl.org/? view&did=800762.

Those principles apply with full force here. Whether or not plaintiff was the specific target of the attacks he describes, there are "obvious alternative explanations" for them—including the likelihood they were carried out by the Syrian government or its allies. After all, plaintiff alleges that he is part of a news organization dedicated in part to providing "access to the views" of anti-government rebels, JA 21; that two of the attacks hit the offices of the network for which he reports, JA 22; and that another attack occurred in an area that had "recently" shifted "from government control to rebel hands." JA 23. Neither plaintiff nor the district court disputes that the Syrian government (like ISIS-affiliated rebels) has "routinely targeted and killed both local and foreign journalists" in the conflict, while also using "indiscriminate and deadly force against civilians," including through "air and ground-based military assaults." U.S. Dep't of State, *Syria 2016 Human Rights Report*, at 2, 29 (2017)[5]; *see Colvin v. Syrian Arab Republic*, 363 F. Supp. 3d 141, 159 (D.D.C. 2019) (noting "Syria's long-standing policy of violence towards media activists"). Plaintiff's failure to account for the uncontested realities of his work and these "obvious alternative explanation[s]" underscores why his allegations fail to cross "the line from conceivable to plausible." *Iqbal*, 556 U.S. at 680, 682 (quotation omitted).

[5] https://www.justice.gov/sites/default/files/pages/attachments/2017/03/06/dos-hrr_2016_syria.pdf.

II. The District Court Correctly Concluded That The State Secrets Privilege Required Dismissal.

The Supreme Court has long recognized that in certain circumstances the government may bar disclosure of otherwise relevant information in a lawsuit where "there is a reasonable danger that compulsion of the evidence will expose military [or state-secret] matters which, in the interest of national security, should not be divulged." *United States v. Reynolds*, 345 U.S. 1, 10 (1953). Thus, "secrets of state—matters the revelation of which reasonably could be seen as a threat to the military or diplomatic interests of the nation—are *absolutely privileged* from disclosure in the courts." *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982) (*Halkin II*). The state secrets privilege "performs a function of constitutional significance" by ensuring that the Executive Branch can "protect information whose secrecy is necessary to its military and foreign-affairs responsibilities." *El-Masri v. United States*, 479 F.3d 296, 303 (4th Cir. 2007).

Because the privilege is "not to be lightly invoked," *Reynolds*, 345 U.S. at 7, the Supreme Court has established procedural requirements to ensure that the invocation of the privilege occurs only after policy consideration at the highest levels of government, *Halkin II*, 690 F.2d at 996. Specifically, the privilege may only be invoked through a "formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Reynolds*, 345 U.S. at 7-8. Plaintiff does not dispute that those requirements were met

here: the privilege was formally invoked by the then-Acting Secretary of Defense and the then-Director of National Intelligence, both of whom attested to their personal consideration of the issue. JA 182-201.

Once these procedural requisites have been met, the court's task is to assess whether "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10. In conducting that assessment, the court considers, for example, whether the government has shown that the information might "divulg[e] too much to a 'sophisticated intelligence analyst,'" recognizing that "seemingly innocuous" or "harmless" information can be of value to a trained adversary. *In re United States*, 872 F.2d 472, 475 (D.C. Cir 1989) (quoting *Halkin v. Helms*, 598 F.2d 1, 8, 10 (D.C. Cir. 1978) (*Halkin I*)); *see also Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 402 (D.C. Cir. 1984). That assessment can be based, where necessary, on explanations submitted *ex parte* and *in camera*. *See, e.g.*, *Molerio v. FBI*, 749 F.2d 815, 822, 825 (D.C. Cir. 1984). The court accords "the 'utmost deference' to executive assertions of privilege upon grounds of military or diplomatic secrets." *Halkin I*, 598 F.2d at 9 (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

If the court is satisfied that a reasonable danger of disclosure of state secrets exists, the privilege is absolute: "No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983). There is thus no

balancing of plaintiff's need for the material against the government's interest in secrecy, because "[t]hat balance has already been struck" in favor of the government's need to protect state secrets. *Halkin II*, 690 F.2d at 990. The court may take the importance of the plaintiff's interest into account solely for the purpose of "determining the extent of the court's inquiry into the appropriateness of the claim" of privilege. *Id.*

The effect of the proper invocation of the privilege is "completely to remove the evidence from the case," and the court must then examine whether the case can proceed without the privileged information. *In re United States*, 872 F.2d at 476. If it cannot, dismissal is appropriate, such as where "plaintiff has no prospects of evidence to support the assertions in his complaint." *In re Sealed Case*, 494 F.3d 139, 145 (D.C. Cir. 2007).

A. Litigating Plaintiff's Claim Would Present a Reasonable Danger of Exposing State Secrets, Requiring Dismissal.

1. Applying these principles, the district court correctly concluded that the information at issue here is protected by the privilege. As the public declarations here explained, the privileged material includes (i) information regarding whether or not the U.S. Intelligence Community targets individuals for the use of lethal force outside of the United States, *see* JA 197; (ii) information concerning the military's past or future use of lethal force against targets in Syria, including the process by which targets are selected, *see* JA 186; (iii) information regarding whether or not plaintiff has

been designated for the use of lethal force by the Intelligence Community or the military, JA 186, 197; and (iv) information regarding whether or not the Intelligence Community or the military maintain any information concerning plaintiff, including any intelligence information or any information related to his allegations, JA 186, 197.

The public declarations—along with greater detail provided in classified declarations submitted *ex parte* and *in camera*—demonstrate that disclosure of each of these categories of information would present precisely the "reasonable danger" of "expos[ure] of military matters which, in the interest of national security, should not be divulged" that the privilege is designed to protect. *Reynolds*, 345 U.S. at 10. The assertion of the privilege here necessarily precludes confirming or denying whether any particular individual is a target, because either answer would necessarily reveal state secrets and pose a reasonable danger to national security. Revealing that the United States is targeting a particular individual would enable that person to "alter his behavior" to "evad[e] capture or further detection by the United States," and would "identify to the target and those affiliated with the target that the U.S. Intelligence Community is actively attempting to collect intelligence on the target," resulting in "heightened security awareness" and "additional risk to the intelligence sources and methods being directed at the target." JA 198-99. Similarly, the fact that the U.S. military has targeted or intends to target a particular individual would "provide knowledge or confirmation of potential military actions," allowing "the specific targets of lethal force to alter their behavior to evade military action" and revealing

"information concerning operational capabilities that could be used by other adversaries to evade or counter any future strikes." JA 188. Similarly, revealing whether the Intelligence Community targets individuals outside the United States for the use of lethal force would "alert[] terrorists and terrorist organizations to specific means that the U.S. Government is using, or has chosen not to use, to combat terrorism." JA 198.

Those concerns do not dissipate if a particular individual is *not* being targeted for lethal force. An individual who is aware that he is not being targeted would be able to "operate more freely," JA 189, or "facilitate any plans they may have to undertake terrorist actions," JA 199. Revealing the military's targeting practices would also "provide insight to foreign adversaries more broadly as to U.S. military targeting priorities and decision-making that would assist others in evading military operations and in planning countermeasures." JA 189. And revealing that an individual has not been or is not currently targeted would compromise security in future cases as well: "if the Government were to confirm that specific individuals have not been designated for the use of lethal force, but later refuse to comment in a case involving an actual designee, a person could easily deduce by comparing the Government's responses that the person in the latter case is a designee." JA 199; *accord* JA 189.

In addition, revealing information (or the lack thereof) in the government's possession about particular individuals would necessarily reveal facts about the government's intelligence collection activities. Disclosure of information about

whether or not the military or the intelligence community has information related to a particular person would necessarily confirm whether those bodies have an interest in that person's activities or are actively attempting to collect intelligence related to that person, and could enable that person to take steps to avoid detection or operate more freely. JA 189, 198-99. Any specific information in the government's possession would also reveal what aspects of the person's activities the government is aware of, "providing valuable insights into what activities may or may not have been detected," and "would also tend to reveal the sources and methods by which such information was obtained, compromising the safety and effectiveness of those sources and methods." JA 200; *accord* JA 190. And that disclosure would have implications beyond the particular individual targeted: "Disclosure of whether or not a person is of interest to the Intelligence Community could also reveal to associates of that person information about the scope of the intelligence possessed by the Intelligence Community about their activities." JA 200. That information would also "allow terrorist elements and other targets of intelligence collection to adjust their communications and operational security practices, thereby preventing or impairing future U.S. intelligence collection and analysis." JA 190.

The district court conducted a "close examination of the government's assertions," JA 206 (quoting *Ellsberg*, 709 F.2d at 63), as reflected in the government's "public and classified declarations," JA 207, and correctly concluded that disclosure of the information over which the privilege was asserted "would present a reasonable

danger to national security." JA 213. It specifically noted the risk of "hinder[ing] the United States' military operations in Syria," the risk to intelligence sources and methods if the United States were compelled to reveal whether it has collected information related to plaintiff or the content of any such information, and the fact that an individual might be able to alter his activities or otherwise evade detection or capture based on that knowledge. JA 207-08.

2. The district court also correctly concluded that "the unavailability of the requested information is fatal" to plaintiff's complaint, and that dismissal was the only appropriate course. JA 213. Indeed, plaintiff does not appear to contest that his suit cannot proceed if the information the district court found covered by the privilege is removed from the case.

The district court correctly recognized that plaintiff "cannot establish his standing to sue without the [privileged] information." JA 213. Plaintiff's standing depends on the assertion that the United States carried out the attacks he describes in his complaint, and the related assertion that he was the intended target of those strikes, to demonstrate that he faces a risk of future injury. Even assuming that those allegations are sufficient to survive a motion to dismiss, *but see supra* pp. 13-19, the elements of standing are "not mere pleading requirements," and plaintiff must establish his standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). But "[w]ithout access to the privileged information" relevant to those two

assertions, plaintiff "is unable to establish whether he was targeted by lethal force," and thus "ultimately cannot show[] a concrete injury amounting to either a 'specific present objective harm or a threat of specific future harm.'" JA 214 (quoting *Halkin II*, 690 F.2d at 999); *see Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007) (observing that where privileged information is required to demonstrate standing, a plaintiff's "claims must be dismissed").

That alone is sufficient to demonstrate that dismissal is required here. But even if he could establish standing, plaintiff's due process claim could not be litigated on the merits. Plaintiff contends that the government has denied him due process by targeting him for lethal force, and that he is entitled to notice of the government's basis for targeting him, a hearing, and the opportunity to contest any evidence in the government's possession supporting the determination to target him. Br. 17-18; JA 30-31; JA 207.

That claim, like plaintiff's standing, depends on the assertion that the United States is targeting him for lethal force—information the district court correctly found is protected by the privilege, and disclosure would cause serious or exceptionally grave harm to national security.[6] JA 207-08; *see* JA 188, 198. Plaintiff's broader assertions likewise plainly depend on information properly shielded by the privilege. Assuming that due process protections apply in the extraordinary context of the United States'

[6] As explained, the government can neither confirm nor deny whether plaintiff is or has been targeted with lethal force.

use of lethal force against terrorist targets in an area of active hostilities overseas, any due process analysis would necessarily be intensely fact-dependent. As the Supreme Court has explained, the "process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality op.) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Any due process analysis would thus require balancing the government's interest—in protecting the lives of its soldiers and citizens and in engaging in military operations against members of hostile forces—against a particular individual's interest in his life; the military need not provide notice and a hearing before targeting a U.S. citizen member of an enemy force who is about to launch an attack on a U.S. military base abroad, for example. *Cf. id.* at 534 (noting that process due when the Executive decides "to *continue* to hold those who have been seized" does not apply to "initial captures on the battlefield").

Calibrating the process due in this context would inevitably require disclosure of state secrets. Any due process analysis would require determining the "risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. But disclosure of information about the government's process for determining whether individuals are to be targeted, including the specific criteria the government

considers in making that determination, reasonably could be expected to harm national security. JA 207. Similarly, the strength of the government's interest in targeting a particular individual would necessarily require an evaluation of the imminence of the threat posed by that individual and the cost of additional burdens on the government in light of that threat. Answering those questions would likewise require revealing intelligence (if any) collected about that individual, with the corresponding risk of exposing sources and methods of intelligence gathering. Even assuming that a court could properly make judgments about a particular individual's threat and the proper procedures for assessing that threat, *but see infra* pp. 42-50, all of those judgments could only be made upon consideration of the state secrets protected by the privilege.

The necessity of revealing state secrets is most apparent on plaintiff's own conception of what due process requires. Plaintiff asserts that he is entitled to notice of what the government believes he has done and to review and contest any relevant information the government has collected about him. Br. 16-17; JA 31-32, 207. Any procedure of this sort would inevitably require the disclosure of state secrets. Thus, as the district court recognized, "[t]he totality of the issues to be litigated surrounds the alleged decision to target [plaintiff] but all such information is privileged as state secrets and will not be disclosed by the United States." JA 214.

B. Plaintiff's Attempts to Exempt His Suit From the Privilege Are Inconsistent With Controlling Precedent and the Basic Premises of the Privilege.

Plaintiff primarily attempts to cast his suit—a Fifth Amendment claim related to targeting—as unique, arguing that the privilege should be either wholly inapplicable or sharply reduced in scope. Most broadly, plaintiff argues that the unique importance of the right at stake somehow excludes it from the privilege, Br. 18, that the application of the privilege here improperly "eliminates" his due process rights, Br. 20, or that his suit should be treated as "a capital case" in which the privilege does not apply rather than a civil suit, Br. 22. These arguments misunderstand the absolute nature of the privilege, and their premises have already been rejected by this Court or the Supreme Court.

Take first plaintiff's contention that the state secrets privilege does not apply because he is invoking his Fifth Amendment due process rights. Br. 20-21. Specifically, plaintiff argues that the application of the privilege "abridge[s]" his substantive rights and offends his "constitutional trial rights." Br. 20 (quoting 28 U.S.C. § 2072(b) and *In re Sealed Case*, 494 F.3d at 143, respectively). But the very case plaintiff quotes from this Court specifically rejected the argument "that the privilege evaporates in the presence of an alleged constitutional violation." *In re Sealed Case*, 494 F.3d at 143. Rather than affecting "substantive" or "trial" rights, the privilege "operates as a rule of evidence." *Id.* The relevant evidence is simply "unavailable, as though a witness had died." *Id.* at 144-45 (quotation omitted); *In re United States*, 872

F.2d at 476. In other words, a constitutional claim may go unadjudicated because of the unavailability of evidence withheld under the privilege, just as such claims may go unadjudicated because evidence is unavailable under other privileges or because of the loss of witnesses or documents. *See Halkin II*, 690 F.2d at 990 (observing that the privilege, "like other evidentiary privileges, operates to foreclose relief for violations of rights that may well have occurred by foreclosing the discovery of evidence that they did occur").

Nor can plaintiff square this argument, or his broader assertion that the privilege cannot apply to a decision by the government "to target one of its own citizens for lethal action," Br. 18, with the basic premises of the privilege. The privilege is absolute, and as the Supreme Court has explained, "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Reynolds*, 345 U.S. at 11. Thus, "[n]o competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege." *Ellsberg*, 709 F.2d at 57; *accord In re Sealed Case*, 494 F.3d at 144. A plaintiff therefore "cannot override a properly invoked state secrets privilege," even if his "allegations involve serious constitutional claims." *Halkin I*, 598 F.2d at 7 n.5. Instead, the weight of the plaintiff's interest is used to calibrate "the extent of the court's inquiry into the appropriateness of the claim" of privilege. *Halkin II*, 690 F.2d at 990; *see Reynolds*, 345 U.S. at 11. The district court here took that consideration into account, expressly

noting that it was engaging in a "close examination" of the government's assertions because of the "strong" nature of plaintiff's interest. JA 206. Plaintiff incorrectly describes that analysis as the district court "limiting its inquiry to whether procedural requirements for invoking the state secrets privilege had been met," Br. 21, but the district court undertook the careful substantive inquiry required by *Reynolds* and its progeny.

Given the nature of the privilege, neither this Court nor any other has ever held that the state secrets privilege is unavailable in any category of cases based on the right at issue. Nor would such an exception make sense. The privilege is a common-law recognition of the Executive's constitutionally committed responsibility to safeguard the nation's security. The privilege is thus independent of the issues, claims, or defenses presented in a particular case, and it exists for the purpose of preserving the national security in the face of disclosure risks posed by litigation implicating information that must be kept secret. Courts (including this one) have therefore regularly applied the privilege in cases involving constitutional claims, including Fifth Amendment claims. *See, e.g.*, *In re Sealed Case*, 494 F.3d at 141 (applying privilege to Fourth Amendment claims); *Ellsberg*, 709 F.2d at 65 (same); *Halkin I*, 598 F.2d at 3 (First, Fourth, and Fifth Amendment claims); *Molerio*, 749 F.2d at 819 (First Amendment claim); *see also*, *e.g.*, *El-Masri*, 479 F.3d at 300 (Fifth Amendment claim); *Black v. United States*, 62 F.3d 1115, 1117 (8th Cir. 1995) (Fourth Amendment claim). In such cases, where "the need to protect sensitive information affecting the national

security clashes with fundamental constitutional rights of individuals" and "the Constitution compels the subordination of [plaintiffs'] interest in the pursuit of their claims to the executive's duty to preserve our national security," any "remedies for constitutional violations that cannot be proven under existing legal standards, if there are to be such remedies, must be provided by Congress." *Halkin II*, 690 F.2d at 1001.

In a last-ditch effort to undermine application of the privilege, plaintiff suggests that his civil suit against the government should be conceptually restyled as "a capital case" subject to the rules governing criminal proceedings. Br. 22. Plaintiff provides no basis in the law governing the privilege for this recharacterization, and none exists. A central premise of the privilege is that litigants cannot compel the government to release state secrets by bringing suit: the rationale of criminal cases, in which the government has the choice of disclosing certain information or dropping the prosecution, "has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented." *Reynolds*, 345 U.S. at 12.

Nor does plaintiff identify any basis for his attempted distinction between an action seeking prospective relief and a damages claim. Br. 23-25. The relevant point is that in a criminal prosecution, the government has other tools at its disposal to carry out its constitutional obligation to protect secret information, whether by declining to indict in the first place, by selecting which charges to bring so as to exclude those that carry a risk of disclosure, or by dismissing an indictment if it

appears the risk of disclosure is too great. No such option is available to the government where a litigant initiates a civil suit against the government on his or her own terms.

Aside from his arguments that the privilege is inapplicable, plaintiff erroneously contends that the district court had "an obligation" to adjudicate his due process claim notwithstanding the government's invocation of the privilege. Br. 26. Plaintiff suggests, for example, that the Classified Information Procedures Act (CIPA), which applies in criminal cases, should be imported here. Br. 27-28. But as the district court correctly recognized, CIPA does not apply where the state secrets privilege removes information from a civil suit; the statute by its terms applies only where classified information might be relevant in criminal prosecutions, cases where the government has the option to decline to prosecute if it determines the risk of disclosure is too great. JA 210-11.

Nor would the application of such procedures make sense on their own terms. An absolute privilege against disclosure is fundamentally inconsistent with a compelled disclosure to a litigant or his counsel. As the Supreme Court explained in *Reynolds*, when "the occasion for the privilege is appropriate … the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." 345 U.S. at 10. Because *Reynolds* "expressly foreclosed" the use of "some procedure under which state secrets would [be] revealed to [plaintiff], his counsel, and the court, but withheld from

the public," *El-Masri*, 479 F.3d at 311, courts have routinely rejected the suggestion that state secrets should be disclosed in litigation, even under a protective order or through *in camera* review. *See, e.g.*, *Ellsberg*, 709 F.2d at 61 ("It is well settled that a trial judge called upon to assess the legitimacy of a state secrets privilege claim should not permit the requester's counsel to participate in an *in camera* examination of putatively privileged material."); *Halkin I*, 598 F.2d at 7 (rejecting plaintiff counsel's request to participate in *in camera* proceedings under a protective order).

In some circumstances, it might be possible to consider "procedural innovation" where the litigation can continue without the use or disclosure of state secrets, *Ellsberg*, 709 F.2d at 64; *see In re Sealed Case*, 494 F.3d at 154, but such innovation is not possible or appropriate where here "the whole object of the suit and of the discovery is to establish a fact that is a state secret," *Molerio*, 749 F.2d at 821. After all, the result of the invocation of the privilege is "completely to remove the evidence from the case," *In re United States*, 872 F.2d at 476, not to have the privileged information injected into the case by other means. The district court correctly recognized that no alternative procedures could allow this case to proceed while protecting the state secrets at issue.

Nor are these conclusions merely an artifact of the "civil styling of the case." Br. 27. It is well established that the Executive Branch has the responsibility to protect state secrets and has authority to control that information. *See Department of Navy v. Egan*, 484 U.S. 518, 527, 529-30 (1988); *CIA v. Sims*, 471 U.S. 159, 180 (1985).

Civil litigants thus have no entitlement to that information, and a court may not compel the Executive Branch to disclose privileged and classified information to a particular litigant or counsel. *See, e.g.*, *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (emphasizing "the primacy of the Executive in controlling and exercising responsibility over access to classified information"). And this Court has recognized that even disclosures made under protective orders or through other protective mechanisms are not free from risk. *Ellsberg*, 709 F.2d at 61 ("[O]ur nation's security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer (whose sense of obligation to his client is likely to strain his fidelity to his pledge of secrecy) or to the coercive power of a protective order."); *Halkin I*, 598 F.2d at 7 (similar); *see Reynolds*, 345 U.S. at 10 ("[T]he court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."). In criminal cases, the Executive can discharge its duty to protect classified information by weighing those risks in light of the available procedures established by Congress in CIPA to determine whether a particular criminal prosecution is justified and in what manner it should proceed. No such option is available where the government is a defendant.

Nor does plaintiff's reference to procedures established for Guantanamo habeas litigation support his theory. Br. 27-28. The Executive Branch in those cases has not invoked the state secrets privilege, and has agreed to provide certain classified

information (though by no means all) to a detainee's counsel in specific circumstances. *See Al Odah v. United States*, 559 F.3d 539, 544 (D.C. Cir. 2009) (per curiam). The unique management of access to classified information within this framework does not displace the clear guidance about the proper application of the state secrets privilege from the Supreme Court and this Court.

C. The District Court Did Not Abuse its Discretion in Concluding That the Information at Issue is Protected by the Privilege.

Plaintiff suggests that some or all of the information over which the privilege has been asserted is not properly considered state secrets. To succeed on these contentions, plaintiff must demonstrate that the district court abused its discretion in concluding that there was a "reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged," *Reynolds*, 345 U.S. at 10, according "the utmost deference" to the Executive's assertions of the privilege. *Halkin I*, 598 F.2d at 9.

Plaintiff's arguments on this score take two tacks. First, plaintiff contends that there would be no risk to national security at all from revealing that he is not targeted for lethal force. Br. 31-32, 35. But as the declarations explained, an individual who is aware that he is not being targeted would be able to "operate more freely," JA 189, or "facilitate any plans they may have to undertake terrorist actions," JA 199. Revealing the military's targeting practices would also "provide insight to foreign adversaries more broadly as to U.S. military targeting priorities and decision-making that would

assist others in evading military operations and in planning countermeasures." JA 189.

Plaintiff contends that it "appears to be obvious to" him that he has been targeted, based on his conjecture about the near-misses he experienced in Syria in 2016, and thus any incentive "to alter his behavior" has already occurred. Br. 35. Plaintiff apparently believes that if a purported target has already taken some steps to avoid military action, the military should simply announce that the person is and remains a target, because there is no continuing justification for secrecy. That assertion is unfounded and does not undercut the serious military and security concerns in the declarations supporting the privilege. Moreover, this Court has long recognized that "in the arena of intelligence and foreign relations" there is a "critical difference" between official recognition of a fact and speculation. *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). Official confirmation of the United States' involvement in particular attacks, or its targeting choices, would provide a certainty to hostile individuals, organizations, or intelligence analysts that they could not otherwise have.

Equally unfounded is plaintiff's assertion that there is no risk he would "operate more freely" if told he is not a target for lethal action because that would mean that "the government does not have any concerns that have resulted in his designation for death." Br. 35. But as explained, a central concern is that providing notice as to who may or may not be targeted for lethal force in an area of hostilities

overseas would reveal an array of information not only to a particular individual but to any associates and hostile foreign adversaries, including terrorist organizations or governments, about U.S. military targeting decisions. Indeed, a person notified he is not a target who may in fact have a hostile intent would find it valuable to know that the United States has not chosen to target them, or perhaps has not yet learned the full scope of their activities, and could then adjust or carry on their conduct accordingly.

Plaintiff also dismisses out of hand the consequences of his contention that the court should compel the government to disclose that a particular individual is not being targeted. Br. 31. As the declarations explained, if the government were compelled to reveal that information about individuals who are not targeted, then the necessary implication of future cases in which that information was *not* revealed (with the court's permission) would be that the individual was a target. JA 189, 199. Plaintiff's theory would thus convert litigation into a mechanism for organizations to further their operational planning by testing whether the government has plans to take action against certain members, or even for those groups to obtain forewarning of planned actions. *See* Br. 31 (government must "inform the court" if it concludes action is warranted).

Second, and more broadly, plaintiff contends that certain information about the government's targeting choices is already public, thus rendering the government unable to assert the privilege. Br. 36-43. Plaintiff appears to argue that because the

government sometimes releases information related to national security—for example, by identifying individuals as terrorists on an FBI "most wanted list," or including their pictures on a deck of cards distributed to soldiers invading a foreign country, Br. 36—it follows that the government cannot invoke the privilege over other classified information related to whether or not "the U.S. government has suspicions about" a particular individual's conduct. Br. 37. That is plainly incorrect as a general matter, and in any event, such disparate examples have no bearing on the risk to national security from the particular disclosures related to the military and intelligence operations at issue here, and both the public and classified declarations explain those risks with specificity.

Plaintiff also contends that because certain other information about targeting decisions has been made public, there is no basis for any further secrecy about those issues. Br. 37-40. As the district court recognized, JA 212, that argument is squarely foreclosed by this Court's precedent: "The government is not estopped from concluding in one case that disclosure is permissible while in another case it is not." *Halkin I*, 598 F.2d at 9; *see Sims*, 471 U.S. at 180-81 (explaining that one official's determination that disclosure should occur did "not bind his successors to make the same determination, in a different context," even with respect to closely-related information); *Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982) (similar). The question remains whether there is a reasonable danger to national security from the disclosures at issue, and the declarations here explain those dangers in detail. *See*

Al-Haramain, 507 F.3d at 1205 (holding that although the existence of a particular surveillance program was not a secret, whether or not the plaintiffs were targeted for surveillance under that program was properly protected under the privilege); *El-Masri*, 479 F.3d at 308-11 (reaching the same conclusion for allegations related to a rendition program); *Halkin I*, 598 F.2d at 9 (noting that further related disclosures may "be useful information to a sophisticated intelligence analyst"). And treating prior voluntary disclosures of information as barring any future assertion of the privilege over all conceivably related information would discourage any discretionary disclosure of national security information to better inform the public. *Salisbury*, 690 F.2d at 971.

The materials plaintiff cites are unresponsive to these points. Plaintiff relies on media reports to assert that the government disclosed Anwar al-Aulaqi's targeting in advance of the 2011 airstrike that killed him, Br. 37 & n.5, but reports "quoting undisclosed sources" are not equivalent to "an official and documented disclosure." *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 621-22 (D.C. Cir. 2011). And the fact that the government released certain general memoranda related to al-Aulaqi several years after his death (Br. 38-39) does not undercut the harms detailed in the declarations from disclosure of the specific and distinct categories of information here.

To the extent plaintiff intends only the more limited claim that the district court should have reviewed the invocation of the privilege with "considerable skepticism," Br. 36; *see* Br. 41-42, the district court explained that it was doing just that, with the benefit of the government's further *ex parte* explanations. JA 206, 207,

209. It did not abuse its discretion in concluding that the material was covered by the privilege after completing that review.

III. Plaintiff's Claim Presents Non-Justiciable Political Questions

Because plaintiff has failed to plead standing, and could not establish his standing or litigate his due process claim on the merits without information protected by the state secrets privilege, the district court's judgment dismissing the case should be affirmed. But even if plaintiff could plead standing and could avoid application of the state secrets privilege, his claim would still have to be dismissed because it presents non-justiciable political questions. As this Court has explained, "[i]f the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (en banc).

A. The political question doctrine recognizes that "courts lack jurisdiction over political decisions that are by their nature committed to the political branches to the exclusion of the judiciary." *Schneider v. Kissinger*, 412 F.3d 190,193 (D.C. Cir. 2005) (quotation omitted). It "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. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Cases presenting non-justiciable political questions are marked by one or more of a variety

of factors, two of which are particularly relevant here: "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and "a lack of judicially discoverable and manageable standards for resolving" the question. *Baker v. Carr*, 369 U.S. 186, 217 (1962); *see El-Shifa*, 607 F.3d at 841. While "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance," *Baker*, 369 U.S. at 211, "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention," *Haig v. Agee*, 453 U.S. 280, 292 (1981), because they "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. Article I, Section 8 of the Constitution "direct[ly] allocat[es]" "foreign policy and national security powers" to Congress. *Schneider*, 412 F.3d at 194. Article II "likewise provides allocation of foreign relations and national security powers to the President, the unitary chief executive." *Id.*

Decisions about the use of military force abroad are at the core of the doctrine. In *El-Shifa*, this Court held that claims challenging the Executive's decision to launch a missile strike raised non-justiciable political questions. The Court explained that "[t]he political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion." 607 F.3d at 842. Judgments about whether certain terrorist activity "threatens" national

security, for example, are "political judgments, decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Id.* at 843 (quotation omitted). Similarly, courts "lack the 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." *Id.* at 844.

Instead, "[w]hether the circumstances warrant a military attack on a foreign target is a 'substantive political judgment[] entrusted expressly to the coordinate branches of government, and using a judicial forum to reconsider its wisdom would be anathema to the separation of powers.'" *El-Shifa*, 607 F.3d at 845 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973)); *see also id.* at 844-45 ("Whether an attack on a foreign target is justified—that is whether it is warranted or well-grounded—is a quintessential policy choice and value determination [] constitutionally committed" to the political branches (quotation omitted)). The Court thus held that claims challenging the Executive's decision to launch a military strike on a pharmaceutical plant in Sudan as "mistaken and not justified," and seeking a declaration that the strike violated international law, presented non-justiciable political questions.

Similarly, in *Jaber v. United States*, 861 F.3d 241 (D.C. Cir. 2017), this Court rejected claims related to an alleged drone strike in Yemen because the claims at issue "call for a court to pass judgment on the wisdom of Executive's decision to commence military action—mistaken or not—against a foreign target." *Id.* at 246.

And this Court reiterated that a determination of whether a particular decision to attack a military target is "mistaken and not justified" is "the province of the political branches." *Id.* at 247. "Put simply, it is not the role of the Judiciary to second-guess the determination of the Executive, in coordination with the Legislature, that the interests of the U.S. call for a particular military action in the ongoing War on Terror." *Id.*

B. The district court correctly dismissed several of plaintiff's claims as involving political questions. It recognized, for example, that the Presidential Policy Guidance that plaintiff cited did not provide a "judicially manageable standard" for resolving a challenge to plaintiff's purported placement on a list of targets. JA 108; *see Jaber*, 861 F.3d at 249-50 (observing that the same guidance cited by plaintiff here, along with others, "did not concede authority to the Judiciary to enforce" them). And it dismissed other claims, acknowledging that it had no authority to "delve into the propriety or merit of the [alleged] decision" to target plaintiff, because such inquiry "is prohibited by the political question doctrine." JA 110.

The district court, however, suggested that plaintiff's due process claim was different because it was a procedural claim asserting "a prior opportunity to be heard" before military action was taken against him. JA 113; *accord* JA 114. But the district court's apparent distinction between a forbidden inquiry into "the propriety or merit" of a targeting decision and an inquiry into the process by which that decision is reached is illusory. The process the Executive employs in selecting military targets, as

well as gathering and evaluating information about prospective targets—including what information, if any, to disclose to those prospective targets before a strike—are "inextricably intertwined" with the decision to engage in a particular strike. *El-Shifa*, 607 F.3d at 846 (quotation omitted). As this Court explained in *El-Shifa*, a claim is non-justiciable where it invites the district court to "elucidate the … standards that are to guide a President when he evaluates the veracity of military intelligence," even in the face of claims that the President has "failed to assure himself with a sufficient degree of certainty of the factual basis for his decision." 607 F.3d at 846 (quoting *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1365 (Fed. Cir. 2004)); *see El-Shifa*, 378 F.3d at 1367 n.6 (noting that "it would be difficult, if not extraordinary, for the federal courts to discover and announce the threshold standard by which the United States government evaluates intelligence in making a decision to commit military force in an effort to thwart an imminent terrorist attack on Americans"). For the same reasons courts "lack the 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*, 607 F.3d at 844, courts likewise cannot prescribe the process by which the President and other responsible officials make judgments about whether a particular strike is warranted.

Moreover, as discussed above, *see supra* pp. 27-29, any due process analysis would necessarily require consideration of questions courts are not equipped to answer. An essential element of any balancing analysis would be the threat posed by a

particular target and the dangers involved in targeting that individual or disclosing information to that individual, likely including highly sensitive U.S. intelligence information concerning the threat, the capability of the targeted terrorists to carry out a threatened attack, what response would be sufficient to address the threat, possible diplomatic considerations, the vulnerability of potential victims of the terrorists, the availability of military and non-military options, and the risks to military and non-military personnel in carrying out any operation. Those are inherently "delicate, complex" judgments that "involve large elements of prophecy" and "for which the Judiciary has neither aptitude, facilities nor responsibility." *El-Shifa*, 607 F.3d at 845 (quotation omitted). For those reasons, this Court has concluded that "whether the terrorist activity of foreign organizations constitute threats to the United States" are "political judgments" vested in the political branches. *Id.* at 843 (quoting *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22-24 (D.C. Cir. 1999)); *see Jaber*, 861 F.3d at 249-50. And the Supreme Court has explained that courts may not assess the threat posed by a particular individual in such contexts, either. *See Ludecke v. Watkins*, 335 U.S. 160, 170 (1948) (upholding an order removing an "enemy alien[]" during wartime because that individual's "potency for mischief" is a "matter[] of political judgment for which judges have neither technical competence nor official responsibility").

The relief plaintiff seeks illustrates these concerns. Plaintiff seeks an injunction barring his targeting until the government follows certain procedures (in his view)

required by due process, "including notice, access to evidence, and a right to be heard." JA 32. Thus, if the government became aware that plaintiff was involved in an imminent attack on U.S. forces or citizens, the responsible officials would be faced with the choice of complying with the injunction and allowing plaintiff to act freely in carrying out that attack, or running the risk of contempt in deciding that the imminence of a particular threat and the risks of disclosure (among other considerations) warranted swift action without notice and a hearing. But courts, which have "no covert agents, no intelligence sources, and no policy advisors," *Schneider v. Kissinger*, 412 F.3d at 196, are not constitutionally entitled "to assess the strategic decision to deploy force," dictate "standards that are to guide a President when he evaluates the veracity of military intelligence," or determine whether "'the President failed to assure himself with a sufficient degree of certainty' of the factual basis" for a particular strike, *El-Shifa*, 607 F.3d at 844, 846, much less to exercise "continuing judicial surveillance" over military affairs, *Gilligan*, 413 U.S. at 6.

The district court offered several other justifications for allowing the claim to proceed, but none are persuasive. The court suggested that due process claims are fundamentally different from other claims, and are thus justiciable. JA 111-12; *see* JA 113. But due process claims are not exempt from the political question doctrine. *See Gilligan*, 413 U.S. at 10-11 (Fourteenth Amendment due process claim was nonjusticiable where it called for "complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force"). Instead, courts

must engage in "'a discriminating analysis of the particular question posed' in the 'specific case' before the court to determine whether the political question doctrine prevents a claim from going forward." *El-Shifa*, 607 F.3d at 841. As this Court has made clear, "[i]n military matters in particular, the courts lack the 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." *Id.* at 844; *accord Jaber*, 861 F.3d at 247; *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 45-52 (D.D.C. 2010).

To be sure, courts have sometimes adjudicated due process claims implicating foreign policy and military judgments. *See Ralls Corp. v. Committee on Foreign Inv. in U.S.*, 758 F.3d 296, 313-14 (D.C. Cir. 2014); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 934-35 (D.C. Cir. 1988). But those cases did not involve any targeting decision, much less the sort of real-time intelligence and foreign policy judgments implicated by such a decision, and shed no light on the justiciability of a claim that seeks judicial prescription of the process by which the President or other responsible officials assess the imminence of threats and decide to exercise military force against adversaries abroad—including, on plaintiff's telling, compelling the disclosure of planned military operations to a target before they occur.

The district court also believed that *El-Shifa* and *Jaber* were distinguishable because those cases sought "a ruling that a strike by the U.S. military was mistaken or improper," while plaintiff's claim sought to intervene before any such strike. JA 114. But the preemptive nature of plaintiff's claim makes it less suited for judicial

resolution, not more. Unlike retrospective actions—which at least could be adjudicated on the basis of established facts—prospective military action necessarily turns on predictive and real-time judgments about intelligence and other military and foreign policy considerations that courts are particularly unsuited to make. *El-Shifa*, 607 F.3d at 845-46.

The district court suggested that this case did not implicate interference with, or judicial reweighing of, military decisions "thousands of miles from the forum" because plaintiff alleged that the "identification of targets is made by the principals of U.S. defense agencies or the President in Washington." JA 115; *see* JA 107. Even assuming that is true, the location of the decisionmaker is irrelevant; as *El-Shifa* explained in concluding that claims that the President had launched a mistaken military strike were non-justiciable: "the courts cannot assess the merits of the President's decision to launch an attack on a foreign target." 607 F.3d at 844.

Finally, the district court relied on cases involving habeas review of the detention of enemy combatants. But *El-Shifa* directly addressed those examples, explaining that "the Constitution specifically contemplates a judicial role" in habeas, and that there is "no comparable constitutional commitment to the courts for review of a military decision to launch a missile at a foreign target." 607 F.3d at 849.

For all these reasons, the political question doctrine provides an alternative basis for affirming the district court's decision to dismiss plaintiff's remaining claim.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,993 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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