DC Circ. Drone Strike Case Implicates Separation Of Powers

By **Lawrence Ebner**

Law360, New York (July 7, 2017, 12:23 PM EDT) --
In Ali Jaber v. United States, No. 16-5093 (D.C. Cir. June 30, 2017), D.C. Circuit Judge Janice Rogers Brown authored a unanimous panel opinion faithfully applying circuit precedent and the political question doctrine to bar a declaratory judgment suit challenging the wisdom of a U.S. drone strike in Yemen that allegedly resulted in human "collateral damage." But Judge Brown also took the unusual step of filing a separate concurring opinion asserting that the political question doctrine — which bars courts from second-guessing the wisdom of military decisions — not only "may be deeply flawed," but also "rendered ... largely obsolete" by technological advances such as use of unmanned weaponized drones. Recognizing that "the political question doctrine insures that effective supervision of this wondrous new warfare will not be provided by the U.S. courts," Judge Brown, a judicial conservative who was nominated by President George W. Bush, asks "if judges will not check this outsized power, then who will?"

Lawrence Ebner

Case Background

The Ali Jaber suit essentially challenged use of "signature strikes" in the counterterrorism drone program jointly operated by the Central Intelligence Agency and the U.S. Department of Defense's Joint Special Operations Command. Unlike drone strikes that target known, high-value individuals, see, e.g., Al-Aulaqui v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010), a signature strike "targets an unidentified person ... based on a pattern of suspicious behavior as identified through metadata." "[S]ignature strikes target unidentified individuals based on where they live, who they associate with and whether they engage in behavior commonly associated with militants. ... [E]ven after a signature strike is complete, the government still does not know the precise identities of who [was] killed."

The Ali Jaber plaintiffs alleged that two Yemenis — an anti-al-Qaeda imam and a local policeman — were "collateral damage" in a signature strike against three young men who were looking for the imam. Their complaint alleged that the drone strike against the three young men was avoidable, unjustified and too risky to nearby civilians. According to the plaintiffs, the drone strike violated U.S. and international law.

A D.C. federal district court granted the U.S. Department of Justice's Rule 12(b)(1) motion to dismiss the suit for lack of subject matter jurisdiction on the ground of the political question doctrine. On appeal, the D.C. Circuit affirmed.

Judge Brown's Panel Opinion

In her panel opinion, Judge Brown, joined by Circuit Judges Sri Srinivasan and Cornelia Pillard, held that "[i]t would be difficult to imagine precedent more directly adverse to Plaintiffs' position" than El Shifa Pharmaceutical Industries Co. v. United States, 607 F.3d 836 (D.C. Cir. 2010) (en banc). El Shifa involved a Sudanese factory that the U.S. military destroyed in a missile strike based on the belief that it was involved in chemical weapons production for Osama bin Laden's terrorist network. The factory owners sued for damages, claiming that they merely were producing medicine and that the strike was a mistake.

The en banc D. C. Circuit affirmed dismissal of the suit on political question grounds. As Judge Brown explained in Ali Jaber, the El Shifa court "adopted a functional approach to the political question doctrine, distinguishing between nonjusticiable claims requiring [courts] to decide whether taking military action was wise — a policy choice and value determination constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch — and fully justiciable claims presenting purely legal issues such as whether the government had legal authority to act." The panel opinion pointed to Zivotofsky v. Clinton, 566 U.S. 189 (2012) (involving a statute requiring the secretary of state, in contravention of U.S. foreign policy, to identify a U.S. citizen's place of birth as "Jerusalem, Israel"), as an example of a suit "attacking the constitutionality of a statute allegedly regulating the Executive," rather than calling upon a court to second-guess U.S. foreign policy (i.e., whether Jerusalem should be viewed as Israel's capital).

Judge Brown indicated in her Ali Jaber panel opinion that the plaintiffs' claims "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." "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." "[I]t is the Executive, and not a panel of the D.C. Circuit, who commands our armed forces and determines our nation's foreign policy."

Judge Brown's Concurring Opinion

The Ali Jaber decision quite properly and correctly could have stopped with the conclusion that the political question doctrine bars the suit. Instead, Judge Brown filed a fascinating and thought-provoking concurring opinion. Her concurring opinion does not question the separation-of-powers basis for the political question doctrine, long ago articulated by the Supreme Court in Baker v. Carr, 369 U.S. 186 (1962), and repeated in a small but generally uniform series of subsequent Supreme Court cases arising in military and other contexts. See, e.g., Gilligan v. Morgan, 413 U.S. 1 (1973) (holding that the political question doctrine bars courts from determining whether the use of military force was justified in a particular situation). Nor does Judge Brown question El Shifa, which "sensibly holds that a court should not second-guess an Executive's decision about the appropriate military response ... to address a singular threat that might occur once or twice at widely separated intervals."

What Judge Brown's concurring opinion does cast doubt upon, however, is the impact of the political question doctrine (i.e., precluding judicial review) in connection with "an executive decision — deployed through the CIA/JSOC targeted killing program — implementing a standard operating procedure that will be replicated hundreds if not thousands of times." The concurring opinion does not appear to suggest that courts should be allowed to oversee military decisions relating to such frequently deployed drone strikes, which Judge Brown acknowledges "are an unquestionably effective way to wage war against geographically-

isolated targets ... at low financial cost, zero risk of harm to U.S. forces, and fewer civilian casualties than many alternative methods." Her concurring opinion, however, does express serious concern about the effectiveness of political branch oversight of the targeted drone program.

Judge Brown asserts, for example, that "despite an impressive number of executive oversight bodies, there is pitifully little oversight within the Executive ... their operations are shrouded in secrecy; and it often seems boards are more interested in protecting and excusing the actions of agencies than holding them accountable." And in Judge Brown's view, Congress fares no better: "[C]ongressional oversight is a joke — and a bad one at that. Anyone who has watched the zeal with which politicians of one party go after the lawyers and advisors of the opposite party following a change of administration can understand why neither the military nor the intelligence agencies puts any trust in congressional oversight committees."

The concurring opinion argues that "[t]he Executive and Congress must establish a clear policy for drone strikes and precise avenues for accountability." According to Judge Brown, "all a Judiciary bound by precedent and constitutional constraints may permissibly claim" is that "the political question doctrine provides poor shelter in this gale. ... It is up to others to take it from here."

Importance of the Ali Jaber Case

Ali Jaber is not only noteworthy, but also considerably valuable for at least two reasons. First, the panel's opinion adheres to Supreme Court and D.C. Circuit precedent by reaffirming that the well-established political question doctrine deprives federal courts of subject matter jurisdiction when called upon to evaluate the wisdom of military, national security or foreign policy decisions adopted or implemented by either the executive branch or Congress.[1]

Second, for the very reason that, as Judge Brown put it in her concurring opinion, "the Judiciary has no part to play," the executive branch, through the military and intelligence agencies, has a heightened responsibility to adopt and adhere to its own policies, standards, and procedures for deployment of drones and other types of high-tech, 21st century warfare, such as cyber warfare. Congressional oversight of such activities should not be a "bad joke" characterized by grandstanding, partisan politicians, but instead, a genuinely inquisitive and constructive legislative function. In this manner the political branches will be worthy of the judicial deference that the political question doctrine affords to them in the area of national defense.

Lawrence S. Ebner, a fellow of the American Academy of Appellate Lawyers, is the founder of Capital Appellate Advocacy PLLC, a Washington, D.C.-based appellate litigation boutique. He has orally argued and/or briefed the political question doctrine in many private party appeals implicating U.S. military operations in foreign war zones.

[1] See Panel op. at 11 n.1 (criticizing the Fourth Circuit's opinion in Al Shimari v. CACI Premier Technologies Inc., 840 F.3d 147 (4th Cir. 2016), a tort suit alleging U.S. government contractor abuse of detainees at Iraq's Abu Ghraib prison, and which, according to the Ali Jaber panel, "puts the cart before the horse, requiring the district court to first decide the merits of a claim and, only thereafter, determine whether the claim was justiciable.").
