UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI, on his own behalf and as next friend of Anwar Al-Aulaqi,

Plaintiff,

v.

BARACK H. OBAMA, in his official capacity as President of the United States; ROBERT M. GATES, in his official capacity as Secretary of Defense; and LEON E. PANETTA, in his official capacity as Director of the Central Intelligence Agency,

Defendants.

Civil Action No. 10-1469 (JDB)

MEMORANDUM OPINION

On August 30, 2010, plaintiff Nasser Al-Aulaqi ("plaintiff") filed this action, claiming that the President, the Secretary of Defense, and the Director of the CIA (collectively, "defendants") have unlawfully authorized the targeted killing of plaintiff's son, Anwar Al-Aulaqi, a dual U.S.-Yemeni citizen currently hiding in Yemen who has alleged ties to al Qaeda in the Arabian Peninsula ("AQAP"). Plaintiff seeks an injunction prohibiting defendants from intentionally killing Anwar Al-Aulaqi "unless he presents a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat." See Compl., Prayer for Relief (c). Defendants have responded with a motion to dismiss plaintiff's complaint on five threshold grounds: standing, the political question doctrine, the Court's exercise of its "equitable discretion," the

absence of a cause of action under the Alien Tort Statute ("ATS"), and the state secrets privilege.

This is a unique and extraordinary case. Both the threshold and merits issues present fundamental questions of separation of powers involving the proper role of the courts in our constitutional structure. Leading Supreme Court decisions from Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), through Justice Jackson's celebrated concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), to the more recent cases dealing with Guantanamo detainees have been invoked to guide this Court's deliberations. Vital considerations of national security and of military and foreign affairs (and hence potentially of state secrets) are at play.

Stark, and perplexing, questions readily come to mind, including the following: How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to defendants, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death? Can a U.S. citizen -- himself or through another -- use the U.S. judicial system to vindicate his constitutional rights while simultaneously evading U.S. law enforcement authorities, calling for "jihad against the West," and engaging in operational planning for an organization that has already carried out numerous terrorist attacks against the United States? Can the Executive order the assassination of a U.S. citizen without first affording him any form of judicial process whatsoever, based on the mere assertion that he is a dangerous member of a terrorist organization? How can the courts, as plaintiff proposes, make real-time assessments of the nature and severity of alleged threats to national security, determine the imminence of those threats, weigh the benefits and costs of possible diplomatic and military responses, and ultimately decide whether, and under what circumstances, the use of military force against such threats is justified? When would it

ever make sense for the United States to disclose in advance to the "target" of contemplated military action the precise standards under which it will take that military action? And how does the evolving AQAP relate to core al Qaeda for purposes of assessing the legality of targeting AQAP (or its principals) under the September 18, 2001 Authorization for the Use of Military Force?

These and other legal and policy questions posed by this case are controversial and of great public interest. "Unfortunately, however, no matter how interesting and no matter how important this case may be . . . we cannot address it unless we have jurisdiction." United States v. White, 743 F.2d 488, 492 (7th Cir. 1984). Before reaching the merits of plaintiff's claims, then, this Court must decide whether plaintiff is the proper person to bring the constitutional and statutory challenges he asserts, and whether plaintiff's challenges, as framed, state claims within the ambit of the Judiciary to resolve. These jurisdictional issues pose "distinct and separate limitation[s], so that either the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974) (internal citations omitted).

Although these threshold questions of jurisdiction may seem less significant than the questions posed by the merits of plaintiff's claims, "[m]uch more than legal niceties are at stake here" -- the "constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998). Here, the jurisdictional hurdles that plaintiff must surmount are

both complex and at the heart of the intriguing nature of this case. But "[a] court without jurisdiction is a court without power, no matter how appealing the case for exceptions may be," Bailey v. Sharp, 782 F.2d 1366, 1373 (7th Cir. 1986) (Easterbrook, J., concurring), and hence it is these threshold obstacles to reaching the merits of plaintiff's constitutional and statutory challenges that must be the initial focus of this Court's attention. Because these questions of justiciability require dismissal of this case at the outset, the serious issues regarding the merits of the alleged authorization of the targeted killing of a U.S. citizen overseas must await another day or another (non-judicial) forum.

BACKGROUND

This case arises from the United States's alleged policy of "authorizing, planning, and carrying out targeted killings, including of U.S. citizens, outside the context of armed conflict." See Compl. ¶ 13. Specifically, plaintiff, a Yemeni citizen, claims that the United States has authorized the targeted killing of plaintiff's son, Anwar Al-Aulaqi, in violation of the Constitution and international law. See id. ¶¶ 3-4, 9, 17, 21, 23.

Anwar Al-Aulaqi is a Muslim cleric with dual U.S.-Yemeni citizenship, who is currently believed to be in hiding in Yemen. See id. ¶¶ 9, 26; see also Defs.' Mem. in Supp. of Defs.' Mot. to Dismiss ("Defs.' Mem.") [Docket Entry 15], at 1; Pl.'s Mem. in Support of Pl.'s Mot. for Prelim. Inj. ("Pl.'s Mem.") [Docket Entry 3], Decl. of Ben Wizner ("Wizner Decl."), Ex. AA. Anwar Al-Aulaqi was born in New Mexico in 1971, and spent much of his early life in the United States, attending college at Colorado State University and receiving his master's degree from San Diego State University before moving to Yemen in 2004. See Wizner Decl., Ex. AB, Decl. of Dr. Nasser Al-Aulaqi ("Al-Aulaqi Decl.") ¶¶ 3-4. On July 16, 2010, the U.S. Treasury

Department's Office of Foreign Assets Control ("OFAC") designated Anwar Al-Aulaqi as a Specially Designated Global Terrorist ("SDGT") in light of evidence that he was "acting for or on behalf of al-Qa'ida in the Arabian Peninsula (AQAP)" and "providing financial, material or technological support for, or other services to or in support of, acts of terrorism[.]" See Defs.' Mem. at 6-7 (quoting Designation of ANWAR AL-AULAQI Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594, 75 Fed. Reg. 43233 (July 16, 2010)) (hereinafter, "OFAC Designation"). In its designation, OFAC explained that Anwar Al-Aulaqi had "taken on an increasingly operational role" in AQAP since late 2009, as he "facilitated training camps in Yemen in support of acts of terrorism" and provided "instructions" to Umar Farouk Abdulmutallab, the man accused of attempting to detonate a bomb aboard a Detroit-bound Northwest Airlines flight on Christmas Day 2009. See OFAC Designation. Media sources have also reported ties between Anwar Al-Aulaqi and Nidal Malik Hasan, the U.S. Army Major suspected of killing 13 people in a November 2009 shooting at Fort Hood, Texas. See, e.g., Wizner Decl., Exs. E, F, H, J, L, M, V, W. According to a January 2010 Los Angeles Times article, unnamed "U.S. officials" have discovered that Anwar Al-Aulaqi and Hasan exchanged as many as eighteen e-mails prior to the Fort Hood shootings. See id., Ex. E.

Recently, Anwar Al-Aulaqi has made numerous public statements calling for "jihad against the West," praising the actions of "his students" Abdulmutallab and Hasan, and asking others to "follow suit." See, e.g., Wizner Decl., Ex. V; Defs.' Reply to Pl.'s Opp. to Defs.' Mot. to Dismiss ("Defs.' Reply") [Docket Entry 29], Exs. 1-2; Defs.' Mem., Ex. 1, Unclassified Decl. of James R. Clapper, Dir. of Nat'l Intelligence ("Clapper Decl.") ¶ 16. Michael Leiter, Director of the National Counterterrorism Center, has explained that Anwar Al-Aulaqi's "familiarity with the

West" is a "key concern[]" for the United States, see Defs.' Mem., Ex. 3, and media sources have similarly cited Anwar Al-Aulaqi's ability to communicate with an English-speaking audience as a source of "particular concern" to U.S. officials, see Wizner Decl., Ex. V. But despite the United States's expressed "concern" regarding Anwar Al-Aulaqi's "familiarity with the West" and his "role in AQAP," see Defs.' Mem., Ex. 3, the United States has not yet publicly charged Anwar Al-Aulaqi with any crime. See Pl.'s Mem. in Opp. to Defs.' Mot. to Dismiss ("Pl.'s Opp.") [Docket Entry 25], at 9. For his part, Anwar Al-Aulaqi has made clear that he has no intention of making himself available for criminal prosecution in U.S. courts, remarking in a May 2010 AQAP video interview that he "will never surrender" to the United States, and that "[i]f the Americans want me, [they can] come look for me." See Wizner Decl., Ex. V; see also Clapper Decl. ¶ 16; Defs.' Mem. at 14 n.5 (quoting Anwar Al-Aulaqi as stating, "I have no intention of turning myself in to [the Americans]. If they want me, let them search for me.").

Plaintiff does not deny his son's affiliation with AQAP or his designation as a SDGT. Rather, plaintiff challenges his son's alleged unlawful inclusion on so-called "kill lists" that he contends are maintained by the CIA and the Joint Special Operations Command ("JSOC"). See Pl.'s Mem. at 5; see also Compl. ¶¶ 3, 19. In support of his claim that the United States has placed Anwar Al-Aulaqi on "kill lists," plaintiff cites a number of media reports, which attribute their information to anonymous U.S. military and intelligence sources. See, e.g., Compl. ¶ 19; Pl.'s Mem. at 5; Wizner Decl., Exs. F, H, L. For example, in January 2010, The Washington Post reported that, according to unnamed military officials, Anwar Al-Aulaqi was on "a shortlist of U.S. citizens" that JSOC was authorized to kill or capture. See Wizner Decl., Ex. F. A few months later, The Washington Post cited an anonymous U.S. official as stating that Anwar Al-

Aulaqi had become "the first U.S. citizen added to a list of suspected terrorists the CIA is authorized to kill." See id., Ex. L. And in July 2010, National Public Radio announced -- on the basis of unidentified "[i]ntelligence sources" -- that the United States had already ordered "almost a dozen" unsuccessful drone and air-strikes targeting Anwar Al-Aulaqi in Yemen. See id., Ex. S.

Based on these news reports, plaintiff claims that the United States has placed Anwar Al-Aulaqi on the CIA and JSOC "kill lists" without "charge, trial, or conviction." See Compl. ¶ 1. Plaintiff alleges that individuals like his son are placed on "kill lists" after a "closed executive process" in which defendants and other executive officials determine that "secret criteria" have been satisfied. See id. ¶ 21; Pl.'s Mem. at 5-6. Plaintiff further avers "[u]pon information and belief" that once an individual is placed on a "kill list," he remains there for "months at a time." See Compl. ¶ 22; see also Pl.'s Mem. at 6; Wizner Decl., Ex. E (quoting unnamed U.S. officials as stating that "kill lists" are reviewed every six months and names are removed from the list if there is no longer intelligence linking the person to "known terrorists or [terrorist] plans"). Consequently, plaintiff argues, Anwar Al-Aulaqi is "now subject to a standing order that permits the CIA and JSOC to kill him . . . without regard to whether, at the time lethal force will be used, he presents a concrete, specific, and imminent threat to life, or whether there are reasonable means short of lethal force that could be used to address any such threat." See Compl. ¶¶ 21, 23.

The United States has neither confirmed nor denied the allegation that it has issued a "standing order" authorizing the CIA and JSOC to kill plaintiff's son. See Defs.' Mem. at 36; see also Mot. Hr'g Tr. [Docket Entry 30] 17:24-18:1, Nov. 8, 2010. Additionally, the United States has neither confirmed nor denied whether -- if it has, in fact, authorized the use of lethal force against plaintiff's son -- the authorization was made with regard to whether Anwar Al-Aulaqi

presents a concrete, specific, and imminent threat to life, or whether there were reasonable means short of lethal force that could be used to address any such threat. See Defs.' Mem. at 36. The United States has, however, repeatedly stated that if Anwar Al-Aulaqi "were to surrender or otherwise present himself to the proper authorities in a peaceful and appropriate manner, legal principles with which the United States has traditionally and uniformly complied would prohibit using lethal force or other violence against him in such circumstances." Id. at 2; see also Mot. Hr'g Tr. 15:2-9.

Nevertheless, plaintiff alleges that due to his son's inclusion on the CIA and JSOC "kill lists," Anwar Al-Aulaqi is in "hiding under threat of death and cannot access counsel or the courts to assert his constitutional rights without disclosing his whereabouts and exposing himself to possible attack by Defendants." Compl. ¶ 9; see also id. ¶ 26; Al-Aulaqi Decl. ¶ 10 (stating that "[b]ecause the U.S. government is seeking to kill my son, as reported, he cannot access legal assistance or a court without risking his life"). Plaintiff therefore brings four claims -- three constitutional, and one statutory -- on his son's behalf. He asserts that the United States's alleged policy of authorizing the targeted killing of U.S. citizens, including plaintiff's son, outside of armed conflict, "in circumstances in which they do not present concrete, specific, and imminent threats to life or physical safety, and where there are means other than lethal force that could reasonably be employed to neutralize any such threat," violates (1) Anwar Al-Aulaqi's Fourth Amendment right to be free from unreasonable seizures and (2) his Fifth Amendment right not to be deprived of life without due process of law. See Compl. ¶¶ 27-28. Plaintiff further claims that (3) the United States's refusal to disclose the criteria by which it selects U.S. citizens like plaintiff's son for targeted killing independently violates the notice requirement of the Fifth

Amendment Due Process Clause. See id. ¶ 30. Finally, plaintiff brings (4) a statutory claim under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, alleging that the United States's "policy of targeted killings violates treaty and customary international law." See id. ¶ 29.

Plaintiff seeks both declaratory and injunctive relief. First, he requests a declaration that, outside of armed conflict, the Constitution prohibits defendants "from carrying out the targeted killing of U.S. citizens," including Anwar Al-Aulaqi, "except in circumstances in which they present a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat." See Compl., Prayer for Relief (a); id. ¶ 6; Pl.'s Mem. at 39-40. Second, plaintiff requests a declaration that, outside of armed conflict, "treaty and customary international law" prohibit the targeted killing of all individuals -- regardless of their citizenship -- except in those same, limited circumstances. See Compl., Prayer for Relief (b); id. ¶ 6; Pl.'s Mem. at 40. Third, plaintiff requests a preliminary injunction prohibiting defendants from intentionally killing Anwar Al-Aulaqi "unless he presents a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat." See Compl., Prayer for Relief (c); Pl.'s Mem. at 40. Finally, plaintiff seeks an injunction ordering defendants to disclose the criteria that the United States uses to determine whether a U.S. citizen will be targeted for killing. See Compl., Prayer for Relief (d); id. ¶ 6; Pl.'s Mem. at 40.

Presently before the Court is defendants' motion to dismiss plaintiff's complaint on five distinct grounds: (1) standing; (2) political question; (3) "equitable discretion"; (4) lack of a cause of action under the ATS; and (5) the state secrets privilege. See Defs.' Mot. at 1. On November 8, 2010, this Court held a motions hearing on plaintiff's motion for a preliminary

injunction and defendants' motion to dismiss, and heard nearly three hours of argument from counsel for the parties.

STANDARD OF REVIEW

Defendants assert three primary grounds for dismissal, arguing that (1) plaintiff fails to state an ATS claim upon which relief can be granted; (2) plaintiff lacks standing to bring his three constitutional claims; and (3) all of plaintiff's claims -- both statutory and constitutional -- present non-justiciable political questions. See Defs.' Mot. at 1; see also Mot. Hr'g Tr. 37:3-5 (in which defendants state that plaintiff's constitutional claims and his ATS claim are barred by the political question doctrine). The first of these three grounds for dismissal constitutes a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure, whereas the latter two challenge subject matter jurisdiction and must be evaluated under Rule 12(b)(1). See Haase v. Sessions, 835 F.2d 902, 906 (D.C. Cir. 1987) (stating that "the defect of standing is a defect in subject matter jurisdiction"); Gonzalez-Vera v. Kissinger, 449 F.3d 1260, 1262 (D.C. Cir. 2006) (explaining that a dismissal under the political question doctrine constitutes a dismissal for lack of subject matter jurisdiction and "not an adjudication on the merits"). "[I]n passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); see Leatherman v. Tarrant Cnty. Narcotics and Coordination Unit, 507 U.S. 163, 164 (1993); Phillips v. Bureau of Prisons, 591 F.2d 966, 968 (D.C. Cir. 1979). In other words, the factual allegations in the plaintiff's complaint must be presumed true, and the plaintiff must be given every favorable inference that may be drawn from the allegations of fact. Scheuer, 416 U.S. at 236; Sparrow v. United Air Lines, Inc.,

216 F.3d 1111, 1113 (D.C. Cir. 2000). At the same time, however, the Court need not accept as true "a legal conclusion couched as a factual allegation," nor need it accept inferences that are unsupported by the facts set forth in the complaint. Trudeau v. Fed. Trade Comm'n, 456 F.3d 178, 193 (D.C. Cir. 2006) (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)).

Under Rule 12(b)(1), the party seeking to invoke the jurisdiction of a federal court -- plaintiff in this case -- bears the burden of establishing that the court has jurisdiction to hear his claims. See U.S. Ecology, Inc. v. U.S. Dep't of Interior, 231 F.3d 20, 24 (D.C. Cir. 2000); Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C. 2001) (explaining that a court has an "affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority"); Pitney Bowes, Inc. v. U.S. Postal Serv., 27 F. Supp. 2d 15, 19 (D.D.C. 1998). Since the elements necessary to establish jurisdiction are "not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof; i.e., with the manner and degree of evidence required at successive stages of the litigation." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). Although courts examining a Rule 12(b)(1) motion to dismiss -- such as for lack of standing -- will "construe the complaint in favor of the complaining party," see Warth v. Seldin, 422 U.S. 490, 501 (1975), the "'plaintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim," Grand Lodge, 185 F. Supp. 2d at 13-14 (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (2d ed. 1987)). Thus, a court may consider material other than the allegations of the complaint in determining whether it has jurisdiction to hear the case, so long as the court accepts the factual

allegations in the complaint as true. See Jerome Stevens Pharm., Inc. v. FDA, 402 F.3d 1249, 1253-54 (D.C. Cir. 2005); EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624-25 n.3 (D.C. Cir. 1997); Herbert v. Nat'l Acad. of Scis., 974 F.2d 192, 197 (D.C. Cir. 1992).

To survive a motion to dismiss under Rule 12(b)(6), a complaint need only contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,'" such that the defendant has "'fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)); accord Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam). Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion to dismiss, a plaintiff must furnish "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action" in order to provide the "grounds" of "entitle[ment] to relief." Twombly, 550 U.S. at 555-56; see also Papasan, 478 U.S. at 286. Instead, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, --- U.S. ----, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570); Atherton v. Dist. of Columbia Office of the Mayor, 567 F.3d 672, 681 (D.C. Cir. 2009). A complaint is considered plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949. This amounts to a "two-pronged approach," under which a court first identifies the factual allegations that are entitled to an assumption of truth and then determines "whether they plausibly give rise to an entitlement to relief." Id. at 1950-51.

DISCUSSION

I. Standing

Before this Court may entertain the merits of his claims, plaintiff, as the party invoking federal jurisdiction, must establish that he has the requisite standing to sue. See Lujan, 504 U.S. at 560-61. Article III of the U.S. Constitution "limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies,'" Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982), and the doctrine of standing serves to identify those "'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III" and which are thus "'appropriately resolved through the judicial process,'" Lujan, 504 U.S. at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." See Warth, 422 U.S. at 498.

Standing doctrine encompasses "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." Id. To establish the "irreducible constitutional minimum of standing," a plaintiff must allege (1) an "injury in fact" which is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) "a causal connection between the injury and the conduct complained of"; and (3) a likelihood "that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 560-61 (internal quotation marks and citations omitted). A "particularized" injury is defined as one that "affect[s] the plaintiff in a personal and individual way." Id. at 561 n.1. Thus, Article III "requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" Valley Forge,

454 U.S. at 472 (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)) (emphasis added).

Closely related to the constitutional requirement that a plaintiff must suffer a "personal" injury to establish standing is the prudential requirement that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth, 422 U.S. at 499; see also Allen v. Wright, 468 U.S. 737, 751 (1984). This "self-imposed" judicial limitation on the exercise of federal jurisdiction serves dual purposes, as it helps to prevent "the adjudication of rights which those not before the Court may not wish to assert" and also seeks to ensure "that the most effective advocate of the rights at issue is present to champion them." Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 80 (1978). Nevertheless, since the prohibition against one party asserting the legal rights of another is prudential -- not constitutional -- the Supreme Court may "recognize[] exceptions to this general rule," see Coalition of Clergy, Lawyers, & Professors v. Bush, 310 F.3d 1153, 1160 (9th Cir. 2002), and it has done so in "narrowly limited" circumstances, see Duke Power Co., 438 U.S. at 80. The doctrines of "next friend" and "third party" standing constitute two such limited exceptions to the general rule that a party may not bring suit to vindicate the legal rights of another. See Whitmore, 495 U.S. at 162-65; Powers v. Ohio, 499 U.S. 400, 410-11 (1991).

In his complaint, plaintiff purports to bring three constitutional claims as his son's "next friend." See Compl. ¶¶ 27-28, 30. First, he claims that the United States's alleged policy of authorizing the targeted killing of U.S. citizens, including his son, outside of armed conflict, and "in circumstances in which they do not present concrete, specific, and imminent threats to life or physical safety, and where there are means other than lethal force that could reasonably be

employed to neutralize any such threat," violates Anwar Al-Aulaqi's Fourth Amendment right to be free from unreasonable seizures. See id. ¶ 27. Second, plaintiff argues that this targeted killing policy violates Anwar Al-Aulaqi's Fifth Amendment right not to be deprived of life without due process of law. See id. ¶ 28. Third, plaintiff alleges that the failure to disclose the criteria by which U.S. citizens like Anwar Al-Aulaqi are selected for targeted killing violates those citizens' rights to notice under the Fifth Amendment Due Process Clause. See id. ¶ 30. In opposing defendants' motion to dismiss, plaintiff asserts an additional basis for raising these claims, maintaining that he also has third party standing to sue on his son's behalf. See Pl.'s Opp. at 2-6, 11-15. The Court will address plaintiff's arguments in support of "next friend" standing and third party standing in turn.[1]

A. Next Friend Standing

"Next friend" standing originated in connection with petitions for habeas corpus, as early American courts allowed "next friends" to appear "on behalf of detained prisoners who [were] unable, usually because of mental incompetence or inaccessibility, to seek relief themselves."

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[1] Any contention that plaintiff has "direct party" or "individual" standing to bring claims alleging violations of his son's constitutional rights is mistaken. Plaintiff does not assert that the alleged targeted killing of his son would violate plaintiff's own constitutional right to maintain a relationship with his adult child. Nor could he. See Butera v. Dist. of Columbia, 235 F.3d 637, 656 (D.C. Cir. 2001) (foreclosing the possibility of such a claim by holding that "a parent does not have a constitutionally-protected liberty interest in the companionship of a child who is past minority and independent"). Instead, plaintiff argues that the alleged inclusion of his son on a "kill list" violates plaintiff's son's rights under the Fourth and Fifth Amendments. See Compl. ¶¶ 27-28, 30. Thus, it is plaintiff's son -- and not plaintiff -- who would have "direct party" standing to pursue these claims. See, e.g., Reed v. Islamic Republic of Iran, 439 F. Supp. 2d 53, 62 (D.D.C. 2006) (explaining that son's allegations that his father was subject to "torture, arbitrary and prolonged detention and hostage taking are third party claims because they arise from acts perpetrated against the plaintiff's father" and it is therefore the father, not the son, "who has direct party standing to bring an action on these claims.")

See Whitmore, 495 U.S. at 162. Congress statutorily authorized "next friend" standing in the habeas corpus context in 1948, amending the habeas corpus statute to allow petitions to be "'signed and verified by the person for whose relief it is intended *or by someone acting in his behalf*.'" See id. at 162-63 (quoting 28 U.S.C. § 2242) (emphasis in original). In Whitmore v. Arkansas, the Supreme Court expressly declined to decide whether congressional authorization -- like that provided by 28 U.S.C. § 2242 -- is necessary to confer "next friend" standing outside the habeas corpus context. See id. at 164-65. The Court noted, however, that to the extent parties may ever invoke a "federal doctrine of 'next friend' standing" in non-habeas proceedings, the scope of that doctrine "is no broader than what is permitted by the habeas corpus statute, which codified the historical practice." Id.

After examining "[d]ecisions applying the habeas corpus statute," the Whitmore Court set forth "two firmly rooted prerequisites" that must be satisfied in order for an individual to be accorded standing to proceed as another's "next friend." See id. at 163. First, the putative "'next friend' must provide an adequate explanation - such as inaccessibility, mental incompetence, or other disability - why the real party in interest cannot appear on his own behalf to prosecute the action." Id. Second, "the 'next friend' must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate." Id. The Whitmore Court further suggested that -- while not necessarily a "firmly rooted prerequisite" to "next friend" standing -- a "next friend" must also "have some significant relationship with the real party in interest." Id. at 164. The burden is on the putative "next friend" to prove "the propriety of his status and thereby justify the jurisdiction of the court." Id. Even where the requirements of "next friend" standing are met, the "'next friend' does not himself become a party to the . . . action in which he participates, but

simply pursues the cause on behalf of the . . . real party in interest." Id. at 163. Thus, the "next friend" relies "wholly on the injury to the real party in interest to satisfy constitutional standing requirements." Id. at 178 n.6 (Marshall, J., dissenting).[2]

1. *Anwar Al-Aulaqi's Access to the Courts*

Plaintiff has failed to provide an adequate explanation for his son's inability to appear on his own behalf, which is fatal to plaintiff's attempt to establish "next friend" standing.[3] In his complaint, plaintiff maintains that his son cannot bring suit on his own behalf because he is "in hiding under threat of death" and any attempt to access counsel or the courts would "expos[e] him[] to possible attack by Defendants." Compl. ¶ 9; see also id. ¶ 26; Al-Aulaqi Decl. ¶ 10. But while Anwar Al-Aulaqi may have chosen to "hide" from U.S. law enforcement authorities, there is nothing preventing him from peacefully presenting himself at the U.S. Embassy in

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[2] Hence, if plaintiff satisfies the criteria for "next friend" standing, the Court would need to conduct a further inquiry to determine whether Anwar Al-Aulaqi meets the constitutional standing requirements of injury in fact, causation, and redressability.

[3] Plaintiff is correct that for purposes of a motion to dismiss for lack of standing, the trial court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Warth, 422 U.S. at 501; see Pl.'s Opp. at 5 n.2. However, in the context of "next friend" standing, courts have refused -- even at the pleading stage -- to accept unsubstantiated allegations that the real party in interest is "incompetent" or "lacks access to the courts"; rather, courts have required that claims pertaining to incompetency or inaccessibility have some "support in the record." See, e.g., Demonsthenes v. Baal, 495 U.S. 731, 736 (1990) (refusing to grant next friend standing where state court determination that real party in interest was competent was "fairly supported by the record"); Diamond v. Charles, 476 U.S. 54, 67 (1986) (explaining that father lacked standing to sue on his daughter's behalf because he had failed "to adduce factual support" that his daughter "is currently a minor or that she is otherwise incapable of asserting her own rights"); Coalition of Clergy, 310 F.3d at 1160 (finding an evidentiary hearing on "inaccessibility" unnecessary where putative "next friend" failed to make even "a preliminary showing that upon remand it could prove" that the real parties in interest lacked access to the courts under Whitmore). This Court thus need not accept plaintiff's bald assertion that his son lacks access to the courts if "the record makes clear the contrary." See Coalition of Clergy, 310 F.3d at 1160 n.2.

Yemen and expressing a desire to vindicate his constitutional rights in U.S. courts. Defendants have made clear -- and indeed, both international and domestic law would require -- that if Anwar Al-Aulaqi were to present himself in that manner, the United States would be "prohibit[ed] [from] using lethal force or other violence against him in such circumstances." See Defs.' Mem. at 2; see also id. at 5, 13-14; Mot. Hr'g Tr. 15:6-8 (government counsel states that "if [Anwar Al-Aulaqi] does present himself, he is under no danger of the United States government using lethal force" against him); Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (explaining that "[i]n the case of armed conflict not of an international character," a party to the conflict is prohibited from using "violence to life and person" with respect to individuals "who have laid down their arms"); Hamdan v. Rumsfeld, 548 U.S. 557, 629-32 (2006) (holding that Geneva Convention Common Article 3 applies to the current U.S. conflict with al Qaeda); Tennessee v. Garner, 471 U.S. 1, 11 (1985) (explaining in the domestic law enforcement context that "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead").

Plaintiff argues that to accept defendants' position -- that Anwar Al-Aulaqi can access the U.S. judicial system so long as he "surrenders" -- "would require the Court to accept at the standing stage what is disputed on the merits," since the Court would then be acknowledging that Anwar Al-Aulaqi is, in fact, currently "a participant in an armed conflict against the United States." See Pl.'s Opp. at 9. Not so. The Court's conclusion that Anwar Al-Aulaqi can access the U.S. judicial system by presenting himself in a peaceful manner implies no judgment as to Anwar Al-Aulaqi's status as a potential terrorist. All U.S. citizens may avail themselves of the U.S. judicial system if they present themselves peacefully, and no U.S. citizen may

simultaneously avail himself of the U.S. judicial system and evade U.S. law enforcement authorities. Anwar Al-Aulaqi is thus faced with the same choice presented to all U.S. citizens.[4]

It is certainly possible that Anwar Al-Aulaqi could be arrested -- and imprisoned -- if he were to come out of hiding to seek judicial relief in U.S. courts. Without expressing an opinion as to the likelihood of Anwar Al-Aulaqi's future arrest or imprisonment, it is significant to note that an individual's incarceration does not render him unable to access the courts within the meaning of Whitmore. See Avent v. Dist. of Columbia, 2009 WL 387668, at *1 (D.D.C. Feb. 13, 2009) (finding that parent lacked "next friend" standing to pursue claim on behalf of her incarcerated and mentally capable adult child); see also Arocho v. Camp Hill Corr. Facilities, 417 F. Supp. 2d 661, 662 (M.D. Pa. 2005) (denying father "next friend" standing to sue on behalf of his incarcerated adult son, who "had access to prison legal sources" and was fully capable of prosecuting the case on his own behalf). Indeed, "prisoners can, and do, bring civil suits all the time." Avent, 2009 WL 387668, at *1. Given that an individual's actual incarceration is insufficient to show that he lacks access to the courts, the mere prospect of Anwar Al-Aulaqi's future incarceration fails to satisfy Whitmore's "inaccessibility" requirement.

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[4] In fact, it is possible that Anwar Al-Aulaqi would not even need to emerge from "hiding" in order to seek judicial relief. The use of videoconferencing and other technology has made civil judicial proceedings possible even where the plaintiff himself cannot physically access the courtroom. For example, courts frequently entertain habeas corpus petitions from detainees at Guantanamo Bay despite the fact that those detainees are not present in the courtroom. See, e.g., Al-Maqaleh v. Gates, 604 F. Supp. 2d 205, 228 (D.D.C. 2009), *rev'd and remanded on other grounds*, 605 F.3d 84 (D.C. Cir. 2010) (explaining that "real-time video conferencing provides a workable substitute for an in-court appearance" and noting that this "is the process being used in scores of Guantanamo habeas proceedings now taking place in this District Court, in which no Guantanamo detainee has been physically transferred here"). There is no reason why -- if Anwar Al-Aulaqi wanted to seek judicial relief but feared the consequences of emerging from hiding -- he could not communicate with attorneys via the Internet from his current place of hiding.

Plaintiff argues, however, that if his son were to seek judicial relief, he would not be detained as an ordinary federal prisoner, but instead would be subject to "indefinite detention without charge." See Pl.'s Opp. at 14; see also Mot. Hr'g Tr. 64:10-12. It is true that courts have, in some instances, granted "next friend" standing to enemy combatants being held "incommunicado." For example, in Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd and remanded on other grounds*, 542 U.S. 426 (2004), the Second Circuit granted an attorney "next friend" standing to file a habeas petition on behalf of an American citizen who was being detained as an enemy combatant at a U.S. naval base in South Carolina. See id. at 700, 703. The court in Padilla had little difficulty concluding that the real party in interest was unable to "access the courts" under Whitmore, as he had been denied "any contact with his counsel, his family or any other non-military personnel" for eighteen months. See id. Similarly, in Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002), *vacated on other grounds,* 542 U.S. 507 (2004), the Fourth Circuit permitted the father of a military detainee to petition the court on his son's behalf, see id. at 280, as the son was being "held incommunicado and subjected to an infinite detention . . . without access to a lawyer," see Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 528 (E.D. Va. 2002).

But unlike the detainees in Padilla and Hamdi, Anwar Al-Aulaqi is not in U.S. custody, nor is he being held incommunicado against his will. To the extent that Anwar Al-Aulaqi is currently incommunicado, that is the result of his own choice. Moreover, there is reason to doubt whether Anwar Al-Aulaqi is, in fact, incommunicado. Since his alleged period of hiding began in January 2010, see Al-Aulaqi Decl. ¶ 8, Anwar Al-Aulaqi has communicated with the outside world on numerous occasions, participating in AQAP video interviews and publishing online

articles in the AQAP magazine Inspire. See, e.g., Defs.' Mem. at 14 n.5 (describing May 2010 AQAP video interview with Anwar Al-Aulaqi); Clapper Decl. ¶ 16 (same); Wizner Decl., Ex. V (same); Defs.' Reply at 4 (referencing April 2010 and July 2010 Inspire articles written by Anwar Al-Aulaqi); Defs.' Reply, Exs. 1-2 (providing copies of Anwar Al-Aulaqi's April 2010 and July 2010 Inspire articles). Anwar Al-Aulaqi has continued to use his personal website to convey messages to readers worldwide, see Wizner Decl., Ex. V, and a July 2010 online article written by Anwar Al-Aulaqi advises readers that they "may contact Shayk [Anwar] Al-Aulaqi through any of the emails listed on the contact page." See Defs.' Reply at 4 n.4; id., Ex. 2. Needless to say, Anwar Al-Aulaqi's access to e-mail renders the circumstances of his existing, self-made "confinement" far different than the confinement of the detainees in Padilla and Hamdi.

Even if Anwar Al-Aulaqi were to be captured and detained, the conditions of his confinement would still need to be akin to those in Padilla and Hamdi before his father could be accorded standing to proceed as Anwar Al-Aulaqi's "next friend." In cases brought by purported "next friends" on behalf of detainees at Guantanamo Bay, courts have not presumed that the detainees lack access to the U.S. judicial system, but have required the would-be "next friends" to make a showing of inaccessibility. See, e.g., Ahmed v. Bush, 2005 WL 6066070, at *1-2 (D.D.C. May 25, 2005) (ordering supplemental briefing to substantiate petitioner's claim to "next friend" standing where petition had merely "presume[d], rather than demonstrate[d] through facts, that [the detainee] ha[d] been denied access to the courts of the United States"); Fenstermaker v. Bush, 2007 WL 1705068, at *6 (S.D.N.Y. June 12, 2007) (finding that "next friend" lacked standing to proceed, in part because he was "unable to demonstrate that the Detainees cannot appear on their own behalf"); Does 1-570 v. Bush, 2006 WL 3096685, at *5

(D.D.C. Oct. 31, 2006) (questioning whether petitioners satisfied Whitmore "inaccessibility" requirement in light of evidence that Guantanamo Bay detainees have "been able to file petitions before the Court in large numbers").

Because Anwar Al-Aulaqi has not yet been detained, it is impossible to determine whether the nature of any such hypothetical detention would be more similar to that in Padilla and Hamdi, or to the Guantanamo Bay cases in which detainees have been found capable of bringing suit on their own behalf. Regardless, the mere prospect of future detention is insufficient to warrant a finding that Anwar Al-Aulaqi currently lacks access to the courts.

2. *Plaintiff's Dedication to Anwar Al-Aulaqi's "Best Interests"*

Not only has plaintiff failed to prove that Anwar Al-Aulaqi lacks access to the courts, but he has also failed to show that he is "truly dedicated" to Anwar Al-Aulaqi's "best interests." Plaintiff states that, as Anwar Al-Aulaqi's father, he "only wants to do what is in his [son's] best interests." See Al-Aulaqi Decl. ¶ 11. He further maintains that "he believe[s] taking legal action to stop the United States from killing [his] son is in his [son's] best interests." Id. Accepting these statements as true, they are nonetheless insufficient to establish that this lawsuit accords with Anwar Al-Aulaqi's best interests within the meaning of Whitmore.

Under the second prong of Whitmore, a purported "next friend" may not simply speculate as to the best interests of the party on whose behalf he seeks to litigate. See Does 1-570, 2006 WL 3096685, at *5. Rather, the "next friend" must provide some evidence that he is acting in accordance with the intentions or wishes of the real party in interest. See id. Courts have therefore refused to grant "next friend" standing where the putative "next friend" has never conferred with the party in interest and, as a result, can offer no "basis on which to conclude that

the [party] want[s] legal representation as a general matter or more specifically by counsel in the instant matter." Id.; see also Idris v. Obama, 667 F. Supp. 2d 25, 29 (D.D.C. 2009) (holding that "because [the putative 'next friend'] has never met with petitioner since his confinement, counsel cannot be certain that [the 'next friend'] represents petitioner's best interests").

In Does 1-570, the court denied standing to attorneys seeking to file habeas petitions as "next friends" on behalf of hundreds of unidentified Guantanamo Bay detainees with whom they had never met. See Does 1-570, 2006 WL 3096685, at *5, *8. As the court explained, "[w]hile it may be fair to assume that the detainees want to be released from detention in Guantanamo Bay, there may be reasons why detainees may not want to file habeas petitions as a vehicle for accomplishing this purpose." Id. at *6. For example, the court noted, "certain detainees may mistrust the United States judicial system and choose to avoid participating in such proceedings altogether." Id. Absent proof as to the specific "interests and preferences" of the detainees on whose behalf they sought to litigate, the attorneys in Does 1-570 could not meet "the requirements of 'next friend' standing pursuant to the second prong of Whitmore." See id. at *4, *5; see also Fenstermaker, 2007 WL 1705068, at *6 n. 10 (refusing to accord "next friend" standing to attorney seeking to represent Guantanamo Bay detainees when attorney conceded that if consulted, the detainees might express their desire to become "martyrs" rather than to litigate).

Here, plaintiff has presented no evidence that his son wants to vindicate his U.S. constitutional rights through the U.S. judicial system. Plaintiff concedes that he has not spoken to Anwar Al-Aulaqi since he was allegedly first targeted for "killing" by the United States, see Compl. ¶ 26; Al-Aulaqi Decl. ¶ 9; Pl.'s Opp. at 7, and hence plaintiff "cannot be certain that [he] represents [Anwar Al-Aulaqi's] best interests," see Idris, 667 F. Supp. 2d at 29. Although

plaintiff maintains that his son's "public silence with respect to the present lawsuit" supports an inference that Anwar Al-Aulaqi does not object to this litigation, see Pl.'s Opp. at 10, plaintiff cannot base his claim to "next friend" standing on his son's mere failure to expressly disavow this suit. Rather, plaintiff bears the burden of showing that this action accords with his son's best interests. See Whitmore, 495 U.S. at 164 (explaining that "[t]he burden is on the 'next friend' clearly to establish the propriety of his status and thereby justify the jurisdiction of the court").

Indeed, to the extent that Anwar Al-Aulaqi has made his personal preferences known, he has indicated precisely the opposite -- i.e., that he believes it is not in his best interests to prosecute this case. According to plaintiff's complaint, the media first reported that Anwar Al-Aulaqi had been added to the JSOC "kill list" as early as January 2010. See Compl. ¶ 19. However, at no point has Anwar Al-Aulaqi sought to challenge his alleged inclusion on the CIA or JSOC "kill lists," nor has he communicated any desire to do so. Although plaintiff maintains that "Anwar Al-Aulaqi cannot communicate with his father or counsel without endangering his own life," see Compl. ¶ 26 (emphasis added), this contention is belied by the numerous public statements that Anwar Al-Aulaqi has made since his alleged period of hiding began. Several times during the past ten months, Anwar Al-Aulaqi has publicly expressed his desire for "jihad against the West," see Defs.' Reply, Ex. 2, and he has called upon Muslims to meet "American aggression" not with "pigeons and olive branches" but "with bullets and bombs." See id., Ex. 1. Given that Anwar Al-Aulaqi has been able to make such controversial statements with impunity, there is no reason to believe that he could not convey a desire to sue without somehow placing his life in danger. Under these circumstances, the fact that Anwar Al-Aulaqi has chosen not to communicate any such desire strongly supports the inference that he does not want to litigate in

the U.S. courts.

This inference is further corroborated by the content of Anwar Al-Aulaqi's public statements, in which he has decried the U.S. legal system and suggested that Muslims are not bound by Western law. As recently as April 2010, Anwar Al-Aulaqi wrote an article for the AQAP publication Inspire, in which he asserted that Muslims "should not be forced to accept rulings of courts of law that are contrary to the law of Allah." See Defs.' Reply, Ex. 1. According to Anwar Al-Aulaqi, Muslims need not adhere to the laws of the "civil state," since "the modern civil state of the West does not guarantee Islamic rights." Id. In a July 2010 Inspire article, Anwar Al-Aulaqi again expressed his belief that because Western "government, political parties, the police, [and] the intelligence services . . . are part of a system within which the defamation of Islam is . . . promoted . . . the attacking of any Western target [is] legal from an Islamic viewpoint." Id., Ex. 2. He went on to argue that a U.S. civilian who drew a cartoon depiction of Mohammed should be "a prime target of assassination" and that "[a]ssassinations, bombings, and acts of arson" constitute "legitimate forms of revenge against a system that relishes the sacrilege of Islam in the name of freedom." Id.

Such statements -- which reveal a complete lack of respect for U.S. law and governmental structures as well as a belief that it is "legal" and "legitimate" to violate U.S. law -- do not reflect the views of an individual who would likely want to sue to vindicate his U.S. constitutional rights in U.S. courts. After all, the substantive rights that are being asserted in this case are only provided to Anwar Al-Aulaqi by the U.S. Constitution and international law. Yet he has made clear his belief that "international treaties" do not govern Muslims, and that Muslims are not bound by any law -- U.S., international, or otherwise -- that conflicts with the "law of Allah."

See id., Ex. 1. There is, then, reason to doubt that Anwar Al-Aulaqi would even regard a ruling from this Court as binding -- much less that he would want to litigate in order to obtain such a ruling. Anwar Al-Aulaqi's public statement that "[i]f the Americans want me, [they can] come look for me" provides further evidence that he has no intention of making himself the subject of litigation in U.S. courts. See Wizner Decl., Ex. V; see also Defs.' Mem. at 14 n.5 (quoting Anwar Al-Aulaqi as stating, "I have no intention of turning myself in . . . [i]f they want me, let them search for me."). In light of such remarks, this Court cannot conclude that Anwar Al-Aulaqi believes "taking legal action to stop the United States from killing" him would be in his "best interests." See Al-Aulaqi Decl. ¶ 11. While he may very well wish to avoid targeted killing by the United States, all available evidence indicates that he does not wish "to file [suit] as a vehicle for accomplishing this purpose." See Does 1-570, 2006 WL 3096685, at *6.

Plaintiff's mere assertion of a *per se* rule that a parent meets the "best interests" test does not satisfy his burden of showing that he is acting in accordance with his son's best interests, especially in the face of his son's numerous public statements suggesting the contrary. See Pl.'s Opp. at 6 (citing Vargas ex rel. Sagastegui v. Lambert, 159 F.3d 1161, 1168 (9th Cir. 1998)). Although "[t]he existence of a significant relationship enhances the probability" that a putative next friend "knows and is dedicated to the [absent party's] individual best interests," Coalition of Clergy, 310 F.3d at 1162, courts have refused to infer -- simply on the basis of a close familial tie -- that a putative "next friend" actually represents the absent party's best interests. See, e.g., Anthem Life Ins. Co. v. Olguin, 2007 WL 1390672, at *2 (E.D. Cal. May 9, 2007) (explaining that "a parent is not entitled to be the next friend of his or her child as a matter of absolute right" and noting that "the best interests of a child and the best interests of even a loving parent can

conflict"); Finan v. Good Earth Tools, Inc., 2007 WL 1452246, at *2 (E.D. Mo. May 15, 2007) (closely examining whether husband's interests might conflict with those of his incompetent wife before allowing husband to file suit as his wife's "next friend"). In other words, where a party's own views as to his best interests appear to conflict with those of a putative "next friend," a court cannot substitute the views of the would-be "next friend" for those of the absent party, even where the purported "next friend" is a loving parent who only wants what he rationally believes to be in the best interests of his adult child. See Gilmore v. Utah, 429 U.S. 1012, 1017 (1976). Thus, courts have uniformly denied "next friend" standing to parents of death row inmates seeking to stay their adult children's executions where the inmate is mentally competent and has chosen not to seek a stay of execution on his own behalf. See id.; see also Baal, 495 U.S. at 737; Hauser v. Moore, 223 F.3d 1316, 1321 (11th Cir. 2000); Brewer v. Lewis, 989 F.2d 1021, 1027 (9th Cir. 1993).

Hence, even accepting that plaintiff, as Anwar Al-Aulaqi's father, has a "significant relationship" with his son, plaintiff nonetheless cannot establish "next friend" standing under the second prong of Whitmore. There is no dispute that Anwar Al-Aulaqi is mentally competent, and the Court has found that he has access to the courts within the meaning of Whitmore. And yet, during the past ten months that his name has allegedly appeared on "kill lists," Anwar Al-Aulaqi has neither filed suit on his own behalf nor expressed any desire to do so. Moreover, all available evidence as to Anwar Al-Aulaqi's "intentions and preferences" suggests that if consulted, he would have no desire to use the U.S. judicial system as a means of preventing his alleged targeting by the United States. To allow plaintiff to sue as his son's "next friend" under these circumstances would risk "allow[ing] the adjudication of rights which parties not before the

Court may not wish to assert." Duke Power, 438 U.S. at 80. Because plaintiff cannot show that Anwar Al-Aulaqi lacks access to the courts and that he is acting in Anwar Al-Aulaqi's best interests, plaintiff lacks standing to bring constitutional claims as his son's "next friend."

B. Third Party Standing

In opposing defendants' motion to dismiss, plaintiff argues -- for the first time -- that he "also has third-party standing to raise his son's constitutional claims." See Pl.'s Opp. at 11. Like "next friend" standing, third party or *jus tertii* standing constitutes a "limited exception[]" to the general rule that "a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." Powers, 499 U.S. at 410. Because third party standing is the "exception" rather than the norm, the burden is on the plaintiff "to establish that [he] has third party standing, not on the defendant to rebut third party standing." Amato v. Wilentz, 952 F.2d 742, 750 (3d Cir. 1991).

In Powers v. Ohio, the Supreme Court held that a criminal defendant had third party standing to assert the equal protection rights of jurors allegedly excluded from serving at the defendant's trial on account of their race. See Powers, 499 U.S. at 415. In so doing, the Court articulated three requirements that must be satisfied before a litigant may be accorded third party standing. See id. at 411. First, he must show that he himself has suffered a concrete, redressable "injury in fact" adequate to satisfy Article III's case-or-controversy requirement.[5] See id. Second, the litigant must have "a close relation to the third party." Id. Third, there must be

[5] From a constitutional perspective, third party standing thus parallels direct party standing; in either case, the plaintiff himself must satisfy Article III standing requirements of an injury in fact, which is caused by the defendant's conduct, and which is likely to be redressed by a favorable decision. See Kowalski v. Tesmer, 543 U.S. 125, 129 n.2 (2004).

"some hindrance to the third party's ability to protect his or her own interests." Id. The first of these requirements is constitutional, while the latter two are prudential. See Caplin & Drysdale, Ctd. v. United States, 491 U.S. 617, 624 n.3 (1989).

Prior to Powers, the Supreme Court articulated an additional prudential factor for courts to consider in deciding whether to permit third party standing: "the impact of the litigation on third-party interests." See id. Where "genuine conflicts" exist between the litigant's interests and those of the absent third party, this factor "strongly counsels against third party standing." Amato, 952 F.2d at 750; see also Clifton Terrace Assocs., Ltd. v. United Tech. Corp., 929 F.2d 714, 722 (D.C. Cir. 1991) (denying third party standing where the litigant's "interests in the subject of this suit to some extent conflict with those of the [third parties] whose rights [the litigant] purports to advance"). Although Powers did not specifically list this factor in its three-part test for third party standing, "the opinion's later discussion of the relationship prong incorporated it." Amato, 952 F.2d at 750 n.7; see also Powers, 499 U.S. at 414 (noting that the "excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom"). Courts examining claims of third party standing after Powers have continued to assess whether the litigant and the third party have common interests, either as an additional, independent prudential factor, see, e.g., Hutchins by Owens v. Dist. of Columbia, 144 F.3d 798, 803 (D.C. Cir. 1998) (listing the "impact of the litigation on the rights of the third party" as one of three prudential considerations), *rev'd on other grounds,* 188 F.3d 531 (D.C. Cir. 1999) (en banc), or as an aspect of the "close relationship" inquiry under Powers, see, e.g., Amato, 952 F.2d at 750 n.7 (explaining its decision to follow the Powers approach of "combining these closely linked factors"); Lepelletier v. FDIC, 164 F.3d 37, 44 (D.C. Cir. 1999)

(noting that courts applying Powers have "only required a 'close relation' in the sense that there must be an identity of interests between the parties such that the plaintiff will act as an effective advocate of the third parties' interests").

Ultimately, plaintiff's belated argument in support of third party standing fares no better than his attempt to sue as his son's "next friend." Plaintiff cannot show that a parent suffers an injury in fact if his adult child is threatened with a future extrajudicial killing. Moreover, even if plaintiff could make such a showing, the prudential Powers factors militate against according plaintiff third party standing to assert violations of his son's constitutional rights. As the Supreme Court has observed, where "the interests of [a] parent and [a] child are not in parallel, and indeed, are potentially in conflict," a parent may not evade the requirements of "next friend" standing by instead bringing suit under the related doctrine of third party standing. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 15 (2004).

1. *Article III Standing Requirements*

In contrast to "next friend" standing, where the "next friend" relies on the injury to the real party in interest, third party standing requires that the plaintiff himself satisfy the demands of Article III. See Kowalski, 543 U.S. at 129 n.2. Plaintiff maintains that "[t]he threatened injury here -- the killing of Plaintiff's son -- is plainly sufficient to satisfy Powers' first requirement" that the party bringing suit suffer a constitutional injury in fact. See Pl.'s Opp. at 11. Whether plaintiff has met Article III standing requirements, however, is not nearly so plain as plaintiff suggests.

Under Article III, a party invoking the jurisdiction of a federal court must show that he has suffered an injury in fact, defined as "an invasion of a legally protected interest which is (a)

concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560 (internal quotation marks and citations omitted). When a plaintiff seeks to vindicate the rights of a third party not before the court, the plaintiff himself must suffer a concrete injury, which must be particularized in the sense that it "affect[s] the plaintiff in a personal and individual way." Id. at 561 n.1; see Caplin & Drysdale, 491 U.S. at 624 n.3. At least one court has therefore denied standing to a father suing state actors for their alleged use of "excessive force" against his son, on the ground that the alleged injuries to the son did not impact the father "in a personal and individual way." Weakes v. FBI-MPD Safe Streets Task Force, 2006 WL 212141, at *2 (D.D.C. Jan. 27, 2006).

Plaintiff, however, does not merely allege that his son will be injured by defendants' use of "excessive force"; rather, plaintiff maintains that he, too, will be injured by defendants' use of lethal force, since defendants' extrajudicial killing of Anwar Al-Aulaqi would permanently sever plaintiff's relationship with his adult child. See Pl.'s Opp. at 13 (explaining that "[i]n this case, a father seeks to preserve the very existence of a relationship with his son by protecting his son's right to life"). Although this Court does not question the severity of the emotional harm that plaintiff may suffer if his son were to be killed by the United States, emotional harm -- in and of itself -- is not sufficient to satisfy Article III's injury in fact requirement. See, e.g., Humane Soc'y of U.S. v. Babbitt, 46 F.3d 93, 98 (D.C. Cir. 1995) (explaining that "general emotional 'harm,' no matter how deeply felt, cannot suffice for injury-in-fact for standing purposes"). Instead, a plaintiff can only establish an Article III injury in fact based on emotional harm if that alleged harm stems from the infringement of some "legally protected," see Lujan, 504 U.S. at 560, or "judicially cognizable," see Bennett v. Spear, 520 U.S. 154, 167 (1997), interest that is either

"recognized at common law or specifically recognized as such by the Congress." Sargeant v. Dixon, 130 F.3d 1067, 1069 (D.C. Cir. 1997).[6]

Here, this Court has been unable to find any legal basis for such an interest, either statutory or otherwise. The D.C. wrongful death statute does not provide a basis for plaintiff's alleged legally protected interest in preserving his relationship with his adult son, as it only protects persons who are "officially appointed executors or administrators of the child's estate." See Saunders v. Air Florida, Inc., 558 F. Supp. 1233, 1235 (D.D.C. 1983) (citing Strother v. Dist. of Columbia, 372 A.2d 1291, 1296 n.7 (D.C. 1977)) (finding that parents could not bring suit under the D.C. wrongful death statute where the adult child's widow, and not the parents, was the duly appointed administrator of the decedent's estate). There is no evidence in the record to suggest that plaintiff is the "executor or administrator" of Anwar Al-Aulaqi's estate, and the Court is aware of no other possible statutory basis for plaintiff's alleged legally protected interest.

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[6] In Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus, 317 F.3d 334 (D.C. Cir. 2003), the D.C. Circuit held that a former Ringling Brothers employee did allege an Article III injury in fact based on the "aesthetic and emotional injury," id. at 335 (internal quotation marks omitted), he suffered upon witnessing the "mistreatment of the [Asian] elephants to which he became emotionally attached during his tenure at Ringling Bros." Id. at 338. The court explained that the former circus employee's "personal relationship with the elephants," coupled with his stated "desire to visit the elephants" in the future without detecting "the effects of mistreatment," satisfied the injury in fact requirement for standing, at least for purposes of a motion to dismiss. See id. at 337-38. At first glance, it would seem that if one suffers an Article III injury in fact when an elephant to whom one has an emotional attachment is threatened with future mistreatment, one must also suffer an injury in fact when one's adult son is threatened with future extrajudicial killing. But the alleged injury in Ringling Bros. is distinguishable from plaintiff's alleged injury here in one legally significant respect: the plaintiff in Ringling Bros. could cite a statutory basis for his alleged interest in maintaining a relationship with the (unharmed) Asian elephants -- namely, the citizen-suit provision of the Endangered Species Act, which "allows any person to commence a civil suit to enjoin violations of the Act or its regulations." See 16 U.S.C. § 1540(g)(1)(A) (emphasis added). By contrast, plaintiff can point to no statutory basis for his claim that as a parent he enjoys a legally protected interest in maintaining a relationship with his adult child.

Plaintiff also has no constitutionally protected interest in maintaining a relationship with his adult child. In suits brought under 42 U.S.C. § 1983, several federal circuits have considered "whether the Constitution protects a parent's relationship with his adult children in the context of state action which has the incidental effect of severing that relationship." Russ v. Watts, 414 F.3d 783, 787 (7th Cir. 2005).[7] To date, however, no court has held that a parent possesses a constitutionally protected liberty interest in maintaining a relationship with his adult child free from indirect government interference. Rather, all circuits to address the issue "have expressly declined to find a violation of the familial liberty interest" where state action has only an incidental effect on the parent's relationship with his adult child, and "was not aimed specifically at interfering with the relationship." See, e.g., Russ, 414 F.3d at 791 (declining to recognize a "constitutional right to recover for the loss of the companionship of an adult child" where the parent-child relationship "is terminated as an incidental result of state action"); McCurdy v. Dodd, 352 F.3d 820, 830 (3d Cir. 2003) (dismissing section 1983 claim against police officers implicated in the fatal shooting of plaintiff's son on the ground that "the fundamental guarantees of the Due Process Clause do not extend to a parent's interest in the companionship of his independent adult child"); Valdivieso Ortiz v. Burgos, 807 F.2d 6, 9 (1st Cir. 1986) (holding that stepfather of an adult inmate allegedly beaten to death by prison guards had no remedy under section 1983 for the "incidental deprivation" of his relationship with his adult stepson); cf.

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[7] Suits brought under section 1983 "must be based upon the violation of [a] plaintiff's personal rights, and not the rights of someone else." Archuleta v. McShan, 897 F.2d 495, 497 (10th Cir. 1990); see also Claybrook v. Birchwell, 199 F.3d 350, 357 (6th Cir. 2000) (explaining that "a section 1983 cause of action is entirely personal to the direct victim of the alleged constitutional tort"); Dohaish v. Tooley, 670 F.2d 934, 936 (10th Cir. 1982) (stating that a 1983 civil rights action "does not accrue to a relative, even the father of the deceased").

Trujillo v. Bd. of Cnty. Comm'rs, 768 F.2d 1186, 1189-90 (10th Cir. 1985) (finding that mother had a constitutionally protected liberty interest in her relationship with her adult son, but dismissing claim against government officials allegedly responsible for son's death where there was no allegation of the officials' intent to interfere with the parent-adult child relationship). Most importantly, in Butera v. Dist. of Columbia, 235 F.3d at 656, the D.C. Circuit dismissed a mother's section 1983 claim that her son's death during his employment with the D.C. Metropolitan Police Department violated her due process right to the companionship of her adult child. As the D.C. Circuit held, "a parent does not have a constitutionally protected liberty interest in the companionship of a child who is past minority and independent." 235 F.3d at 656.[8]

To be sure, plaintiff does not actually need to show that he has a constitutionally protected liberty interest in the preservation of his relationship with his adult son, since he -- unlike the mother in Butera -- does not bring suit under section 1983 for a violation of his own constitutional rights. Nevertheless, plaintiff does need to show that he has suffered an injury to some legally protected interest. See Lujan, 504 U.S. at 560; Powers, 499 U.S. at 411. Because plaintiff can cite no statutory basis for such an interest, and because there is no constitutional basis for such an interest in light of Butera, the only remaining question is whether plaintiff's

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[8] According to defendants, even if Butera had concluded that a parent enjoys a constitutionally protected liberty interest in maintaining a relationship with his adult child, plaintiff, "as an alien residing in Yemen . . . would not have [such] a liberty interest under the Constitution that could support the third party standing argument he seeks to pursue." See Defs.' Reply at 7 n.7. This argument is not without merit, as "[t]he Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections." See Jifry v. F.A.A., 370 F.3d 1174, 1182 (D.C. Cir. 2004). But this Court need not reach this issue in light of Butera's clear holding that no parent -- regardless of his citizenship -- enjoys such an interest.

alleged interest is somehow protected by common law.

But plaintiff has failed to cite a single case to support the argument that a parent enjoys a common law interest in maintaining a relationship with his adult child. Although he cites a few cases in which courts have found that the separation of a parent from a child creates an Article III injury in fact, all of these cases involved minor rather than adult children. See Pl.'s Opp. at 12 (citing Jones v. Prince George's Cnty., 348 F.3d 1014, 1018 (D.C. Cir. 2003) (holding that an infant child suffered an injury in fact when her father was wrongfully killed, thereby permanently depriving her of his "financial and emotional support"); Reed, 439 F. Supp. 2d at 58, 62 (concluding that a six-year-old boy suffered an injury in fact when his father was kidnaped, detained, and tortured for more than three years)); see also Payne-Barahona v. Gonzalez, 474 F.3d 1, 2 (1st Cir. 2007) (acknowledging as sufficient for Article III purposes the injury in fact that a father would sustain if he were deported and thereby separated from his minor children); Coleman v. United States, 454 F. Supp. 2d 757, 763 (N.D. Ill. 2006) (finding that minor child alleged injury in fact under Article III by showing that, "unless enjoined, Defendants will execute an order of removal that will force his mother to leave the United States").

On the other hand, courts have repeatedly emphasized the need for differential treatment of the parent-child relationship when it "involves two adults." See Butera, 235 F.3d at 656. As the D.C. Circuit has explained, "[w]hen children grow up, their dependence on their parents for guidance, socialization, and support gradually diminishes . . . [and] the strength and importance of the emotional bonds between them and their parents usually decrease." Franz v. United States, 712 F.2d 1428, 1432 (D.C. Cir. 1983), *addendum to* 707 F.2d 582 (D.C. Cir. 1983). The differences that emerge in the parent-child relationship as the child becomes an adult have been

held "sufficiently marked to warrant sharply different constitutional treatment." Id. Hence, although both the Supreme Court and the D.C. Circuit have recognized that a parent enjoys a constitutionally protected liberty interest in maintaining a relationship with his minor child (and is therefore entitled to procedural due process protections before the government directly interferes with that relationship), see, e.g., Santosky v. Kramer, 455 U.S. 745, 753 (1982); Stanley v. Illinois, 405 U.S. 645, 650 (1972); Franz v. United States, 707 F.2d 582, 599 (D.C. Cir. 1983), the Supreme Court has never extended such a right beyond settings involving minor children, see Ortiz, 807 F.2d at 8-9, and this Circuit expressly declined to make that extension in Butera.

There are many reasons why courts have been reluctant to extend procedural due process protections to the relationship between a parent and his adult child, and these same reasons counsel against recognizing plaintiff's alleged injury here as sufficient for standing. In declining to find that a parent enjoys a constitutionally protected liberty interest in maintaining a relationship with his adult child, the First Circuit explained that a contrary holding "would constitutionalize adjudication in a myriad of situations we think inappropriate for due process scrutiny." See Ortiz, 807 F.2d at 9. For example, the court noted, parents could then be expected to sue for "the alleged wrongful prosecution and incarceration of a child or the alleged wrongful discharge of a child from a state job, forcing the child to seek employment in another part of the country." Id. Similarly, if this Court were to recognize plaintiff's interest in preserving his relationship with his adult son as legally protected, other parents could be expected to raise claims in federal court asserting violations of their adult children's rights whenever their children were arrested, incarcerated or discharged from government employment. These claims would be

cognizable under third party standing doctrine, so long as the parent was able to demonstrate a "close relationship" to the adult child and some "hindrance" to the adult child's ability to sue on his own behalf. See Powers, 499 U.S. at 411.

This Court will not advance that outcome, absent case law holding that a parent enjoys a legally protected interest in his relationship with his adult child. Indeed, this Circuit's opinion in Butera strongly suggests that such an interest should not be recognized, in light of the marked changes that occur in the parent-child relationship once a child reaches the age of majority. Like the D.C. Circuit, this Court "does not minimize the devastating loss that a parent can experience from the death of an adult child." Butera, 235 F.3d at 656. But not all devastating losses constitute invasions of judicially cognizable interests. And absent an invasion of such an interest, plaintiff cannot show that he has suffered the requisite Article III injury in fact needed to establish third party standing.[9]

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[9] Defendants make much of the fact that plaintiff's alleged injury is "speculative," since plaintiff has not shown whether the United States is acting "in compliance with the standard plaintiff argues should be applied here." See Defs.' Reply at 10; see also Defs.' Mem. at 16-18; Mot. Hr'g Tr. 29:12-31:12. Because plaintiff has failed to allege an invasion of any legally protected interest, this Court need not address defendants' argument that the threatened extrajudicial killing of plaintiff's adult child is also too "speculative" to satisfy Article III. The Court notes, however, that a threatened injury -- like that asserted by plaintiff here -- may form the basis of an Article III injury in fact so long as it is "certainly impending." See Whitmore, 495 U.S. at 158 (internal quotation marks and citations omitted); see also City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (explaining that "[t]he plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical") (internal quotation marks and citations omitted); Steffel v. Thompson, 415 U.S. 452, 459 (1974) (permitting plaintiff to challenge the legality of his potential arrest under a criminal trespass statute where plaintiff alleged threats of prosecution that were neither imaginary nor speculative); Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997) (explaining that where a criminal statute has not yet been enforced against a litigant, the litigant may still challenge the statute if she "can demonstrate that she faces a threat of prosecution . . . which is credible and immediate, and not merely abstract or speculative").

2. *Prudential Standing Requirements*

Even assuming that plaintiff did suffer an "injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement," this Court still must ask whether "prudential considerations . . . point to permitting [plaintiff] to advance his claim." See Caplin & Drysdale, 491 U.S. at 624 n.3. The Supreme Court has been clear in enumerating the relevant third party standing prudential considerations -- a close relationship and an identity of interests between the litigant and the third party as well as some hindrance to the third party's ability to litigate on his own behalf -- but the Court has been "less clear . . . about what to do with these factors." Amato, 952 F.2d at 749; see also Amer. Immigration Lawyers Ass'n v. Reno, 199 F.3d 1352, 1362 (D.C. Cir. 2000) (noting that "the general state of third party standing law" is "not entirely clear"); Miller v. Albright, 523 U.S. 420, 455 n.1 (1998) (Scalia, J., concurring) (explaining that the Court's third party standing jurisprudence "is in need of what may charitably be called clarification").

Powers implied that a litigant must satisfy all of the prudential third party standing criteria in order to be accorded third party standing. See Powers, 499 U.S. at 411 (stating that the litigant "must have a close relation to the third party, and there must exist some hindrance to the third party's ability to protect his or her own interests"); see also Amato, 952 F.2d at 749 (explaining that the Court's language in Powers "seemed to *require* certain showings from would-be third party claimants") (emphasis in original). Yet the Supreme Court has, in some instances, been "quite forgiving" in its application of the Powers prudential factors (see Kowalski, 543 U.S. at 130), allowing third party standing even where there is no discernible "hindrance" to the third party's ability to litigate on his own behalf. See, e.g., Caplin & Drysdale, 491 U.S. at 624 n.3 (granting third party standing to attorney challenging forfeiture law as a

violation of his client's Sixth Amendment rights although the client himself suffered no "obstacles . . . to advancing his own constitutional claim"); Craig v. Boren, 429 U.S. 190, 192-97 (1976) (permitting vendor to bring third party challenge to state statute prohibiting sales of 3.2% beer to males under age 21 but permitting sales to females between ages 18 and 21, even though the suit could have been brought by a discriminated-against 18-to-21-year-old male); Miller, 523 U.S. at 433 (permitting daughter to raise equal protection claims on her father's behalf despite the absence of any apparent obstacles to the father's assertion of his own constitutional rights).

In light of the Supreme Court's apparent willingness to dispense with the hindrance requirement in certain circumstances, the Third Circuit has adopted a "more flexible balancing approach" to the prudential Powers factors in order to determine whether third party standing is appropriate. See Amato, 952 F.2d at 742 (explaining that "we read the body of Supreme Court precedent as (1) identifying factors that are relevant to determining third party standing and (2) rendering an overall balance of factors dispositive"). The D.C. Circuit has, on occasion, also used a balancing analysis of the Powers criteria for third party standing. See, e.g., Hutchins, 144 F.3d at 803 (finding that third party standing was justified where "the closeness of the relationship between parents and children and the magnitude of the potential impact of our decision on children's rights outweigh[ed] the absence of [any barrier to the children's ability to litigate on their own behalf]"). But most recently, the D.C. Circuit has stated that "when the 'Powers test' is applied, all three requirements must be met." See Amer. Immigration Lawyers Ass'n, 199 F.3d at 1362 n. 15.

The D.C. Circuit has also observed that the Supreme Court's seemingly inconsistent third party standing jurisprudence can be reconciled without resort to balancing of the Powers factors.

See Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp., 28 F.3d 1268, 1280 (D.C. Cir. 1994). Instead, the court in Fair Emp't Council implied, the cases in which the Supreme Court has found third party standing despite the absence of the Powers "hindrance" factor can be understood as falling within an alternative test for third party standing provided by the D.C. Circuit in Haitian Refugee Ctr. v. Gracey, 809 F.2d 794 (D.C. Cir. 1987). See 28 F.3d at 1280-81. In Haitian Refugee -- which pre-dated Powers -- the court held that "third party standing . . . is appropriate only when the third party's rights protect that party's relationship with the litigant." See 809 F.2d at 809. Although the D.C. Circuit has yet to clarify the precise impact of Powers on the Haitian Refugee approach, it has recognized the possibility that the two tests "now coexist and a party can establish third party standing by meeting either standard." See Amer. Immigration Lawyers Ass'n, 199 F.3d at 1362. Thus, in its most recent in-depth discussion of third party standing, the D.C. Circuit first examined whether the litigants could proceed under Haitian Refugee and then whether they met the Powers prudential criteria for third party standing. See id. Because the litigants could not show that the challenged government action specifically targeted a protected "relationship" between the litigant and the third party (as required by Haitian Refugee), and also could not establish "'some hindrance to the third party's ability to protect his or her own interests'" (as required by Powers), the court in Amer. Immigration Lawyers Ass'n found that prudential considerations precluded the litigants from suing on behalf of the absent third parties. Id. at 1362 (quoting Powers, 499 U.S. at 411).

Here, plaintiff has similarly failed both the Powers and the Haitian Refugee tests for third party standing. Despite the arguable hindrance to Anwar Al-Aulaqi's ability to sue on his own behalf, plaintiff lacks third party standing under Powers because his interests do not align with

those of his son. Plaintiff also cannot pass the Haitian Refugee "relationship" inquiry, because none of the rights that plaintiff claims are infringed by the alleged targeted killing of his son constitute substantive protections of the father-adult son relationship, and the alleged targeted killing of plaintiff's adult son is not "designed to interfere with" the father-adult son relationship. See Haitian Refugee, 809 F.2d at 809-10.

(a) Application of the Powers Factors

In order to establish third party standing under Powers, plaintiff must show (1) a close relationship with his son in the sense that they have an identity of interests and (2) some hindrance to Anwar Al-Aulaqi's ability to protect his own legal rights. See Powers, 499 U.S. at 411. These prudential standing requirements serve dual purposes. First, the presence of a hindrance or genuine obstacle preventing the third party from asserting his own legal rights reduces the likelihood that the third party's absence is due to the fact that his rights are either "not truly at stake or not truly important to him." See Singleton v. Wulff, 428 U.S. 106, 116 (1976). Application of this factor thus prevents courts from "adjudicat[ing] . . . rights unnecessarily," where "in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." Id. at 113-14. Second, the requirement that the litigant and the third party have a close relationship such that there is an identity of interests between them helps to ensure that there will be "little loss in terms of effective advocacy" by allowing the litigant to proceed on the absent third party's behalf. See Craig, 429 U.S. at 194 (internal quotation marks and citation omitted).

Plaintiff is correct that "the 'hindrance' requirement under Powers has been more liberally construed and is significantly less stringent than the analogous consideration under the doctrine

of next friend standing." See Pl.'s Opp. at 14. Whereas one purporting to act as another's "next friend" must show that the real party in interest is unable to access the courts, one seeking to satisfy the hindrance requirement for third party standing need only demonstrate that there is some impediment to the real party in interest's ability to assert his own legal rights. See, e.g., Singleton, 428 U.S. at 118 (explaining that the obstacles to the third party bringing suit on his own behalf need not be insurmountable in order to justify third party standing). The Supreme Court has recognized as sufficient hindrances justifying third party standing (1) a third party's financial disincentive to litigate, see Powers, 499 U.S. at 414-15 (permitting criminal defendant to bring third party challenge to alleged race-based exclusion of jurors in part because an excluded juror would have only a "small financial stake" in the outcome of a suit but would be forced to endure the "economic burdens of litigation"); (2) a party's desire to protect her personal privacy, see Singleton, 428 U.S. at 118 (according physicians third party standing to assert the rights of their women patients in challenging a statute as an unconstitutional "interference with the abortion decision" in part because the pregnant women "may be chilled from such assertion by a desire to protect the very privacy of [their] decision[s] from the publicity of a court suit"); and (3) the "imminent mootness" of a party's claims, see id. at 117 (describing the "imminent mootness" of a pregnant woman's challenge to a statute restricting the circumstances in which pregnant women may receive medicaid benefits for abortions); Craig, 429 U.S. at 192-93 (permitting vendor to continue equal protection challenge to a statute prohibiting certain alcohol sales to male minors when the named plaintiff turned 21 during the course of the litigation); see also Hutchins, 144 F.3d at 803 (allowing parents to bring third party challenge to D.C. curfew law in part because a young plaintiff "might turn seventeen by the end" of the litigation, thereby

mooting his claims).

Anwar Al-Aulaqi certainly would face challenges if he were to sue on his own behalf. Although he can access U.S. courts within the meaning of Whitmore, this access is constrained as a result of Anwar Al-Aulaqi's current location in Yemen. The D.C. Circuit has explained that individuals who reside outside the country and "far from the courthouse are hindered when it comes to taking legal action," although such hindrance -- in and of itself -- has not been found sufficient to justify third party standing. See Amer. Immigration Lawyers Ass'n, 199 F.3d at 1364. But here, plaintiff has alleged a further hindrance to his son's ability to bring suit: namely, Anwar Al-Aulaqi's inclusion on the CIA and JSOC "kill lists."

Anwar Al-Aulaqi would not be killed if he were to present himself in a peaceful manner and seek relief in U.S. courts, but he would expose himself to possible detention as an enemy combatant. If Anwar Al-Aulaqi were to emerge from hiding and be detained, the present action -- which seeks to prevent defendants from unlawfully killing him -- would likely be deemed moot. Given the Supreme Court's suggestion that the "imminent mootness" of a party's claims can constitute a sufficient hindrance under Powers, see Singleton, 428 U.S. at 117; Craig, 429 U.S. at 192-93, this case may satisfy that criterion. Nevertheless, the purpose of the hindrance requirement is to ensure "that the rightholder did not simply decline to bring the claim on his own behalf, but could not in fact do so." Miller, 523 U.S. at 450 (O'Connor, J., concurring). It appears that Anwar Al-Aulaqi could have brought suit on his own behalf, but that he has simply declined to do so. Unlike the third parties in Powers, then, who lacked a sufficient incentive to litigate, see Powers, 499 U.S. at 414-15, Anwar Al-Aulaqi should have the requisite incentive to sue, given that his life is allegedly at stake. The fact that Anwar Al-Aulaqi has not brought suit

during the past ten months that his name has allegedly appeared on "kill lists" strongly suggests that his rights are either "not truly at stake or not truly important to him." Singleton, 428 U.S. at 116. Thus, despite the potential imminent mootness of Anwar Al-Aulaqi's claims, allowing plaintiff to litigate the present action would not seem to further the purpose of the Powers hindrance requirement.

But regardless of whether there is some hindrance to Anwar Al-Aulaqi's ability to litigate within the meaning of Powers, plaintiff cannot meet the other Powers prudential requirement -- that he and his son have a close relationship such that they have an identity of interests. It is true that courts have often found the parent-child relationship sufficiently close to justify third party standing. See, e.g., Hutchins, 144 F.3d at 803 (joining other circuits in concluding that "the parent-child relationship is sufficiently close to meet [the] prudential standing requirements" of third party standing); Reed, 439 F. Supp. 2d at 62 (explaining that "the relationship between a son and his father constitutes the requisite close relationship for the second prong of the third party standing test"); Yaman v. U.S. Dep't of State, 709 F. Supp. 2d 85, 90-91 (D.D.C. 2010) (finding that a mother had third party standing to sue on behalf of her minor daughters where she had "a close relation to her children," whose minority rendered them "hindered from bringing suit on their own"). But none of these cases involved a parent-adult child relationship. Moreover, in these cases, there was no indication that the interests of the parent might diverge from those of the minor child on whose behalf the parent sought to litigate. The courts therefore had no reason to examine the underlying purpose of the Powers close relationship prong, which is to ensure "that the plaintiff will act as an effective advocate for the third party." Lepelletier, 164 F.3d at 43 (quoting Lepelletier v. FDIC, 977 F. Supp. 456, 463 (D.D.C. 1997)).

In requiring a "close" relationship between a litigant and a third party, Powers did not intend for close to be "synonymous with loving or affectionate." See N. Jeremi Duru, A Claim for Third Party Standing in America's Prisons, 20 BUFF. PUB. INT. L.J. 101, 116 (2002). If that were the case, Powers would not have accorded third party standing to a criminal defendant asserting the equal protection rights of excluded jurors with whom he had never spoken. Rather, the Supreme Court "only required a 'close relation' in the sense that there must be an identity of interests between the parties such that the plaintiff will act as an effective advocate of the third party's interests." Lepelletier, 164 F.3d at 44; see also Powers, 499 U.S. at 414 (describing the relationship between criminal defendant and excluded juror as "close" in the sense that they "have a common interest in eliminating racial discrimination from the courtroom"). Courts examining claims of third party standing thus must assess "the extent of potential conflicts of interests between the plaintiff and the third party whose rights are [being] asserted," Amato, 952 F.2d at 750, and deny third party standing where the litigant's "interests in the subject of [the] suit to some extent conflict with those of the [third parties] whose rights [the litigant] purports to advance," Clifton Terrace Assocs., 929 F.2d at 722.

Although a parent may sometimes serve as an effective advocate for the interests of his child, a parent may not be accorded third party standing where his interests are "potentially in conflict" with his child's. See Elk Grove, 542 U.S. at 15 (denying father standing to sue on behalf of his minor daughter where he was not authorized to sue as his daughter's "next friend" and where, "[i]n marked contrast to our case law on *jus tertii*, the interests of [the] parent and [his] child are not parallel, and indeed, are potentially in conflict"). Here, plaintiff's interests are potentially in conflict with those of his son. Plaintiff maintains that he has an interest in

"preserv[ing] the very existence of a relationship with his son by protecting his son's right to life," Pl.'s Opp. at 13, and that he "believe[s] taking legal action to stop the United States from killing [Anwar Al-Aulaqi] is in [his son's] best interests," see Al-Aulaqi Decl. ¶ 11. Anwar Al-Aulaqi, however, has given no indication that he believes it is in his interest to take legal action to stop the United States from killing him. Not only has he failed to bring suit on his own behalf at any point over the past ten months -- despite the fact that his life is allegedly at stake -- but he has made numerous public statements condemning the U.S. judicial system, see, e.g., Defs.' Reply, Exs. 1-2, and has publicly announced that he has no intention of "surrendering" to the Americans. See Wizner Decl., Ex. V (quoting Anwar Al-Aulaqi as remarking, "[a]s for the Americans, I will never surrender to them"); see also Clapper Decl. ¶ 16; Defs.' Mem. at 14 n.5. Taken together, Anwar Al-Aulaqi's actions and statements strongly suggest that his interests do not include litigating in U.S. courts.

Whatever the reason for Anwar Al-Aulaqi's failure to seek legal redress for his alleged inclusion on the CIA and JSOC "kill lists" -- a mistrust of or disdain for the American judicial system, a desire to become a martyr, or a mere lack of interest in pursuing a case thousands of miles away from his current location -- this Court cannot subvert the purpose of the Powers prudential standing requirements by "adjudicat[ing] . . . rights unnecessarily" when "the holders of those rights . . . do not wish to assert them." Singleton, 428 U.S. at 114. As the Supreme Court has explained, "[i]t is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case." Whitmore, 495 U.S. at 161. Because it does not appear as though plaintiff would be an effective advocate for his son in light of their seemingly divergent interests, plaintiff cannot satisfy the Powers prudential criteria for

third party standing.

(b) The "Relationship" Inquiry Under Haitian Refugee

In Haitian Refugee, the D.C. Circuit examined whether a non-profit organization designed to assist Haitian refugees (and two of its members) had third party standing to assert the rights of Haitian refugees in challenging the United States's program of interdicting undocumented aliens on the high seas. See Haitian Refugee, 809 F.2d at 796. In an opinion by Judge Bork, the D.C. Circuit held that "third party standing . . . is appropriate only when the third party's rights protect that party's relationship with the litigant." See id. at 809. "If the government has directly interfered with the litigant's ability to engage in conduct together with the third party . . . by putting the litigant under a legal disability with criminal penalties . . . the litigant has standing to challenge the government's interference by invoking the third party's rights." Id. at 808. Hence, in Craig v. Boren, the Supreme Court had permitted beer vendors to assert the equal protection rights of male beer purchasers in challenging a state statute that prohibited sales of 3.2% beer to males under age 21 but permitted sales to females between ages 18 and 21. See id. (citing Craig v. Boren, 429 U.S. at 192-97). Similarly, in other cases where "'enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights,'" see id. (quoting Warth, 422 U.S. at 510), the Supreme Court found that the litigant had standing to challenge the restriction on behalf of the third parties. See, e.g., Carey v. Population Servs. Inc., 431 U.S. 678, 683-84 (1977) (permitting distributors of contraceptives to assert the rights of "potential purchasers" in challenging the constitutionality of a state law restricting the distribution of contraceptives); Barrows v. Jackson, 346 U.S. 249, 257 (1953) (allowing white property owners to raise the constitutional rights of black property

inhabitants as a defense in a lawsuit charging the white owners with breach of a racially discriminatory restrictive covenant).

Even where a statute does not impose legal sanctions on a litigant for maintaining a relationship with a third party, the statute may still be subject to third-party challenge if it "disrupt[s] a special relationship - protected by the rights in question - between the litigants and the third parties." Fair Emp't Council, 28 F.3d at 1281; see Caplin & Drysdale, 491 U.S. at 623-24 n. 3 (granting an attorney third party standing to assert a client's Sixth Amendment rights in challenging a forfeiture statute that prevented the client from paying the attorney's legal fees). Thus, in Singleton the Court permitted physicians to assert the constitutional rights of their low-income women patients in challenging a state statute that prohibited the use of medicaid benefits to pay for non-"medically indicated" abortions. See 428 U.S. at 118. Although the statute in Singleton did not impose "legal penalties" on physicians who continued to perform abortions on their low-income patients, it was nonetheless subject to challenge by the physicians, as it was "specifically intended to burden" the physicians' relationship with their low-income patients. See Haitian Refugee, 809 F.2d at 810.

Because the interdiction program in Haitian Refugee did not impose legal sanctions on the plaintiffs for maintaining a relationship with Haitian aliens, and was not "designed to interfere with" a special relationship between Haitian aliens and the plaintiffs, the court held that the plaintiffs lacked third party standing to challenge the program on behalf of Haitian aliens. See id. at 809-10. As the court explained, "none of the laws that the interdiction program [was] alleged to violate [were] substantive protections of a relationship between Haitian aliens and [the plaintiffs]" and any interference that the program caused to that relationship was only "an

unintended side effect of a program with other purposes." Id.

Just as in Haitian Refugee, none of the Fourth and Fifth Amendment rights that plaintiff claims are infringed by the targeted killing of his son provide "substantive protections" of a father's relationship with his adult child. Indeed, as explained earlier, plaintiff's relationship with his adult child is not entitled to any "substantive protection" under the U.S. Constitution. Moreover, defendants' alleged targeting of plaintiff's son is not designed to interfere with the father-adult son relationship. Unlike cases in which a statute places legal sanctions on a litigant if he maintains a relationship with a third party, see, e.g., Craig v. Boren, 429 U.S. at 192-97, or cases in which a statute directly infringes upon a special relationship, see, e.g., Singleton, 428 U.S. at 118, any harm caused to plaintiff as a result of the extrajudicial killing of his son would be an "unintended side effect" of government action having other purposes. Hence, plaintiff cannot establish third party standing under Haitian Refugee.

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Because plaintiff can satisfy neither the requirements of third party standing (under Haitian Refugee or Powers) nor the requirements of "next friend" standing (under Whitmore), all three of plaintiff's constitutional claims must be dismissed due to lack of standing.

II. The Alien Tort Statute

Plaintiff brings his fourth and final claim under the Alien Tort Statute ("ATS"), alleging that the United States's "policy of targeted killings violates treaty and customary international law." See Compl. ¶ 29. The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Plaintiff is an alien, see Al-Aulaqi

Decl. ¶ 2, but in order for his ATS claim to survive a motion to dismiss, he must also show that (1) an alien suffers a legally cognizable tort -- which rises to the level of a "customary international law norm" -- when his U.S. citizen son is threatened with a future extrajudicial killing and (2) the United States has waived sovereign immunity for that type of claim. Because plaintiff has failed to make either showing, his ATS claim must be dismissed.

A. Plaintiff's Alleged ATS Cause of Action

In Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), the Supreme Court explained that Congress, in enacting the ATS as part of the Judiciary Act of 1789, "intended the ATS to furnish jurisdiction for a relatively modest set of actions" that were recognized at common law as being "torts in violation of the law of nations." Id. at 720. Specifically, the Court concluded that the ATS was originally meant to provide a cause of action for "three primary offenses": (1) violation of safe conducts; (2) infringement of the rights of ambassadors; and (3) piracy. Id. at 724. Citing historical evidence as to the limited scope of the ATS -- and additional reasons for exercising "great caution in adapting the law of nations to private rights," id. at 728 -- the Supreme Court held that ATS claims must allege violations of "the present-day law of nations" that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." Id. at 725. The Court further explained that all judicial determinations as to whether an alleged international law norm "is sufficiently definite to support a cause of action [under the present-day law of nations] should (and indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in federal courts." Id. at 732-33. Since Sosa, it has become clear that "[w]hile the ATS may provide subject-matter jurisdiction for

modern causes of action not recognized at the time of its initial passage in 1789, there is a 'high bar to new private causes of action for violating international law.'" Ali Shafi v. Palestinian Auth., 686 F. Supp. 2d 23, 26 (D.D.C. 2010) (quoting Sosa, 542 U.S. at 727); see also Saleh v. Titan Corp., 580 F.3d 1, 14 (D.C. Cir. 2009) (explaining that "[t]he Sosa Court, while opening the door a crack to the expansion of international law norms to be applied under the ATS, expressed the imperative of judicial restraint").

Plaintiff maintains that his alleged tort -- extrajudicial killing -- meets the high bar of Sosa, since there is a customary international law norm against state-sponsored extrajudicial killings, which has been "consistently recognized by U.S. courts" and "indeed codified in domestic law under the Torture Victim Protection Act." See Pl.'s Opp. at 39.[10] Plaintiff is correct insofar as many U.S. courts have recognized a customary international law norm against past state-sponsored extrajudicial killings as the basis for an ATS claim. See, e.g., Wiwa, 626 F.

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[10] The Torture Victim Protection Act of 1991 ("TVPA") provides in relevant part that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to an extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death." 28 U.S.C. § 1350 note § 2(a)(2). The Seventh Circuit has held that the TVPA "occup[ies] the field" with respect to claims alleging extrajudicial killing, see Enahoro v. Abubakar, 408 F.3d 877, 884-85 (7th Cir. 2005), but most courts have found that the TVPA does not preclude ATS claims for extrajudicial killing. See, e.g., Kadic v. Karadzic, 70 F.3d 232, 241 (2d Cir. 1995) (stating that "[t]he scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim [Protection] Act"); In re XE Servs. Alien Tort Litig., 665 F. Supp. 2d 569, 593 n.29 (E.D. Va. 2009) (explaining that "most courts have held that the TVPA supplements the ATS, and does not preempt it"); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1179 n.13 (C.D. Cal. 2005) (noting that "[t]he Court does not believe that the TVPA precludes claims of . . . extrajudicial killing under the ATS"). These courts view the TVPA and its legislative history as providing strong evidence that there is, in fact, a customary international law norm against extrajudicial killing, upon which an ATS claim may be based. See, e.g., In re XE Servs. Alien Tort Litig., 665 F. Supp. 2d at 593; Mujica, 381 F. Supp. 2d at 1178-79; Wiwa v. Royal Dutch Petroleum Co., 626 F. Supp. 2d 377, 383 n.4 (S.D.N.Y. 2009).

Supp. 2d at 383 n.4; Mujica, 381 F. Supp. 2d at 1178-79; Kadic, 70 F.3d at 241-45; Forti v. Suarez-Mason, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987), *recons. granted in part on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988). Significantly, however, plaintiff cites no case in which a court has ever recognized a "customary international law norm" against a threatened future extrajudicial killing, nor does he cite a single case in which an alien has ever been permitted to recover under the ATS for the extrajudicial killing of his U.S. citizen child. These two features of plaintiff's ATS claim -- that it is based on a threat of a future extrajudicial killing, not an actual extrajudicial killing, that is directed not to plaintiff or to his alien relative, but to his U.S. citizen son -- render plaintiff's ATS claim fundamentally distinct from all extrajudicial killing claims that courts have previously held cognizable under the ATS.

Even assuming that the threat at issue were directed to plaintiff (rather than to plaintiff's U.S. citizen son), there is no basis for the assertion that the threat of a future state-sponsored extrajudicial killing -- as opposed to the commission of a past state-sponsored extrajudicial killing -- constitutes a tort in violation of the "law of nations." A threatened extrajudicial killing could possibly -- depending on the precise nature of the threat -- form the basis of a state tort law claim for assault, see REST. (SECOND) OF TORTS § 21 (1965) (explaining that an actor is subject to liability for assault if he acts "with the intent to cause a harmful or offensive contact, or an imminent apprehension of such a contact," and the other person "is thereby put in such imminent apprehension"), or for intentional infliction of emotional distress, see id. § 46(1) (stating that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm"). But common law tort claims for assault and

intentional infliction of emotional distress do not rise to the level of international torts that are "sufficiently definite and accepted 'among civilized nations' to qualify for the ATS jurisdictional grant." See Ali Shafi, 686 F. Supp. 2d at 29 (quoting Sosa, 542 U.S. at 732). Plaintiff cites no treaty or international document that recognizes assault or intentional infliction of emotional distress as a violation of the "present-day law of nations," nor does he cite any case in which a court has ever found such common law torts cognizable under the ATS. Indeed, there appears to be only one case in which a court has even considered whether "fear" and "anguish" could form the basis of an ATS claim. See Mujica, 381 F. Supp. 2d at 1183. There, the court expressly rejected the plaintiffs' contention that psychic, emotional harms were sufficient to state a claim under the ATS. As that court explained, "[i]t would be impractical to recognize these allegations as constituting an ATS claim because it would allow foreign plaintiffs to litigate claims in U.S. courts that bear a strong resemblance to intentional infliction of emotional distress." Id. Such a holding, the court noted, would make "broad swaths of conduct" actionable by aliens under the ATS, id., which is precisely what the Supreme Court in Sosa warned against.

In Sosa, the Supreme Court instructed federal courts to exercise "great caution" in recognizing new causes of action under the ATS as violations of the "present-day law of nations," and urged courts to consider "the practical consequences" of making such causes of action available to litigants worldwide. See Sosa, 542 U.S. at 728, 732-33. If this Court were to conclude that alleged government threats -- no matter how plausible or severe they may be -- constitute international torts committed in violation of the law of nations, federal courts could be flooded with ATS suits from persons across the globe who alleged that they were somehow placed in fear of danger as a result of contemplated government action. Surely, as interpreted in

Sosa, the ATS was not intended to provide a federal forum for such speculative claims.

The precise relief that plaintiff seeks here -- an injunction against the President, the Secretary of Defense, and the Director of the CIA preventing them from carrying out specific national security measures abroad -- is, as defendants point out, both "novel" and "extraordinary." See Defs.' Mem. at 40. The Supreme Court in Sosa did not call upon the federal courts to recognize such novel, extraordinary claims under the ATS, but rather merely "opened the door a crack to the possible recognition of new causes of action under international law (such as, perhaps, torture) if they were firmly grounded on an international consensus." Saleh, 580 F.3d at 14; see also Sosa, 542 U.S. at 738 (declining to recognize a cause of action for "arbitrary" detentions under the ATS since "[c]reating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise"). Here, it would be an abuse of this Court's discretion, properly constrained by Sosa, to recognize a cause of action under the ATS for alleged threats of state-sponsored extrajudicial killings, given that no court has ever found that the threat of a future extrajudicial killing is a recognized tort, much less one that violates the present-day law of nations. Because plaintiff cannot point to a single case recognizing such a claim, his ATS claim cannot possibly be held to violate a "norm of customary international law so well defined as to support the creation of a federal remedy." See Sosa, 542 U.S. at 738.

Moreover, even if the mere threat of a future state-sponsored extrajudicial killing did constitute a violation of the present-day law of nations, plaintiff could not bring an ATS claim based on the alleged threat of an extrajudicial killing of his U.S. citizen son. Significantly, the ATS authorizes federal jurisdiction over "civil actions by an alien for a tort only, committed in

violation of the law of nations." 28 U.S.C. § 1350 (emphasis added). Although plaintiff is an alien, his son is a U.S. citizen, and as such, Anwar Al-Aulaqi is not authorized to sue under the ATS. Given that Anwar Al-Aulaqi could not maintain an ATS action, plaintiff cannot instead bring an ATS action as a "next friend" or third party on Anwar Al-Aulaqi's behalf. In other words, plaintiff can only sue under the ATS if he alleges that he himself has suffered a tort that rises to the level of a "customary international law norm."

Plaintiff has been far from clear in articulating whether his ATS claim is a third party or "next friend" claim stemming from alleged violations of his U.S. citizen son's rights, or instead an individual claim based on personal injuries that he would suffer if defendants' alleged threatened extrajudicial killing of his son materialized. In his complaint, plaintiff purports to bring his ATS claim not as his son's "next friend" or as a third party, but "in his own right to prevent the injury he would suffer if defendants were to kill his son." See Compl. ¶ 29. But in opposing defendants' motion to dismiss, plaintiff explains that his cause of action under the ATS is not premised upon intentional infliction of emotional distress, loss of consortium, or any other "independent" tort that a parent himself might suffer as a result of his child's wrongful death. See Pl.'s Opp. at 39 (stating that plaintiff's claim is not "one for intentional infliction of emotional distress"). Rather, plaintiff alleges that "Defendants' authorization for the targeted killing of his son in Yemen would constitute an extrajudicial killing," and it is this "extrajudicial killing" -- and not any emotional injury sustained by plaintiff -- that forms the basis of plaintiff's ATS claim. See id. At the November 8th motions hearing, plaintiff seemed to conflate his two arguments, stating both that his ATS claim "[is] a claim based on the prohibition of extrajudicial killing," (which, *a fortiori*, is a claim that belongs to Anwar Al-Aulaqi, and not to plaintiff), Mot.

Hr'g Tr. 92:15-16; see also id. 94:4-5 ("what we are talking about here is a claim for extrajudicial killing"); id. 95:24-96:1 ("the tort that would be occurring . . . would be a violation of the norm of extrajudicial killing"), and that he "is bringing the [ATS] claim in his own name for . . . the harm that he would suffer by virtue of the death of his son," see id., 92:15-21.

Plaintiff cannot have it both ways. He either is bringing an ATS claim on behalf of his U.S. citizen son, alleging violations of Anwar Al-Aulaqi's right to be free from an extrajudicial killing, or he is bringing an ATS claim based on violations of his own right to be free from the emotional harm that he would suffer if his son were to be unlawfully killed. But the former fails as a result of Anwar Al-Aulaqi's U.S. citizenship, and the latter fails because there is not even domestic consensus as to whether a parent can recover for emotional injuries stemming from the death of his adult child, much less universal agreement that such a tort is actionable. See 22 AM. JUR. 2d DEATH § 208 (2010) (explaining that domestic courts are "divided on the question of whether the survivors of a tortiously killed child can recover damages for their grief or mental anguish"); see also 45 A.L.R. 4th 234 §§ 4-6 (1986) (noting that even where such recovery is allowed, courts are split as to whether parents can recover for mental anguish or grief stemming from the tortious death of an adult child). Perhaps recognizing that he can prevail on neither claim, plaintiff seeks to create a novel "hybrid" ATS claim, under which a party can sue in his individual capacity not for his own injuries, but for injuries inflicted upon his adult child. Plaintiff analogizes his unique ATS claim to an action for wrongful death, in which, he alleges, a claimant can sue "for the wrongful death of another individual, for harm that [the] claimant herself has suffered." See Mot. Hr'g Tr. 93:8-11; see also id. 95:24-96:5 (explaining that plaintiff's ATS claim is "no different than wrongful death actions where plaintiffs bring a claim

based on the wrongful death itself, but the injury [to the plaintiff] is of a different nature").

But domestic wrongful death law provides no basis for plaintiff's contention that an alien parent can bring an ATS claim "in his own right" for the threatened extrajudicial killing of his adult U.S. citizen child. Although wrongful death statutes vary from state to state, there are two main types -- "Lord Campbell" statutes and "continuation" statutes. See 12 AM. JUR. TRIALS 317 §§ 4-6 (1966). The less common, continuation-type wrongful death statute creates no new cause of action, but merely provides that "the deceased victim's cause of action against the defendant-tortfeasor shall continue and survive for the benefit of the decedent's estate." See id. § 5-6 (emphasis added). The damages in a continuation wrongful death action are those sustained by the decedent himself (rather than by the decedent's heirs or beneficiaries) and therefore include "the value of the destruction of the decedent's earning capacity plus his inability to engage in all of life's activities." See id. § 5. Plaintiff clearly does not benefit by comparing his ATS claim to a claim brought under a continuation wrongful death statute, since such claims -- by their very nature -- may only be brought in the name of the decedent. Here, plaintiff's ATS claim may not be brought in the name of his U.S. citizen son, who cannot sue under the ATS.

Plaintiff fares no better by analogizing his ATS claim to a wrongful death action brought under a Lord Campbell statute. Deriving its name from Lord Campbell's Act, enacted by the British Parliament in 1864, modern-day Lord Campbell wrongful death statutes -- which exist in the majority of states -- create a new, independent cause of action in favor of certain statutorily designated beneficiaries, which is "distinct and separable from the victim's own right of action for his injuries." See 12 AM. JUR TRIALS 317 §§ 3-4, 6. Unlike continuation wrongful death statutes, Lord Campbell statutes do not permit recovery for "damages which [the decedent

himself] might have recovered for his injury if he had survived," but rather, establish a new form of "liability for the loss and damage sustained by relatives dependent upon the decedent." See Mich. Cent. R.R. Co. v. Vreeland, 227 U.S. 59, 69 (1913). Although damages under Lord Campbell statutes traditionally included only pecuniary losses (such as loss of support), "a clear majority of States . . . either by express statutory provision or by judicial construction" now also permit recovery for certain emotional losses (such as loss of society). See Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 584-87 (1974), *superseded by statute as stated in* Miles v. Apex Marine Corp., 498 U.S. 19, 30 n.1 (1990); see also 12 AM. JUR TRIALS 317 § 19 (explaining that more recent cases interpreting Lord Campbell statutes have allowed damages for "matters not of a pecuniary nature such as loss of the decedent's society, association, and companionship").

Plaintiff's hybrid ATS claim is equally untenable when viewed as a kind of preemptive wrongful death action brought under a Lord Campbell statute. Significantly, claims brought by a decedent's relatives under Lord Campbell statutes are not based on the harms that the decedent himself has suffered, but only on the injuries suffered by the decedent's relatives as a result of the death. Here, plaintiff has not alleged that he would suffer any pecuniary losses as a result of his son's death, and he expressly disavows any intent to recover for emotional injuries that he would suffer if his son were to be unlawfully killed. See Pl.'s Opp. at 39. Plaintiff's hybrid ATS claim is thus not analogous to a Lord Campbell wrongful death action, which can only be brought by statutorily designated relatives for their own injuries.

Ultimately, the Court concludes, plaintiff's ATS claim is not based on any pecuniary or emotional injuries sustained by plaintiff, but on the injury that his U.S. citizen son would suffer if he were to be subject to a state-sponsored extrajudicial killing. And despite his assertions to the

contrary, plaintiff cannot bring such a claim in his own right, since it is Anwar Al-Aulaqi, and not plaintiff, who has allegedly been "targeted" for killing by the United States. Thus, even if plaintiff could establish that the threat of a future extrajudicial killing -- as opposed to the commission of a past extrajudicial killing -- did constitute a violation of "customary international law" (which he cannot), plaintiff would not be authorized to bring such a claim under the ATS on behalf of his U.S. citizen son, who himself is not within the class of persons who can sue under the Act.

B. Sovereign Immunity Under the ATS

Because plaintiff brings his ATS claim against the President, the Secretary of Defense, and the Director of the CIA in their official capacities, his suit is tantamount to a suit against the United States itself. See Kentucky v. Graham, 473 U.S. 159, 165-67 (1985). "It is axiomatic that the United States may not be sued without its consent and that the existence of such consent is a prerequisite for jurisdiction." United States v. Mitchell, 463 U.S. 206, 212 (1983). Waivers of sovereign immunity "must be unequivocally expressed in statutory text, and will not be implied." Lane v. Pena, 518 U.S. 187, 192 (1996); see also United States v. King, 395 U.S. 1, 4 (1969). Moreover, all purported waivers of sovereign immunity will be "strictly construed . . . in favor of the sovereign." Lane, 518 U.S. at 187; see also Soriano v. United States, 352 U.S. 270, 276 (1957) (explaining that "this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied"). Thus, assuming that plaintiff could allege a cognizable tort under the ATS, his ATS claim still must fail absent a valid waiver of sovereign immunity. The ATS "itself does not provide a waiver of sovereign immunity," Industria Panificadora, S.A. v. United States, 957 F.2d

886, 887 (D.C. Cir. 1992); accord Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985), but plaintiff argues that his ATS claim may proceed against the United States either because it is within the Administrative Procedure Act's waiver of sovereign immunity for claims seeking non-monetary relief, or because it is within the so-called Larson-Dugan exception to sovereign immunity. See Pl.'s Opp. at 41. Neither argument is persuasive.

1. *Waiver of Sovereign Immunity Under the APA*

The APA provides that agency action "seeking relief other than money damages . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States." 5 U.S.C. § 702. This waiver of sovereign immunity is not available in suits against the President, since the President is not an "agency" within the meaning of the APA. See Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (plurality opinion). Plaintiff therefore may not assert an ATS claim against the President through reliance on the APA's waiver of sovereign immunity. While the APA remains "arguably available" as a waiver of sovereign immunity with respect to plaintiff's ATS claims against the Secretary of Defense and the Director of the CIA, see Sanchez-Espinoza, 770 F.2d at 207 (recognizing the possibility that ATS suits seeking non-monetary relief may proceed against the Secretary of Defense and the Director of the CIA under the APA's waiver of sovereign immunity), there are several reasons to question whether the APA should be interpreted as a waiver of sovereign immunity for an ATS claim like plaintiff's, which seeks to enjoin U.S. military action abroad that allegedly "received the approval of the President, . . . the Secretary of Defense, and the Director of the CIA." See id. at 208; see also Compl. ¶ 21.

First, defendants' alleged action here might be considered agency action "committed to agency discretion by law," in which case the APA's waiver of sovereign immunity would not

apply. See 5 U.S.C. § 701(a)(2). Agency action is deemed committed to agency discretion by law if "'a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" Al Odah v. United States, 321 F.3d 1134, 1150 (D.C. Cir. 2003) (Randolph, J., concurring) (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985)), *rev'd and remanded*, Rasul v. Bush, 542 U.S. 466 (2004). Given the "lack of judicially manageable standards" by which the Court can resolve this case, see discussion infra pp. 70-71, plaintiff's ATS claim may well seek to challenge agency action that is committed to agency discretion by law.[11]

Ultimately, however, this Court need not decide that issue. Even if the action involved in this case does not fall within the APA's exception for agency action committed to agency discretion by law, this Court nonetheless would follow the approach adopted by the D.C. Circuit in Sanchez-Espinoza and exercise its equitable discretion not to grant the relief sought. There, citizens of Nicaragua brought suit against federal officials under the ATS, alleging that the

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[11] Defendants also argue that the Federal Tort Claims Act ("FTCA") precludes application of the APA's waiver of sovereign immunity to ATS claims seeking injunctive relief. See Defs.' Mem. at 41. The APA's waiver of sovereign immunity does not apply "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." See 5 U.S.C. § 702. The FTCA waives sovereign immunity for suits against the U.S. government "for money damages . . . for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). Despite defendants' contention to the contrary, it does not appear that the FTCA's waiver of sovereign immunity for tort claims seeking money damages against the United States by implication precludes any injunctive relief. The Supreme Court has explained that "Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy." Carlson v. Green, 446 U.S. 14, 20 (1980). Defendants point to no legislative history indicating that the FTCA was intended to provide the exclusive remedy for tort claims against the United States, and the FTCA itself does not purport to forbid injunctive relief, as it merely states that it is "exclusive of any other civil action or proceeding for money damages." 28 U.S.C. § 2679(b)(1). Moreover, in U.S. Info. Agency v. Krc, 989 F.2d 1211, 1216 (D.C. Cir. 1993), the D.C. Circuit expressly declined to adopt the view that the FTCA "impliedly forbids specific relief [against the United States] for tortious interference with prospective employment opportunities."

officials had "approved a plan submitted by the CIA for covert activities to destabilize and overthrow the government of Nicaragua." Sanchez-Espinoza, 770 F.2d at 205. The plaintiffs maintained that the defendants' support of the contras in Nicaragua led to "scores of attacks upon innocent Nicaraguan civilians" which resulted in "summary execution, murder, abduction, torture, rape, wounding, and the destruction of private property and public facilities." Id. (internal quotation marks and citation omitted). Just as in the present case, the plaintiffs in Sanchez-Espinoza argued that their ATS claims for non-monetary relief against federal officials sued in their official capacities could proceed pursuant to the APA's waiver of sovereign immunity. Recognizing that the APA's waiver of sovereign immunity was "arguably available" for these claims, the D.C. Circuit nonetheless noted that "all the bases for nonmonetary relief -- including injunction, mandamus, and declaratory judgment -- are discretionary." Id. at 207-08. As a result, the court held, "[a]t least where the authority for our interjection into so sensitive a foreign affairs matter as this are statutes no more specifically addressed to such concerns than the Alien Tort Statute and the APA, we think it would be an abuse of our discretion to provide discretionary relief." Id. at 208.

Here, plaintiff also asks this Court to interject itself into a "sensitive" foreign affairs matter, by issuing discretionary relief that would prohibit military and intelligence activities against an alleged enemy abroad. See Defs.' Mem. at 31 (describing plaintiff's request "to limit *ex ante* the circumstances in which force against an enemy overseas may be used in the future"). Just as in Sanchez-Espinoza, the military and intelligence activities at issue in this case allegedly "received the attention and approval of the President . . . the Secretary of Defense, and the Director of the CIA." See Sanchez-Espinoza, 770 F.2d at 208; see also Compl. ¶ 21.

Irrespective of whether this case is "a matter so entirely committed to the care of the political branches as to preclude our considering the issue at all," then, the Court concludes that it "at least requires the withholding of discretionary relief." See Sanchez-Espinoza, 770 F.2d at 208.

The Supreme Court has repeatedly acknowledged the separation-of-powers concerns posed by any judicial attempt to "'enjoin the President in performance of his official duties.'" See Franklin, 505 U.S. at 802-03 (quoting Mississippi v. Johnson, 74 U.S. 475, 501 (1866)); see also Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) (noting the "general rule . . . that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other"). Just as the issuance of "injunctive relief against the President personally is an extraordinary measure not lightly to be undertaken," Swan v. Clinton, 100 F.3d 973, 978 (D.C. Cir. 1996), so, too, would it be extraordinary for this Court to order declaratory and injunctive relief against the President's top military and intelligence advisors, with respect to military action abroad that the President himself is alleged to have authorized. Given that there is no clear waiver of sovereign immunity permitting such "extraordinary relief," and that "[t]he Alien Tort Statute has never been held to cover suits against the United States or United States Government officials," see El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 858 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring),[12] this Court declines to exercise its equitable

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[12] One district court has concluded that the APA waives sovereign immunity with respect to "international law claims" seeking non-monetary relief. See Rosner v. United States, 231 F. Supp. 2d 1202, 1211 (S.D. Fla. 2002). There, Hungarian Jews and their descendants sued the United States, arguing that the U.S. Army wrongfully refused to return their property, which had been unlawfully expropriated by the pro-Nazi Hungarian Government during World War II. See id. at 1204-05. In finding that the APA waived sovereign immunity for the plaintiffs' claims, the court in Rosner stressed that the conduct complained of, "although exercised by military personnel, [wa]s decidedly non-military in nature." See id. at 1212. Here, defendants' alleged conduct is "decidedly military in nature."

discretion to grant such relief here.

2. *The Larson-Dugan Exception to Sovereign Immunity*

Plaintiff's argument that his ATS claim "may proceed under the 'Larson-Dugan' exception to sovereign immunity," see Pl.'s Opp. at 41, merits little discussion. Under that exception -- derived from the Supreme Court's decisions in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), and Dugan v. Rank, 372 U.S. 609 (1963) -- "sovereign immunity does not apply as a bar to suits alleging that an officer's actions were unconstitutional or beyond statutory authority, on the grounds that 'where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions.'" Swan, 100 F.3d at 981 (quoting Larson, 337 U.S. at 689); see also Wash. Legal Found. v. U.S. Sentencing Comm'n, 89 F.3d 897, 901 (D.C. Cir. 1996). In other words, where an officer acts outside the bounds of his legal authority, he "'is not doing the business which the sovereign has empowered him to do, or he is doing it in a way which the sovereign has forbidden,'" and hence the officer's actions "'may be made the object of specific relief.'" Wash. Legal Found., 89 F.3d at 901 (quoting Larson, 337 U.S. at 689).

However, the D.C. Circuit in Sanchez-Espinoza expressly stated that the Larson-Dugan exception to sovereign immunity "can have no application when the basis for jurisdiction requires action authorized by the sovereign as opposed to private wrongdoing." Sanchez-Espinoza, 770 F.2d at 207. Here, just as in Sanchez-Espinoza, the ATS is the statute that provides the basis for this Court's jurisdiction, and the D.C. Circuit has held that the ATS only confers jurisdiction over actions that are authorized by the sovereign. See id. (explaining that "the law of nations -- so called 'customary international law,' arising from 'the customs and

usages of civilized nations' . . . does not reach private, non-state conduct"). Because it "would make a mockery of the doctrine of sovereign immunity" if the Larson-Dugan exception were interpreted as authorizing "federal courts . . . to sanction or enjoin . . . actions that are, *concededly and as a jurisdictional necessity*, official actions of the United States," id. (emphasis in original), this Court rejects plaintiff's contention that the Larson-Dugan exception applies to the conduct challenged in this case.

III. The Political Question Doctrine

Defendants argue that even if plaintiff has standing to bring his constitutional claims or states a cognizable claim under the ATS, his claims should still be dismissed because they raise non-justiciable political questions. Like standing, the political question doctrine is an aspect of "the concept of justiciability, which expresses the jurisdictional limitations imposed on the federal courts by the 'case or controversy' requirement of Article III of the Constitution." Schlesinger, 418 U.S. at 215. The political question doctrine "is 'essentially a function of the separation of powers,'" El-Shifa, 607 F.3d at 840 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)), and "'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.'" Id. (quoting Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986)). The precise "'contours'" of the political question doctrine remain "'murky and unsettled.'" Harbury v. Hayden, 522 F.3d 413, 418 (D.C. Cir. 2008) (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 803 n.3 (D.C. Cir. 1984) (Bork, J., concurring)); see also Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1514 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985) (describing the "shifting contours and

uncertain underpinnings" of the political question doctrine). Still, the Supreme Court has articulated six factors which are said to be "[p]rominent on the surface" of cases involving non-justiciable political questions:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. The first two factors -- a textual commitment to another branch of government and a lack of judicially manageable standards -- are considered "the most important," see Harbury, 522 F.3d at 418, but in order for a case to be non-justiciable, the court "need only conclude that one factor is present, not all," Schneider v. Kissinger, 412 F.3d 190, 194 (D.C. Cir. 2005).

Unfortunately, the Baker factors are much easier to enumerate than they are to apply, and it is perhaps for this reason that the political question doctrine "continues to be the subject of scathing scholarly attack." See Ramirez, 745 F.2d at 1514. Dean Erwin Chemerinsky has gone so far as to remark that the Baker criteria "seem useless in identifying what constitutes a political question." See Erwin Chemerinsky, Federal Jurisdiction 149 (5th ed. 2007). According to him, the political question doctrine cannot be understood by mechanically applying the factors enumerated in Baker, but "only by examining the specific areas where the Supreme Court has invoked [the doctrine]." Id. at 150. Although Dean Chemerinsky's derogation of the Baker factors is extreme, it is true that "the category of political questions is more amenable to

description by infinite itemization than by generalization." Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 933 (D.C. Cir. 1988) (internal quotation marks and citations omitted).

An examination of the specific areas in which courts have invoked the political question doctrine reveals that national security, military matters and foreign relations are "'quintessential sources of political questions.'" See El-Shifa, 607 F.3d at 841 (quoting Bancoult v. McNamara, 445 F.3d 427, 433 (D.C. Cir. 2006)); see also Haig v. Agee, 453 U.S. 280, 292 (1981) (explaining that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"). As the D.C. Circuit recently explained, cases involving national security and foreign relations "raise issues that 'frequently turn on standards that defy judicial application' or 'involve the exercise of a discretion demonstrably committed to the executive or legislature.'" El-Shifa, 607 F.3d at 841 (quoting Baker, 369 U.S. at 211). Unlike the political branches, the Judiciary has "no covert agents, no intelligence sources, and no policy advisors." See Schneider, 412 F.3d at 196. Courts are thus institutionally ill-equipped "to assess the nature of battlefield decisions," DaCosta v. Laird, 471 F.2d 1146, 1155 (2d Cir. 1973), or to "define the standard for the government's use of covert operations in conjunction with political turmoil in another country," Schneider, 412 F.3d at 197. These types of decisions involve "delicate, complex" policy judgments with "large elements of prophecy," and "are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility." Chicago & S. Air Lines v. Waterman Corp., 333 U.S. 103, 111 (1948). The difficulty that U.S. courts would encounter if they were tasked with "ascertaining the 'facts' of military decisions exercised thousands of miles from the forum, lies at the heart of the determination whether the question

[posed] is a 'political' one." DaCosta, 471 F.2d at 1148.

At the same time, the Supreme Court has also made clear that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Baker, 369 U.S. at 211.[13] Although "'attacks on foreign policymaking are nonjusticiable, claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs.'" Schneider, 412 F.3d at 198 (quoting DKT Memorial Fund Ltd. v. Agency for Int'l Dev., 810 F.2d 1236, 1238 (D.C. Cir. 1987)). The political question doctrine, the Supreme Court has warned, was only designed to cover a "narrow" category of "carefully defined" cases, and should not be employed as "an ad hoc litmus test of [courts'] reactions to the desirability of and need for judicial application of constitutional or statutory standards to a given type of claim." Davis v. Bandemer, 478 U.S. 109, 126 (1986). Hence, in order to decide whether a particular legal challenge constitutes an impermissible "attack on foreign policymaking" or is instead a justiciable claim with a permissible "effect on foreign affairs," a court "must conduct 'a discriminating analysis of the particular question posed' in the 'specific case.'" El-Shifa, 607 F.3d at 841 (quoting Baker, 369 U.S. at 211).

Judicial resolution of the "particular questions" posed by plaintiff in this case would require this Court to decide: (1) the precise nature and extent of Anwar Al-Aulaqi's affiliation with AQAP; (2) whether AQAP and al Qaeda are so closely linked that the defendants' targeted killing of Anwar Al-Aulaqi in Yemen would come within the United States's current armed conflict with al Qaeda; (3) whether (assuming plaintiff's proffered legal standard applies) Anwar

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[13] Indeed, since Baker, the Supreme Court has only sustained a political question claim twice. See Walter Nixon v. United States, 506 U.S. 224 (1993); Gilligan v. Morgan, 413 U.S. 1 (1973).

Al-Aulaqi's alleged terrorist activity renders him a "concrete, specific, and imminent threat to life or physical safety," see Compl., Prayer for Relief (c); and (4) whether there are "means short of lethal force" that the United States could "reasonably" employ to address any threat that Anwar Al-Aulaqi poses to U.S. national security interests, see id. Such determinations, in turn, would require this Court, in defendants' view, to understand and assess "the capabilities of the [alleged] terrorist operative to carry out a threatened attack, what response would be sufficient to address that threat, possible diplomatic considerations that may bear on such responses, the vulnerability of potential targets that the [alleged] terrorist[] may strike, the availability of military and non-military options, and the risks to military and nonmilitary personnel in attempting application of non-lethal force." Defs.' Mem. at 26; see also Mot. Hr'g Tr. 38:6-14. Viewed through these prisms, it becomes clear that plaintiff's claims pose precisely the types of complex policy questions that the D.C. Circuit has historically held non-justiciable under the political question doctrine.

Most recently, in El-Shifa v. United States the D.C. Circuit examined whether the political question doctrine barred judicial resolution of claims by owners of a Sudanese pharmaceutical plant who brought suit seeking to recover damages after their plant was destroyed by an American cruise missile. President Clinton had ordered the missile strike in light of intelligence indicating that the plant was "'associated with the [Osama] bin Ladin network' and 'involved in the production of materials for chemical weapons.'" El-Shifa, 607 F.3d at 838 (internal citation omitted). The plaintiffs maintained that the U.S. government had been negligent in determining that the plant was tied "to chemical weapons and Osama bin Laden," and therefore sought "a declaration that the government's failure to compensate them for the

destruction of the plant violated customary international law, a declaration that statements government officials made about them were defamatory, and an injunction requiring the government to retract those statements." Id. at 840. Dismissing the plaintiffs' claims as non-justiciable under the political question doctrine, the D.C. Circuit explained that "[i]n military matters . . . the courts lack the competence to assess the strategic decision to employ force or to create standards to determine whether the use of force was justified or well-founded." Id. at 844. Rather than endeavor to resolve questions beyond the Judiciary's institutional competence, the court held that "[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." Id.

Here, plaintiff asks this Court to do exactly what the D.C. Circuit forbid in El-Shifa -- assess the merits of the President's (alleged) decision to launch an attack on a foreign target. Although the "foreign target" happens to be a U.S. citizen, the same reasons that counseled against judicial resolution of the plaintiffs' claims in El-Shifa apply with equal force here. Just as in El-Shifa, any judicial determination as to the propriety of a military attack on Anwar Al-Aulaqi would "'require this court to elucidate the . . . standards that are to guide a President when he evaluates the veracity of military intelligence.'" Id. at 846 (quoting El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1365 (Fed. Cir. 2004)). Indeed, that is just what plaintiff has asked this Court to do. See Compl., Prayer for Relief (d) (requesting that the Court order the defendants to "disclose the criteria used in determining whether the government will carry out the targeted killing of a U.S. citizen"). But there are no judicially manageable standards by which courts can endeavor to assess the President's interpretation of military intelligence and his

resulting decision -- based on that intelligence -- whether to use military force against a terrorist target overseas. See El-Shifa, 378 F.3d at 1367 n. 6 (expressing the view 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"). Nor are there judicially manageable standards by which courts may determine the nature and magnitude of the national security threat posed by a particular individual. In fact, the D.C. Circuit has expressly held that the question whether an organization's alleged "terrorist activity" threatens "the national security of the United States" is "nonjusticiable." People's Mohahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 23 (D.C. Cir. 1999). Given that courts may not undertake to assess whether a particular organization's alleged terrorist activities threaten national security, it would seem axiomatic that courts must also decline to assess whether a particular individual's alleged terrorist activities threaten national security. But absent such a judicial determination as to the nature and extent of the alleged national security threat that Anwar Al-Aulaqi poses to the United States, this Court cannot possibly determine whether the government's alleged use of lethal force against Anwar Al-Aulaqi would be "justified or well-founded." See El-Shifa, 607 F.3d at 844. Thus, the second Baker factor -- a "lack of judicially discoverable and manageable standards" for resolving the dispute -- strongly counsels against judicial review of plaintiff's claims.

The type of relief that plaintiff seeks only underscores the impropriety of judicial review here. Plaintiff requests both a declaration setting forth the standard under which the United States can select individuals for targeted killing as well as an injunction prohibiting defendants

from intentionally killing Anwar Al-Aulaqi unless he meets that standard -- i.e., unless he "presents a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat." Compl., Prayer for Relief (a), (c). Yet plaintiff concedes that the "'imminence' requirement" of his proffered legal standard would render any "real-time judicial review" of targeting decisions "infeasible," Pl.'s Opp. at 17, 30, and he therefore urges this Court to issue his requested preliminary injunction and then enforce the injunction "through an after-the-fact contempt motion or an after-the-fact damages action." Id. at 17-18. But as the D.C. Circuit has explained, "[i]t is not the role of judges to second-guess, with the benefit of hindsight, another branch's determination that the interests of the United States call for military action." El-Shifa, 607 F.3d at 844. Such military determinations are textually committed to the political branches. See Schneider, 412 F.3d at 194-95 (explaining that "Article I, Section 8 of the Constitution . . . is richly laden with the delegation of foreign policy and national security powers to Congress," while "Article II likewise provides allocation of foreign relations and national security powers to the President, the unitary chief executive" and Commander in Chief of the Army and Navy). Moreover, any post hoc judicial assessment as to the propriety of the Executive's decision to employ military force abroad "would be anathema to . . . separation of powers" principles. See El-Shifa, 607 F.3d at 845. The first, fourth, and sixth Baker factors thus all militate against judicial review of plaintiffs' claims, since there is a "textually demonstrable constitutional commitment" of the United States's decision to employ military force to coordinate political departments (Congress and the Executive), and any after-the-fact judicial review of the Executive's decision to employ military force abroad would reveal a "lack of respect due

coordinate branches of government" and create "the potentiality of embarrassment of multifarious pronouncements by various departments on one question." Baker, 369 U.S. at 217.

The mere fact that the "foreign target" of military action in this case is an individual -- rather than alleged enemy property -- does not distinguish plaintiff's claims from those raised in El-Shifa for purposes of the political question doctrine. The D.C. Circuit has on several occasions dismissed claims on political question grounds where resolution of those claims would require a judicial determination as to the propriety of the use of force by U.S. officials against a specific individual abroad. For example, the court in Harbury v. Hayden dismissed as non-justiciable the claims of an American widow who alleged that her husband -- a Guatemalan rebel fighter -- had been tortured and killed by Guatemalan army officers working in conjunction with the CIA in Guatemala. See 522 F.3d at 415. Notwithstanding the plaintiff's contention that "U.S. officials were responsible for physically abusing and killing" her husband, the D.C. Circuit concluded that "the political question doctrine plainly applies to this case." Id. at 420.

Similarly, in Schneider v. Kissinger, the D.C. Circuit deemed non-justiciable the claims raised by the decedents of a Chilean general, who alleged that the United States had caused the general's kidnaping, torture, and death in furtherance of its Cold War efforts to overthrow the leftist Chilean leader Salvador Allende. 412 F.3d at 191-92. As the Schneider court explained, "in order to determine whether the covert operations which allegedly led to the tragic death of [the general] were wrongful," it would first need to determine "whether, 35 years ago, at the height of the Cold War . . . 'it was proper for an Executive Branch official . . . to support covert actions against' a committed Marxist who was set to take power in a Latin American country." Id. at 196-97 (internal citation omitted). The court conceded that it may have been a "drastic

measure" for the United States to ally itself with "dissidents in another country to kidnap a national of that country," but nonetheless concluded that any determination as to "whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking." Id. at 197. Because there were no judicially "discoverable and manageable standards for the resolution" of the plaintiffs' claims, the court dismissed the case as posing a non-justiciable political question. See id.; see also Gonzalez-Vera, 449 F.3d at 1264 (holding non-justiciable claims alleging that Henry Kissinger and other U.S. executive officials cooperated with Chilean dictator Augusto Pinochet to commit human rights abuses in Chile, since "[w]hatever Kissinger did as National Security Advisor or Secretary of State 'can hardly be called anything other than foreign policy'") (internal citation omitted); Bancoult, 445 F.3d at 436 (dismissing claims by former residents of the Chagos Archipelago, who alleged that the United States had caused the forcible relocation and killing of island residents in the 1960s in order to establish a military base on the island, on the ground that the "specific tactical measures" employed by the United States in depopulating the island were "inextricably intertwined with the underlying strategy of establishing a regional military presence" -- an unreviewable political question).

Plaintiff's claim is distinguishable from those asserted in these cases in only one meaningful respect: Anwar Al-Aulaqi -- unlike the Guatemalan rebel fighter in Harbury, the Chilean general in Schneider, the other Chileans in Gonzalez-Vera, or the Chagos Archipelago inhabitants in Bancoult -- is a U.S. citizen. The significance of Anwar Al-Aulaqi's U.S. citizenship is not lost on this Court. Indeed, it does not appear that any court has ever -- on political question doctrine grounds -- refused to hear a U.S. citizen's claim that his personal

constitutional rights have been violated as a result of U.S. government action taken abroad.

Nevertheless, there is inadequate reason to conclude that Anwar Al-Aulaqi's U.S. citizenship -- standing alone -- renders the political question doctrine inapplicable to plaintiff's claims. Plaintiff cites two contexts in which courts have found claims asserting violations of U.S. citizens' constitutional rights to be justiciable despite the fact that those claims implicate grave national security and foreign policy concerns. See Pl.'s Opp. at 22-23, 25-27. Courts have been willing to entertain habeas petitions from U.S. citizens detained by the United States as enemy combatants, see, e.g., Hamdi, 542 U.S. at 509, and they have also heard claims from U.S. citizens alleging unconstitutional takings of their property by the U.S. military abroad, see, e.g., Ramirez de Arellano, 745 F.2d at 1511-12. But habeas petitions and takings claims are both much more amenable to judicial resolution than the claims raised by plaintiff in this case.

Courts have been willing to hear habeas petitions (from both U.S. citizens and aliens) because "the Constitution specifically contemplates a judicial role" for claims by individuals challenging their detention by the Executive. See El-Shifa, 607 F.3d at 848-49; see also Boumediene v. Bush, 553 U.S. 723, 745 (2008) (explaining that the Suspension Clause "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account"). While the Suspension Clause reflects a "textually demonstrable commitment" of habeas corpus claims to the Judiciary, see Baker, 369 U.S. at 217, there is no "constitutional commitment to the courts for review of a military decision to launch a missile at a foreign target," El-Shifa, 607 F.3d at 849. Indeed, such military decisions are textually committed not to the Judiciary, but to the political branches. See Schneider, 412 F.3d at 194-96. Moreover, the resolution of habeas petitions does not require expertise beyond the purview of the Judiciary.

Although plaintiff is correct to point out that habeas cases involving Guantanamo detainees often involve judicial scrutiny of highly sensitive military and intelligence information, see Mot. Hr'g Tr. 54:7-10, 83:24-84:1, such information is only used to determine whether "the United States has unjustly deprived an American citizen of liberty through acts it has already taken." Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 65 (D.D.C. 2004); see also Defs.' Mem. at 31. These post hoc determinations are "precisely what courts are accustomed to assessing." Abu Ali, 350 F. Supp. 2d at 65. But courts are certainly not accustomed to assessing claims like those raised by plaintiff here, which seek to prevent future U.S. military action in the name of national security against specifically contemplated targets by the imposition of judicially-prescribed legal standards enforced through "after-the-fact contempt motion[s]" or "after-the-fact damages action[s]." See Pl.'s Opp. at 17-18. Hence, the Baker factors dictate a different outcome for plaintiff's claims than for habeas petitions filed by detainees at Guantanamo Bay.

Plaintiff's claims are also fundamentally distinct from those in which U.S. citizens have been permitted to sue the United States for alleged unconstitutional takings of their property by the U.S. military abroad. In Ramirez de Arellano, the D.C. Circuit declined to dismiss as non-justiciable the claims brought by U.S. citizens who asserted that the U.S. military had unlawfully expropriated their cattle ranch in Honduras in violation of the Fifth Amendment. 745 F.2d at 1511-12. The D.C. Circuit, ruling en banc, explained that the plaintiffs' claims did not constitute a challenge "to the United States military presence in Honduras" but instead were "narrowly focused on the lawfulness of the United States defendants' occupation and use of the plaintiffs' cattle ranch." Id. at 1512. Once the court characterized the case as a land dispute between the plaintiffs and the U.S. government, it had little difficulty concluding that "adjudication of the

defendants' constitutional authority to occupy and use the plaintiffs' property" did not require "expertise beyond the capacity of the Judiciary" or "unquestioning adherence to a political decision by the Executive." See id. at 1513, 1514; see also Comm. of U.S. Citizens Living in Nicaragua, 859 F.2d at 934-35 (finding justiciable the Fifth Amendment claims raised by U.S. citizens living in Nicaragua, who alleged that the United States's funding of the Contras in Nicaragua deprived them of their liberty and property without due process by making them "targets of the Contra 'resistance,'" but ultimately declining to hear the plaintiffs' claims since there was "no allegation that the United States itself has participated in or in any way sought to encourage injuries to Americans in Nicaragua").

Unlike Ramirez, the questions posed in this case do require both "expertise beyond the capacity of the Judiciary" and the need for "unquestioning adherence to a political decision by the Executive." Here, plaintiff asks the Judiciary to limit the circumstances under which the United States may employ lethal force against an individual abroad whom the Executive has determined "plays an operational role in AQAP planning terrorist attacks against the United States." Defs.' Mem. at 36; see also Clapper Decl. ¶¶ 13-17. The injunctive and declaratory relief sought by plaintiff would thus be vastly more intrusive upon the powers of the Executive than the relief sought in Ramirez, where the court was only called upon to adjudicate "the defendants' constitutional authority to occupy and use the plaintiffs' property." Ramirez, 745 F.2d at 1513. Moreover, although resolution of the plaintiffs' claims in Ramirez only required "interpretations of the Constitution and of federal statutes," which are "quintessential tasks of the federal Judiciary," see id., resolution of the claims in this case would require assessment of "strategic choices directing the nation's foreign affairs [that] are constitutionally committed to the political

branches," El-Shifa, 607 F.3d at 843.

To be sure, this Court recognizes the somewhat unsettling nature of its conclusion -- that there are circumstances in which the Executive's unilateral decision to kill a U.S. citizen overseas is "constitutionally committed to the political branches" and judicially unreviewable. But this case squarely presents such a circumstance. The political question doctrine requires courts to engage in a fact-specific analysis of the "particular question" posed by a specific case, see El-Shifa, 607 F.3d at 841 (quoting Baker, 369 U.S. at 211), and the doctrine does not contain any "carve-out" for cases involving the constitutional rights of U.S. citizens. While it may be true that "the political question doctrine wanes" where the constitutional rights of U.S. citizens are at stake, Abu Ali, 350 F. Supp. at 64, it does not become inapposite. Indeed, in one of the only two cases since Baker v. Carr in which the Supreme Court has dismissed a case on political question grounds, the plaintiffs were U.S. citizens alleging violations of their constitutional rights. See Gilligan v. Morgan, 413 U.S. 1, 3 (1973).

In Gilligan, students at Kent State University brought suit in the wake of the "Kent State massacre," seeking declaratory and injunctive relief that would prohibit the Ohio Governor from "prematurely ordering National Guard troops to duty in civil disorders" and "restrain leaders of the National Guard from future violation of the students' constitutional rights." Id. According to the Court, the plaintiffs were, in essence, asking for "initial judicial review and continuing surveillance by a federal court over the training, weaponry, and orders of the Guard." Id. at 6. Dismissing the plaintiffs' claims as presenting non-justiciable political questions,[14] the Court

[14] The precise scope of the Court's holding in Gilligan is not entirely clear. Although the Court noted that "the questions to be resolved . . . are subjects committed expressly to the political branches of government," it went on to state that "[t]hese factors, when coupled with the

noted that "[i]t would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches." Id. at 10. As the Court explained, the Judiciary lacks the "competence" to make "complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force," and "[t]he ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability." Id.

So, too, does the Constitution place responsibility for the military decisions at issue in this case "in the hands of those who are best positioned and most politically accountable for making them." Hamdi, 542 U.S. at 531; see also Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) (explaining that "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative - 'the political' - departments of the government, and the propriety of what may be done in the exercise of this power is not subject to judicial inquiry or decision"). "Judges, deficient in military knowledge . . . and sitting thousands of miles away from the field of action, cannot reasonably or appropriately determine" if a specific military operation is necessary or wise. DaCosta, 471 F.2d at 1155. Whether the alleged "terrorist activities" of an individual so threaten the national security of the United States as to warrant that military action be taken against that individual is a "political judgment[]. . . [which] belong[s] in the domain of political power not subject to judicial intrusion or inquiry." El-Shifa, 607 F.3d at 843 (internal quotation marks and citations omitted).

Contrary to plaintiff's assertion, in holding that the political question doctrine bars

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uncertainties as to whether a live controversy still exists and the infirmity of the posture of respondents as to standing, render the claim . . . nonjusticiable." 413 U.S. at 10.

plaintiff's claims, this Court does not hold that the Executive possesses "unreviewable authority to order the assassination of any American whom he labels an enemy of the state." See Mot. Hr'g Tr. 118:1-2. Rather, the Court only concludes that it lacks the capacity to determine whether a specific individual in hiding overseas, whom the Director of National Intelligence has stated is an "operational" member of AQAP, see Clapper Decl. ¶ 15, presents such a threat to national security that the United States may authorize the use of lethal force against him. This Court readily acknowledges that it is a "drastic measure" for the United States to employ lethal force against one of its own citizens abroad, even if that citizen is currently playing an operational role in a "terrorist group that has claimed responsibility for numerous attacks against Saudi, Korean, Yemeni, and U.S. targets since January 2009," id. ¶ 13. But as the D.C. Circuit explained in Schneider, a determination as to whether "drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking." 412 F.3d at 197. Because decision-making in the realm of military and foreign affairs is textually committed to the political branches, and because courts are functionally ill-equipped to make the types of complex policy judgments that would be required to adjudicate the merits of plaintiff's claims, the Court finds that the political question doctrine bars judicial resolution of this case.

IV. The Military and State Secrets Privilege

Defendants invoke the military and state secrets privilege as the final basis for dismissal of plaintiff's complaint. The state secrets privilege is premised on the recognition that "in exceptional circumstances courts must act in the interest of the country's national security to prevent disclosure of state secrets, even to the point of dismissing a case entirely." See Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077 (9th Cir. 2010) (en banc) (citing

Totten v. United States, 92 U.S. 105, 107 (1876)); see also United States v. Reynolds, 345 U.S. 1, 7-8 (1953). As the Ninth Circuit has recently explained, "contemporary state secrets doctrine encompasses two applications of this principle. One completely bars adjudication of claims premised on state secrets (the 'Totten bar'); the other is an evidentiary privilege ('the Reynolds privilege') that excludes privileged evidence from the case and *may* result in dismissal of the claims." Jeppesen Dataplan, 614 F.3d at 1077 (emphasis in original).

The Totten bar only applies "'where the very subject matter of the action' is [itself] 'a matter of state secret.'" Id. (quoting Reynolds, 345 U.S. at 11 n.26). In contrast, successful invocation of the Reynolds privilege "remove[s] the privileged evidence from the litigation," but does not necessarily require the plaintiffs' claims to be dismissed. Id. at 1079. Nevertheless, in some instances, "the Reynolds privilege converges with the Totten bar," id. at 1083, and then "the assertion of the privilege will require dismissal because it will become apparent during the Reynolds analysis that the case cannot proceed without privileged evidence, or that litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets," id. at 1079.

Here, defendants do not argue that the very subject matter of this case is itself a "state secret." See Mot. Hr'g Tr. 12:9-12. Rather, they contend that this case is one in which the "Reynolds privilege converges with the Totten bar," because "specific categories of information properly protected against disclosure by the privilege would be necessary to litigate each of plaintiff's claims." Defs.' Mem. at 43; see also Defs.' Reply at 23.[15] Defendants correctly note

[15] In support of their state secrets assertion, defendants have provided brief public and lengthy classified declarations from the Director of National Intelligence, the Secretary of Defense, and the Director of the CIA, all of which this Court has very carefully reviewed. Of

that the privilege protects information from disclosure "where there is a reasonable danger that disclosure would 'expose military matters which, in the interests of national security, should not be divulged.'" Defs.' Mem. at 46 (quoting Reynolds, 345 U.S. at 10). They argue that "where 'the claims and possible defenses are so infused with state secrets that the risk of disclosing them is both apparent and inevitable,' dismissal is required." Id. at 52 (quoting Jeppesen Dataplan, 614 F.3d at 1089). And here, according to defendants, that is most certainly the case because

> [i]n unclassified terms, [the disclosure harmful to national security] includes information needed to address whether or not, or under what circumstances, the United States may target a particular foreign terrorist organization and its senior leadership, the specific threat posed by al-Qaeda, AQAP, or Anwar al-Aulaqi, and other matters that plaintiff has put at issue, including any criteria governing the use of lethal force.

Defs.' Reply at 24; see also Defs.' Mem. at 48-49.

But defendants also correctly and forcefully observe that this Court need not, and should not, reach their claim of state secrets privilege because the case can be resolved on the other grounds they have presented. It is certainly true that the state secrets privilege should be "invoked no more often or extensively than necessary." Jeppesen Dataplan, 614 F.3d at 1080. Indeed, last year the Attorney General promulgated a policy confirming that the state secrets privilege will only be invoked in limited circumstances involving a significant risk of harm to national security and after detailed procedures are followed (including personal approval of the Attorney General). See Defs.' Mem., Ex. 2. And here, defendants have confirmed that the privilege has been invoked only after that careful review and adherence to the mandated

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course, a court must engage in such a careful, independent review before sustaining an invocation of the state secrets privilege. See Jeppesen Dataplan, 614 F.3d at 1086.

procedures under the Attorney General's policy. See Defs.' Mem. at 44.[16]

Under the circumstances, and particularly given both the extraordinary nature of this case and the other clear grounds for resolving it, the Court will not reach defendants' state secrets privilege claim. That is consistent with the request of the Executive Branch and with the law, and plaintiff does not contest that approach. Indeed, given the nature of the state secrets assessment here based on careful judicial review of classified submissions to which neither plaintiff nor his counsel have access, there is little that plaintiff can offer with respect to this issue.[17] But in any event, because plaintiff lacks standing and his claims are non-justiciable, and because the state secrets privilege should not be invoked "more often or extensively than necessary," see Jeppesen Dataplan, 614 F.3d at 1080, this Court will not reach defendants' invocation of the state secrets privilege.

CONCLUSION

For the foregoing reasons, the Court will grant defendants' motion to dismiss. A separate order has been filed on this date.

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[16] So, too, defendants have established that the three procedural requirements for invocation of the state secrets privilege -- (1) a formal claim of privilege (2) by an appropriate department head (3) after personal consideration -- have been satisfied here. See Reynolds, 345 U.S. at 7-8; Jeppesen Dataplan, 614 F.3d at 1080; Defs.' Mem. at 48-50.

[17] Plaintiff's contention that media speculation and public disclosures concerning Anwar Al-Aulaqi undercut the state secrets privilege assertion is not persuasive. Partial disclosure of some aspects of the relevant subject matter does not warrant disclosure of other information that risks serious harm to the national security. Jeppesen Dataplan, 614 F.3d at 1090. Nor does "media and public speculation" preclude assertion of the state secrets privilege where "official acknowledgment" would damage national security. Afshar v. Dep't of State, 702 F.2d 1125, 1130-31 (D.C. Cir. 1983).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI, on his own behalf and as next friend acting on behalf of ANWAR AL-AULAQI Plaintiff, v. BARACK H. OBAMA, President of the United States; ROBERT M. GATES, Secretary of Defense; and LEON E. PANETTA, Director of the Central Intelligence Agency, Defendants.	Civ. A. No. 10-cv-1469 (JDB)

DEFENDANTS' MOTION TO DISMISS

Defendants Barack H. Obama, President of the United States, Leon E. Panetta, Director of the Central Intelligence, and Robert M. Gates, Secretary of Defense, hereby move to dismiss Plaintiff's complaint, pursuant to Federal Rule of Civil Procedure 12(b)(1), on the grounds that Plaintiff lacks standing and that his claims require the Court to decide non-justiciable political questions. Alternatively, the Court should exercise its equitable discretion not to grant the relief sought. In addition, Plaintiff has no cause of action under the Alien Tort Statute.

To the extent that the foregoing are not sufficient grounds to dismiss this lawsuit, plaintiff's action should be dismissed on the ground that information properly protected by the military and state secrets privilege would be necessary to litigate this action.

Date: September 24, 2010

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Assistant Attorney General, Civil Division

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United States Attorney

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI, on his own behalf and as next friend of Anwar Al-Aulaqi,

Plaintiff,

v.

BARACK H. OBAMA, in his official capacity as President of the United States; ROBERT M. GATES, in his official capacity as Secretary of Defense; and LEON E. PANETTA, in his official capacity as Director of the Central Intelligence Agency,

Defendants.

Civil Action No. 10-1469 (JDB)

ORDER

Upon consideration of [3] plaintiff's motion for a preliminary injunction, [15] defendants' motion to dismiss, the parties' and amici's memoranda, and the entire record herein, and for the reasons stated in the Memorandum Opinion issued on this date, it is hereby

ORDERED that [15] defendants' motion to dismiss is **GRANTED**; and it is further

ORDERED that [3] plaintiff's motion for a preliminary injunction is **DENIED** as moot.

SO ORDERED.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

Date: December 7, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI, Plaintiff, v. BARACK H. OBAMA, *et al.*, Defendants.	No. 10-cv- _____

DECLARATION OF DR. NASSER AL-AULAQI

I, Dr. Nasser Al-Aulaqi, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am the Plaintiff in the above-captioned case. I act on my own behalf and as next friend to my son, Anwar Al-Aulaqi, a citizen of the United States.

2. I am a citizen of Yemen and reside in Yemen with my wife, an American citizen, and my family.

3. I came to the United States in 1966 on a Fulbright scholarship to study at New Mexico State University. I lived in the United States for the next 12 years, until 1978, when my family and I moved back to Yemen. After returning to Yemen, I served as Minister of Agriculture and Fisheries in the Government of Yemen. I later founded and served as president of Ibb University and then served as president of Sana'a University. I am currently a Professor of Economics at Sana'a University.

4. My son Anwar was born in the United States in 1971 in New Mexico during my studies there. He went back to the United States in 1991 when he was ready to go to college. He received his bachelor's degree from Colorado State University, went on to

obtain his master's degree from San Diego State University, and later enrolled in a Ph.D. program at George Washington University, which he attended through December 2001. He married and had three children while living in the United States. In 2003, he moved to the United Kingdom and, in 2004, he moved to Yemen.

5. It is my understanding that my son has been authorized for killing by the United States and is actively being targeted by the CIA and the U.S. military.

6. I learned of the United States' authorization to kill my son through numerous news reports of U.S. officials stating that he has been added to government "kill lists." I have also heard and read statements from U.S. officials referring to my son as a threat to the United States and confirming that he is being pursued. In January 2010, after published reports of my son's addition to the U.S. military's kill list, I wrote a letter to President Obama asking him to cease the targeting of my son.

7. News reports have indicated that the United States has deployed armed drones over Yemen, ready to attack my son "at a moment's notice" if the military receives credible intelligence about his whereabouts. I myself have seen these drones flying overhead in Yemen. The media has reported that my son has already been the subject of several unsuccessful strikes.

8. My son is currently in hiding in Yemen. He has been in hiding continuously since at least January 2010, when the United States' intention to kill him became clear.

9. Since the time my son went into hiding, neither I nor any of my family members have had any contact or communication with him. Anyone attempting to meet or communicate with him would place his or her life and safety in jeopardy because of my son's targeting by the United States.

10. Because the U.S. government is seeking to kill my son, as reported, he cannot access legal assistance or a court without risking his life.

11. As Anwar's father, I only want to do what is in his best interests. I believe taking legal action to stop the United States from killing him is in his best interests.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on August 28, 2010

N. a. Aulaqi

Dr. Nasser Al-Aulaqi

Benjamin Remarks

Federal News Service

September 8, 2010 Wednesday

STATE DEPARTMENT BRIEFING

8801 words

REMARKS BY STATE DEPARTMENT COUNTERTERRORISM COORDINATOR DANIEL BENJAMIN TO THE U.S. INSTITUTE OF PEACE;
SUBJECT: U.S. COUNTERTERRORISM STRATEGY IN YEMEN MODERATOR: STEVEN HEYDEMANN, VICE PRESIDENT OF THE USIP'S GRANT AND FELLOWSHIP PROGRAM;
LOCATION: U.S. INSTITUTE OF PEACE, WASHINGTON, D.C.

REMARKS BY STATE DEPARTMENT COUNTERTERRORISM COORDINATOR DANIEL BENJAMIN TO THE U.S. INSTITUTE OF PEACE SUBJECT: U.S. COUNTERTERRORISM STRATEGY IN YEMEN MODERATOR: STEVEN HEYDEMANN, VICE PRESIDENT OF THE USIP'S GRANT AND FELLOWSHIP PROGRAM LOCATION: U.S. INSTITUTE OF PEACE, WASHINGTON, D.C. TIME: 11:00 A.M. EDT DATE: WEDNESDAY, SEPTEMBER 8, 2010

MR. HEYDEMANN: Welcome, everybody, and thank you very much for joining us this morning for this event on counterterrorism in Yemen.

It will not come as a surprise to anyone in this room that Yemen has become an increasingly visible security challenge for the United States over the past year. That is, in large part, because of its status as a weakly governed country, one in which al Qaeda is seeming to gain some momentum.

The one response to this has been increased attention to Yemen from the media, where we have seen all kinds of speculation about Yemen's future, including the possibility that Yemen is poised to become the next Afghanistan, a failed state. And we have also seen an increased response from the U.S. government, which has made counterterrorism one of the pivots of its engagement with Yemen and one of the central elements of its overall policy with Yemen more broadly.

Now, whether counterterrorism should be the pivot of U.S. policy in Yemen, and, if it is, what kind of counterterrorism policy is most appropriate for a country like Yemen, which faces quite an extraordinary range of challenges and where, by all accounts, or by many accounts, the numbers of al Qaeda in the country remain relatively low, are very important questions for U.S. policymakers and the reason why the Yemen Working Group at the U.S. Institute of Peace, which I direct -- I'm Steve Heydemann -- decided to focus our session this morning on the question of counterterrorism in U.S. policy in Yemen, and as a component of U.S. policy more broadly toward Yemen.

And I can literally think of no one more qualified to address the subject of counterterrorism in Yemen than our speaker today, Ambassador Daniel Benjamin, who is the State Department's coordinator for counterterrorism.

Counterterrorism is a subject that Ambassador Benjamin has focused on for much of the past 20

decades in a variety of different capacities -- not 20 -- two decades, 20 years. Excuse me. (Laughter.) You're very well preserved. Two decades. Two decades.

As a journalist, he has written two books on the subject. He has held a variety of senior positions relating to counterterrorism, both in and out of government, as a member of the staff of the National Security Council, as a foreign-policy speechwriter and advisor to President Clinton, as director of counterterrorism in the Office of Transnational Threats. So this is a specialist on counterterrorism, I think, without peer in Washington and in the U.S. government. And we're delighted to have him here to comment on where counterterrorism fits in U.S. policy toward Yemen.

I'm also especially pleased to have Ambassador Benjamin here because among his many impressive accomplishments is his tenure as a former USIP senior fellow. Ambassador Benjamin spent 2000 here as a Jennings Randolph fellow.

We're always particularly pleased to welcome our alumni back to USIP, especially after they have made good. And so please welcome Ambassador Benjamin.

MR. BENJAMIN: Well, thank you very much, Steve, for that kind introduction and for clearly designating me as the Methuselah of CT specialists. However, I'll return to my regular age now, if you don't mind. (Laughter.)

Anyway, it's a great pleasure to be at USIP again; always a pleasure to be in this room. I want to thank you and the institute's Yemen Working Group for the invitation. I'm delighted to see colleagues who I think would have every bit as much to contribute to the subject; right in the front row, Ambassador Barbara Bodine, who was one of my predecessors, as well as ambassador in Yemen, and Ambassador Steve Krajeski. There are many other people here, I'm sure, who could say just as much of value.

Let me say it's also a particular pleasure to be at the institute because of the role it played in my career, which you mentioned. It gave me a home after I left the NSC at the end of 1999. That was really a critical opportunity for me to work through some of the ideas that I was developing about why al Qaeda and its brand of terror was distinctive from what we had seen before, and it really was an extraordinarily valuable experience for which I will always be grateful.

I also want to say that, working where I do now, I see your new building quite frequently. It's extraordinarily beautiful. We very much look forward to having you in the neighborhood and having even more convenient conversations like this. So I hope you'll be kind enough to invite me to recapitulate this speech there.

I'm sure many of you saw the recent Washington Post story claiming that government officials now rank al Qaeda in the Arabian Peninsula, and specifically in Yemen, as the most urgent threat to United States security; even a greater threat than the al Qaeda core in Pakistan.

Let me just say for the record that we have no such rankings, and such statements are of little value except to highlight a threat. Terrorism emanating from Yemen is a major security concern for the United States, but the al Qaeda core in Pakistan remains an extraordinarily formidable and dangerous terrorist organization whose targeting of the United States continues despite the pressure that the group is under in the Federally Administered Tribal Areas.

As we've seen over the last year, though, I think it's also important to note that the threat, the terrorist threat, continues to evolve in ways that make a purely geographical focus less and less important. So we need to put away the ranking tables and turn our attention specifically to the danger and the nature of the threat.

Let me also make clear what many of you and certainly Ambassador Bodine knows very, very well: Yemen isn't a new security concern. Al Qaeda has had a presence in Yemen since at least

December of 1992, when it carried out what was probably the first of al Qaeda's attacks when it attempted to bomb in a hotel in Aden where American personnel were staying.
Those troops, you may recall, were en route to Somalia to support the U.N. mission there. This was almost eight years before the bombing of the USS Cole. Al Qaeda has really always had a foothold in Yemen and it has always been a major concern in the United States; always, that is to say, as long as there's been an al Qaeda.
In the 1990s, a series of major conspiracies were based in Yemen, most of them aimed at Saudi Arabia. Following the attack on the Cole, the Yemeni government, with support from the United States, dealt significant blows to al Qaeda in Yemen through military operations and the arrests of key leaders.
What is important today is that the December 25th conspiracy demonstrated that at least one al Qaeda affiliate, AQAP, has developed not just the desire but also the capability to launch strikes against the United States in the homeland.
The gravity of the AQAP threat was clear to the Obama administration from day one, and it has been focused on Yemen since the outset. In the spring of 2009, the administration initiated a full-scale review of our Yemen policy. That review led to a new whole-of-government approach to Yemen that aims to coordinate our counterterrorism efforts, as well as our non-counterterrorism efforts, with those of other international actors.
Our new strategy seeks to address the root causes of instability and to improve governance. And central to this approach is building the capacity of Yemen's government to exercise its authority and deliver security and services to its people.
To advance this strategy, we've engaged consistently and intensively with our Yemeni counterparts -- at the highest levels, I might add. Senior administration civilian and military officials, including Deputy National Security Advisor John Brennan, Assistant Secretary of State for Near Eastern Affairs Jeff Feltman, Assistant Secretary -- I'm sorry -- former CENTCOM Commander David Petraeus and myself have all visited Yemen to discuss how we can jointly confront the threat of al Qaeda.
We've put an unprecedented priority on Yemeni issues and continue to engage with a broad array of Yemenis from the government and from civil society. Recently, as many of you know, the National Defense University hosted a group of Yemeni officials for two weeks. And I can tell you that an unprecedented number of senior representatives from numerous U.S. agencies met with the group while they were here. I actually met with them twice. And just last week, I met again with representatives from a Yemeni human rights organization.
I've seen a lot of press pieces and think-tank papers that discuss the need to deal with AQAP, not just through security means, but through a wide range of other efforts. What I haven't seen yet is much discussion of how we're doing just that.
Of course we're working on the security issues. We would be negligent in our responsibilities to the American public if we were not. However, we're also putting significant effort and resources into helping Yemenis achieve a more stable, peaceful, prosperous and democratic Yemen. So are our other bilateral and multilateral players. And we're also working to find ways to improve these efforts. But they are real and they should be recognized.
Yemen's future is tied to its neighbors and to others in the global community. I already mentioned AQAP's ambition to strike the United States at home. Within the Gulf, AQAP has already shown itself to be a formidable threat to Yemen itself, with many recent attacks on security services throughout the country.
And it continues to target Saudi Arabia, including the attempted attack against the assistant

minister of the interior and counterterrorism chief, Prince Mohammed bin Nayef.
While terrorism knows no borders, we must also be mindful of the regional dimension of the AQAP threat including its ties with Somalia. The large refugee population from Somalia amplifies the historic ties between these two states, and we know that the vast majority of these connections are not related to terrorism but rather are a matter of economic migration or Somali refugees fleeing political strife. But clearly, there are connections across the Gulf of Aden between extremists, and they are a concern.
Yes, Somalia's al-Shabaab is a different kind of organization from AQAP in Yemen in many ways. It's much more focused on a Somalia- centered agenda while AQAP continues to pursue a more classical al Qaeda course of global terrorism.
Even so, we see a serious threat to regional stability in the connections between these groups, and that gives greater urgency to our work against AQAP and to support the constructive forces in moderation and peace in Somalia.
What is critical today is that the government of Yemen is fully aware of the threat emanating from AQAP. It has conducted multiple operations designed to disrupt AQAP's planning and deprive its leadership of safe haven within Yemeni territory. These security operations may over time weaken the enemy's leadership and deny it the time and space it needs to organize, plan and train for operations.
At the same time, countering violent extremism in Yemen over the long term must involve the development of credible institutions that can deliver real economic and social progress.
That's why our strategy in Yemen is twofold: to assist the Yemeni government not only to confront the immediate security concern of AQAP but also to mitigate the serious political, economic and governance issues that the country faces.
The logic behind this strategy is that while we work with the Yemeni government to constrain and dismantle AQAP, we, along with the international community, will also assist the Yemeni people to build more durable and responsive institutions. Our goal is a more hopeful future and a more capable Yemeni government that will meet more of the needs of its people -- a good in itself, but also key for reducing the appeal of violent extremism.
In fact, the United States has made capacity building one of the cornerstones of our Yemen policy. In the important areas of security, economic development and governance, the U.S. and its international partners are helping the Yemeni government address the state insufficiencies that are exploited by terrorists.
As I mentioned, the United States isn't doing this alone. The international community has been active in helping Yemen address its shortcomings, and our efforts in the country are part of a global partnership to enhance security and improve governance.
We're working with all of Yemen's international partners to better coordinate foreign assistance and to make sure that it has an impact on the ground. Through the Friends of Yemen process, the United States is engaged with international partners, including regional states, and we're working with the government of Yemen to help address a multitude of problems.
The Friends of Yemen forum, launched nine months ago in London, has provided an environment for international coordination and created working groups on economy and governance as well as justice and rule- of-law issues. The Friends of Yemen are helping Yemen to support a national dialogue and parliamentary elections in 2011; plan for new courts and an increase in police and judicial process in remote areas; prepare de-radicalization action plans and renew a push for a coordination improvement in border security.
The Friends of Yemen will hold a ministerial meeting later this month in New York on the

margins of the U.N. General Assembly. We're encouraged by the progress to date, and we expect further international coordination in this arena.

The stability of Yemen is essential as well to the broader Gulf region and to global security. And de-legitimizing AQAP also requires addressing Yemen's own challenges to break the cycle of radicalization.

AQAP takes advantage of insecurity in various regions of Yemen which is worsened by internal conflicts and competition for governance by tribal and non-state actors. Yemen's myriad social and political problems in the context of under-governed spaces means areas of Yemen are serving as incubators for extremism.

The only way to address the problem of terrorism in Yemen is from a comprehensive and long-term perspective. We're working to help strengthen Yemen's capacity to provide basic services and good governance. Yemen, as you all know, is grappling with severe poverty. It is the poorest country in the Arab world. Its per capita income of $930 ranks it 166th out of 174 countries. Its oil production is steadily decreasing. Water resources are fast being depleted. And with over half of the people living in poverty and the population having grown from 8.4 million in 1980 to an estimated 23.8 million today, economic conditions threaten to worsen and further tax the government's already limited capacity.

Moreover, corruption is all too prevalent in various sectors and further impedes the ability of the government to provide essential services.

Therefore, the United States is providing development assistance to improve governance and help meet pressing socioeconomic challenges. USAID has started two development initiatives, a responsive government project and a community livelihoods program.

In looking to tackle the areas that are most in need and most vulnerable to extremism, U.S. assistance includes political and fiscal reforms, reducing corruption and implementing civil-service reform, and economic diversification to generate employment.

In addition, the Middle East Partnership Initiative, MEPI, is working with Yemeni civil society to empower Yemenis to build a more peaceful and prosperous future.

Let me provide you with some numbers. Baseline U.S. assistance to Yemen increased from 17.2 million (dollars) in fiscal year 2008 to 40.3 million (dollars) in 2009 and will be around 67.5 million (dollars) in 2010. The president has requested approximately 106.6 (million dollars) in baseline assistance for 2011.

These numbers do not include -- let me emphasize that -- do not include counterterrorism assistance of 67 million (dollars) in FY 2009 and 150.5 million (dollars) in 2010. Nor do they include humanitarian assistance.

On July 24, the president announced an increase in U.S. humanitarian assistance to Yemen of 29.6 million (dollars), raising the total to 42.5 million (dollars) for this fiscal year. This assistance will provide food, water, sanitation, shelter and health care for over 324,000 individuals displaced by the conflict in Northern Yemen as well as refugees in Southern Yemen. The United States urges other donors to support international agencies working to meet these urgent humanitarian needs as the United Nations humanitarian response plan remains woefully underfunded.

We're also working internationally to prevent funds from getting to AQAP. As soon as it announced its formation in January 2008, we began gathering evidence to build an international consensus behind designating AQAP under U.N. Security Council Resolution 1267. After our designation of the group as a foreign terrorist organization and its senior leaders as designated terrorists, the U.N. announced the designation of AQAP as well as its leader, Nasir al-Wahayshi

and Said al-Shihri, and more recently. Anwar al-Awlaki, on the consolidated list.
This move requires all U.N. member states to implement an assets freeze, a travel ban and an arms embargo against these entities. With these designations, the U.S. and the international community can curb the financial networks and the freedom of movement of known terrorists.
In the case of Anwar al-Awlaki, this designation has made clear his role as an operator in a terrorist group. We should make no mistake about Awlaki. This is not just an ideologue but someone who has been personally involved in planning terrorist operations against Americans, against U.S. interests and against the homeland.
Anwar al-Awlaki prepared Umar Farouk Abdulmutallab for his attempted detonation of a bomb aboard Northwest Airlines Flight 253 on December 25 of last year. In mid-July, Awlaki was designated by the Treasury Department under Executive Order 13224 before he was added to the 1267 consolidated list of individuals and entities associated with al Qaeda or the Taliban.
In order to succeed in Yemen, it's vital that we understand how recruits are radicalized, what their motivations are and how we can address the drivers of radicalization so that we can begin to turn the tide against violent extremism.
Some of our aid programs would help address underlying conditions for at-risk populations. Reducing corruption, building legitimate institutions, increasing economic opportunity with our assistance will also reduce the appeal of terror, and we will continue to build positive people-to-people engagement with the people of Yemen through educational and cultural exchanges, programs that have had a multiplier effect as participants return to Yemen and convey to friends and family the realities of American culture and society and dispel damaging and persistent stereotypes.
These initiatives contribute to the long-term health of our bilateral relationship and help allay suspicion and misunderstanding. We know the tasks are daunting, and that's why we're looking for new partners from Yemeni civil society to work with us as we deepen our engagement with Yemen in this regard.
In addition to such initiatives, we are committed to supporting internal peace within Yemen and we support international efforts to achieve that goal. A ceasefire is currently in place in the conflict centered in the Saada government of northern -- northwestern Yemen, excuse me -- between the central government and the Houthi rebels. Just two weeks ago Houthi leaders and Yemeni government officials met in Qatar to further discuss implementation of the ceasefire agreement that they reached in February.
The U.S. continues to encourage the Yemeni government to move forward toward a lasting peace in Saada as well as to allow for the provision of humanitarian and development assistance there. In the south of Yemen a growing protest movement has led to riots and sporadic outbreaks of violence, and it is fueled by longstanding political grievances.
The U.S. continues to urge political dialogue and peaceful settlement of grievances to address the many concerns of southern Yemenis. The U.S. also calls for a comprehensive and inclusive national dialogue between all opposition groups and the ruling party. Such a dialogue needs to be undertaken in good faith and with haste by all parties to address legitimate grievances, facilitate successful parliamentary elections in 2011, and increase stability in Yemen.
Our strategy recognizes that Yemen has not always had the political will or the focused attention to address its problems. We're working hard with our international partners to address Yemen's security and other challenges. We're encouraged because the Yemeni government has shown more resolve than ever before to confront AQAP and to engage with the international community on non -- on domestic non-security issues.

The United States commends Yemen on its counterterrorism operations and we are committed to continuing support for security initiatives and economic development initiatives.
In closing, let me just reiterate. Our approach to the problem of terrorism in Yemen must be comprehensive and it must be sustained. It must take into account a wide range of political, cultural and socio-economic factors. Ultimately the goal of the United States and international efforts is a stable, secure and effectively governed Yemen. We know this is a long-term challenge. We've taken some steps since this administration came into office, and we have taken -- toward that goal, and we have taken some towards curtailing the threat.
As the government of Yemen grows more transparent and more responsive to the requirements of its citizens, the seeds of extremism and violence will find less fertile ground and a more positive and productive dynamic will begin to prevail. Thank you for listening, and I look forward to your questions. (Applause.)
MR. HEYDEMANN: Thank you very much, both for that very sort of thorough overview of U.S. policy, but also for a very interesting diagnosis of the range of problems that Yemen confronts. We will soon move to questions and answers from the floor. We are webcasting this event and have welcomed questions from those who are hearing or viewing the event on the Web. We understand that the U.S. embassy in Yemen has assembled a number of people to hear what Ambassador Benjamin had to say, and so we may find some questions coming from Yemen.
Just one quick question to get things started. You mentioned that we have requested support from the government of Yemen to deal with issues of governance that seem to be contributing to conditions of alienation and conflict within the country.
Could you be a little bit more specific beyond national dialogue, which you referred to and which is clearly important, about what we have asked from the government of Yemen and in particular, how they have responded in as concrete a way as you feel able to do so?
MR. BENJAMIN: Sure. Well, obviously, this is an important part of the discussion, and U.S. interlocutors raise it, you know, at every juncture because we know that governance is really at the very heart of the country's problems but also of the problems of radicalization in many different contexts around the world, and especially wherever we find un- and undergoverned spaces.
Why don't I just leave this by saying -- because these are government-to-government discussions -- that, you know, the Yemenis have welcomed AID's governance program. We have found many positive and willing and committed interlocutors and implementers as well because AID, of course, is using lots of different partners on the ground.
The Middle East Partnership Initiative is also active in this space, and I think that we are hopeful that over the long term, these many different seeds will bear real fruit. I think that one of the things that perhaps wasn't captured in my remarks enough, and that -- but it's important to keep in mind is that for a number of years in this decade, you know, our engagement was quite minimal. So we know where we are starting from on this and related issues.
And, you know, it's important to keep that historical context in mind as we go forward.
MR. HEYDEMANN: Questions? Sir? We have microphones on the side, and if you could identify yourself in advance of asking your question.
Q I'm Hussein (al-Hussein ?) with the Kuwaiti Newspaper -- (inaudible).
I see that you focused on the AQAP but somehow left out the reports on Iran and the Lebanese Hezbollah training and then arming the Houthis in the north. Are these reports credible by any means? Thanks.

MR. BENJAMIN: We have seen the reports. And as I and Assistant Secretary Feltman and others have said on numerous occasions, we are unable to confirm them. We do not -- we have not seen that these have been borne out.

Q Eli Lake from the Washington Times.

Mr. Ambassador, can you give your assessment of the security of Yemeni prisons in the event that the U.S. would transfer detainees from Guantanamo to Yemen? Do you trust Yemeni jails to keep detainees from Guantanamo detained?

MR. BENJAMIN: Well, obviously, we've had some well-known jail breaks, and they have actually contributed to the problem of AQAP in the region. As you know, right now, the administration has suspended the return of Guantanamo detainees to Yemen except in cases where the courts have ruled on habeas corpus petitions.

It is an issue that we are concerned about, that we are talking to the Yemenis about, and that has also been brought up in the context of the Friends of Yemen. And we understand that this is an area in which improvements clearly need to be made and in which, you know, in a very serious way, U.S. security is affected.

So we are looking at it now. And as I mentioned, we are not returning any more detainees at this time.

Q Thank you, Mr. Ambassador. My name is Mohammed Kadar (sp) from CSIS.

You spoke of -- you mentioned that you were looking for civil -- partners in civil society of Yemen to aid in these efforts. I was wondering if you could speak to sort of how that search is going as well as to the potential role that civil society actors in the U.S. and around the world could play. And specifically, if you would consider or there has been consideration of including Yemen in the Economic Empowerment in Strategic Regions project at State.

MR. BENJAMIN: You know, it's a wise man who knows when he's out of his lane, and I'm going to refer you to my colleagues at AID.

I know that whenever I am speaking to Yemenis, I'm confronted with any number of new NGOs that I had not known of before. And I know that AID is working on getting to know these different organizations.

And I know that my colleagues seem to be optimistic about the opportunities for working in Yemen. But as the counterterrorism coordinator, I can't give you the day-to-day on which organizations are looking hopeful and which aren't. So I would suggest you contact AID.

Q Hi. Christopher Anders from the American Civil Liberties Union.

We've been very concerned about the targeted killing program. And I was wondering if you would be able to comment on the targeted killing program as it relates to Yemen and to Awlaki. And in particular, we've been very concerned about the government's refusal up to this point about disclosing legal justification for the program as well as what the criteria are for getting off or on it, which really is kind of the core of the U.N rapporteur on extrajudicial killings' critique of the program.

MR. BENJAMIN: Well, thanks for that question.

As you know, ACLU has brought suit on this issue, and we are currently in court on this matter. And I learned a long time ago not to comment on ongoing litigation for any number of good bureaucratic and legal reasons.

So I'm going to refer you to my colleague, Harold Koh, the legal adviser. Let me just say about Anwar al-Awlaki that -- underscoring what I said before -- this is not just an ideologue. This is an active terrorist, and the United States is committed to preventing harm from being done to its citizens by those who would commit acts of violence against us.

Q Ambassador, I'm Howard Sumka, I'm the deputy assistant administrator for the Middle East at USAID, and I can't answer his question.

But the numbers that I have -- I appreciated your run through the budgets -- our numbers are more or less the same. I think the important point is to note that, for USAID figures since 2008, we've gone from about 11 (million dollars) or 12 million (dollars) aiming toward about 84 million (dollars) in fiscal 2010 which reflects the community livelihoods program as well as the governance program as well as a very serious monitoring and evaluation effort that we're undertaking trying to understand what works.

My question for you is how you see the interface between counterterrorism actions which are immediate, which are addressed to deal with the threats that we might face in the very near future with the longer-term requirements that these kinds of projects have. It's not possible, as you know, to build a community, to create good governance, to increase livelihoods in the immediacy of a terrorism threat, but rather these are two-year or five-year or ten-year programs that require extensive development.

MR. BENJAMIN: Well, first of all, let me refer you to the earlier gentleman who wants to talk about NGOs in Yemen that we partner with.

You know, you raise an important question. It really goes to the very heart of what we're trying to do and how closely interwoven these different efforts have to be.

You know, development is not going to proceed if there is no security. We know that that's absolutely true, but we also know that if we can't get development projects going, then we have abandoned the field to extremists and they will find, you know, ample pickings if that is the case. And that's really been the president's approach throughout, and he has really tasked us repeatedly to keep working and keep finding more ways in which we can address a fairly grave economic and social situation in Yemen. And there's -- you know, there's no walking away from it.

We know that the demographic bulge that Yemen has experienced, the decline in its, you know, economic output, especially in the hydrocarbon sector, all of these things -- the water table -- all these things are, you know, very, very serious indicators of a very troubled future. And the demographic -- you know, we've seen a leveling off in many Muslim-majority countries of birth rates. In Yemen, the story is still quite dramatic, and the projections 20, 30 years down the line are quite striking.

So we do need to work together as one government. And I think that we also need to -- and we are working to improve that connection where also our development efforts are specifically addressing radicalization.

And, you know, around the world I think developing communities are recognizing how that really does fall within their -- within their ambit and that governments are going to look to them to be able to target those particular problem areas and work on them. So --

Q Thank you.

MR. HEYDEMANN: Before we --

MR. BENJAMIN: You can't stop the New York Times.

MR. HEYDEMANN: We can't.

MR. BENJAMIN: Sir. Go ahead.

MR. HEYDEMANN: We have a couple of questions from both the Web site and the overflow room. And let me just pass on a couple of them to you now.

Tony Capaccio from Bloomberg asks, in terms of al-Awlaki, when did you conclude he was an active planner, and not just an ideologue? Is there a -- is this a recent judgment?

MR. BENJAMIN: That's a good question, and I would have to go back through my own papers

to find out when we -- when we made this conclusion. But it was certainly clear in the aftermath of December 25th that he had played an integral role in the planning and the execution of the attempted bombing of Flight 253.

And as I said, we did have the designation this summer, so my guess is that we were somewhere in that period. I can't rule out the possibility that we -- we certainly knew that he was a problematic individual last year. And his presence on the Web and elsewhere has been widely attested to. Of course, he came to light as well in the Fort Hood case.

So his role has been well attested to. The question is when we actually decided that he was not in one category but in the other. And I would have to place it earlier this year, but I couldn't say with certainty.

MR. HEYDEMANN: One other question focuses on different conceptions of counterterrorism policy, which you've presented here today as a very expansive definition of counterterrorism, in which the kinetic dimensions are complimented by attention to a wide range of economic, social and political concerns. How widely accepted is that definition of counterterrorism within U.S. government agencies? Where are the fault lines in conceptions of counterterrorism? And how are different visions being addressed in the interagency process?

MR. BENJAMIN: We could talk all day about that. I think the important thing is that there is a wide agreement across the government in all the relevant agencies that as John Brennan put it in a speech at CSIS awhile ago, you know you have to also look at the upstream factors.

Now, we as a government face an interesting dilemma because we don't want to fall into the trap of saying that everything we do is counterterrorism, because that is not productive. And we don't want everyone who we engage with to feel like they are a target, because everything we are doing is because of counterterrorism. As I mentioned before, we support a strong and capable Yemeni state, unified state that is answering to the needs of its peoplem because that's a good in its own right.

But I think we also recognize that there are many things that we do that have benefits that in countering radicalization, in countering violent extremists organizations. So to a certain extent, you know the question becomes well what do you label counterterrorism? What do you label encountering violent extremism, what do you label just good governance?

And labeling exercises can often be scholastic and counterproductive. The key thing is that we have to have the right focus. And we recognize that it's more than kinetics, it's more than law enforcement. It's more than border security, it's also getting these very complex situations in places like Yemen, in Somalia and a lot of other areas that have real governance problems. And where the writ of the government may be limited, it's in addressing those broader issues.

MR. HEYDEMANN: Thank you.

Q Hi, Eric Schmitt with the New York Times.

At the end of the last administration, there were proposals being discussed about creating, essentially, a rehabilitation center in Yemen, modeled after what the Saudis have done somewhat successfully, in terms of religious reorientation, job training, putting the onus back on tribes and families of course.

What has happened to that initiative in this administration? Whether -- I understand that the -- you know, the limitations of the U.S. government trying to push this through. But either working through the Saudis or the Friends of Yemen, this would seem to be a constructive way of trying to deal with at least some of the lower- security-type detainees that are Gitmo.

MR. BENJAMIN: Thanks for that, Eric.

It is -- we continue to have active discussions on what we can do in terms of rehabilitation in

Yemen. And the Saudi model is a very attractive one. There are discussions going on within the Friends of Yemen and in other fora on this matter.

I think one of the things to keep in sight of, however, is that the -- there are aspects of the Saudi model that are very much Saudi- specific. To look at two of them, one is that, you know, the Saudi model is very much configured to take advantage of the relationship between individuals, families and tribes. Not all of Yemen is as tribally oriented, I guess you could say, as Saudi Arabia. So that is one important difference.

Another absolutely critical difference is that Yemen doesn't have the kind of resources to put into this effort that a Saudi Arabia does. In fact, very, very, very few countries do. And when we look at all of the different issues that need to be addressed in dealing with the terrorists threat in Yemen, you have to prioritize it as well.

So rehabilitation remains an important issue. But I don't know that we would be able to get to that kind of rehabilitation facility, at least not immediately.

MR. HEYDEMANN: We had two questions from the overflow room relating to U.S. plans for its military role in Yemen. One from John Bennett of the Defense News, who asks, "What are the odds on a one to 100 scale that U.S. troops will be needed in Yemen, meaning thousands or hundreds of thousands?"

The related question is, can you go into more detail -- from Jeff Hines (sp) at American University. "Can you go into more detail about U.S. military involvement will evolve over the long term in Yemen?"

MR. BENJAMIN: Let me try to answer both of those at once. I think the president has been quite clear in ruling out that kind of military engagement in Yemen. If we're talking about, you know, major combat forces, I think he's been quite explicit about that and I don't see anyone contemplating that any time in the foreseeable future.

So we will continue to be actively engaged in training Yemeni forces to deal with the threats that they face and, you know, getting them the equipment that they need and the skills. And that will be the, you know, the key military effort.

And it goes on in a military channel, but there is also an awful lot going on in terms of training civilian authorities in the Ministry of the Interior so that they can also deal with the counterterrorism mission. So there is both a military and a civilian side to it.

MR. HEYDEMANN: Now, one to 100. You're not willing to -- (Laughter).

MR. BENJAMIN: I'm going to pass on that and consign it to the same waste bin as, you know, U.S. news-type tables on the al Qaeda threat -- where is it worst and where is it best.

MR. HEYDEMANN: Viewers on the website had two related questions. And we can -- we can take these as the last of our questions, unless there are others from the audience. I would encourage you to move to the microphones if you have them.

The first is from a viewer from Gaston (ph) Mennonite University, who asks, "How do you see Yemen stability contributing to Middle East stability? More broadly, what are the linkages there?" And the second has to do with what capacity Yemen seems to have in being a source for export of terrorists under the al Qaeda brand more broadly, and in particular, into sensitive areas in Africa across the Horn.

MR. BENJAMIN: Okay, the Yemeni role in broader Middle East stability, obviously it's quite important. I think that it's fair to say that Saudi Arabia is deeply concerned and understandably so about the terrorist threat to itself, and having suffered the traumas of May 2003 and the attacks there, has really been resolved to remove violent extremism from the Arabian Peninsula -- and has been a terrific partner to the United States in that context, and has also been a great partner

together on Yemeni issues. Obviously, anything that would affect security for Saudi Arabia has a very significant -- it's a matter of great significance and concern for anyone who cares about the stability of the region.
In terms of the whole region also and to the extent that AQAP can maintain a foothold and be a source of extremist ideology but also extremist operatives, it is a danger to the region. And you know, there are Yemeni communities in many different areas in the Gulf, across the water in Djibouti and any number of other places, and it will be a great concern. And of course there are Yemeni diasporas around the world, and hence when you find some of the, shall we say, culturally savvy operators like an Al-Awlaki, like some other people who were either American citizens or lived for quite a while here in the United States and who can broadcast that message in a sort of idiomatic way and appeal in a way that Al Qaeda operatives who were working through translation couldn't, then obviously that's a big concern for us.
There's no question that Al-Awlaki himself has had an effect on radicalization in the English-speaking world that goes beyond what his predecessors had. So it is a matter of great concern. Again, to repeat what I said before, he's also a terrorist operative. He's not just someone who's making use of the opportunities afforded by free speech over the Internet. So he's a matter of great concern to the United States. But the ability to use Yemen as a platform for radicalization, especially in an ever-more-globalized, connected electronic world is something we are worried about.
MR. HEYDEMANN: You reference Saudi Arabia and Saudi stability as a principal consideration in thinking about connections between Yemen and the region more broadly. You didn't reference Iran and Yemen's repeated claims that Iran has played a role in the Houthi rebellion in the north in support of Houthi forces. What is the current thinking in your office about Iran's role in this region?
MR. BENJAMIN: As I mentioned before, we don't see an Iranian hand in Saada in the Houthi rebellion. Obviously, one would like not to repeat the whole point so often that Iranians start to wonder whether they should be involved. But to this point we have seen lots of accusations, but we have not seen -- we have not seen the evidence.
MR. HEYDEMANN: So that has not changed from --.
MR. BENJAMIN: That has not changed.
MR. HEYDEMANN: -- over the past several months. Thank you.
Q Les Campbell from the National Democratic Institute, or NDI. I noted your comments about the importance of better governance in Yemen both to bring better livelihoods as well as potentially build institutions and capacity, and certainly would agree with that. I guess the comment and question -- one comment I would make is that the Yemen government is also suffering from perhaps declining legitimacy and different reasons for that. One is that southerners increasingly -- and I think you also addressed this -- increasingly would like to, in a sense, renegotiate the terms of unity, and that has caused unrest as well as a perception of perhaps the government -- the central government not treating the south well.
The Houthi rebellion caused -- for different reasons, perhaps more selfish reasons from the Houthis, though -- has kind of contributed to this idea of a government that's lacking legitimacy. And finally, you know, perhaps good news, an increasingly assertive and organized opposition has drawn attention to things like a legitimacy debate. President Saleh perhaps is trying to groom his son. There are other pretenders for the presidency, and so on.
And I just wonder if you have any view or if you can express a view on the importance of -- you mentioned the planned 2011 election, parliamentary election, but -- and I don't want to

concentrate on that election, but the importance of political processes that are seen to be fair and inclusive. You've mentioned dialogue with opposition parties. But for example, in the election, would you -- could you comment on the importance of an election that is carried out with agreed-upon rules and in a transparent way that could perhaps start to address some of these legitimacy questions around the government?

MR. BENJAMIN: Well, I think your question sets the table very well. Obivously, it's essential for Yemen to have free and fair elections, to have agreed-upon rules of the road. I think that the national dialogue is essential. Ambassador Seche, who just finished his tour, worked very hard on promoting this goal.

Obviously, you know, we're going to have a very hard time getting from here to there if we do not emphasize the governance aspect of this. And, you know, we have spoken -- the Secretary at the Friends of Yemen Conference made a point of underscoring the need for a unified Yemen. This is -- actually, to come back to your question earlier -- this is absolutely essential for regional stability and for the, I think, the future of the Yemeni people. And anything that promotes any of these divisive tendencies will be, you know, harmful both to the people of Yemen but also to security in the Gulf and beyond.

So I can't do more than underscore how important it is that the April elections do go well and that we make progress -- the Yemenis make progress in bridging these divides which have in the past also had a very negative effect in terms of diverting attention from the threat of extremism within the country. So I think there's an abundance of reasons why the political process needs to continue in a positive way.

Q Allen Keiswetter with the Middle East Institute. (Inaudible). Tom Friedman this week had a column called "Super Power, Super Broke," talking about the U.S. And if I do my arithmetic correctly, the U.S. aid programs are $200 (million) to $300 million a year this year, and that's about the number of Al Qaeda agents estimated -- in the press, at least -- of being there, and the prescription is wholesale reform of the society.

MR. BENJAMIN: I'm sorry, how many Al Qaeda?

Q The press -- I read it said 2(00) to 300, but maybe it's more.

MR. BENJAMIN: Oh, I thought you said 200 to 300 million.

Q No, no, no. no. About a million dollars a piece is what -- and the prescription is a fairly wholesale change of Yemeni society and long-term trends, and this is the tip of the iceberg. So I guess this is a conceptual question. Is there any thinking in the CT community about approaches that are not so expensive and that may be more affordable?

MR. BENJAMIN: Well, let me turn your question a little bit on its head and say that I think that this is actually the more affordable way of going. In comparison to many of our other assistance programs, this is still not that large compared to what we have to deal with when a country is broken as in the case of an Iraq or an Afghanistan. This is really a very, very small amount.

I would underscore as the president, as the secretary have that this is a matter for the international community, and there are an awful lot of countries that have recognized this challenge and are, you know, showing their commitment with their pocketbooks.

It's a very difficult time, obviously for us. I think that right now you could argue that our British friends are are on a -- on a very, very difficult course of austerity, but they're maintaining their commitment to Yemen and may be increasing it. There are regional actors who have very deep pockets who we continue to encourage to do what is necessary in Yemen.

Whenever you get to the point where you have to use kinetic force, things get a lot more expensive; that's the first thing. And if there are many other options, other than waiting till you're

sort of at the point of delivery of a terrorist attack and dealing with it then or stopping it earlier on, I'm eager to hear them, if you have any particular suggestions.

Of course, we continue to work aggressively on all the different homeland security programs that will restrict terrorist travel. That was one of the -- one of the conclusions, or one of the initiatives that came out of December 25th, that we had to redouble our efforts on that, particularly in an era of very inventive terrorist conspiracies in which people who had no prior records, who are not in the usual databases, were being deployed against us.

So obviously, you know, we don't like spending lots of money if we don't have to, but this is a key security matter and also a key global issue. So we'll continue to -- we'll continue to pay and to appropriate funds as necessary, and I think the Congress has also seen the wisdom of taking this course. So if you have that third way, I'm eager to hear about it, and otherwise, I'm afraid we've got the strategy we've got for now.

MR. HEYDEMANN: It is not common for Yemeni citizens to have the chance to interact with senior U.S. officials. I have two questions from people who have identified themselves as citizens of Yemen. Let me just pose those to you. First, "Does the U.S. speak with one voice in Yemen? Who has the upper hand over the Yemeni file, the CIA or the State Department?" I suspect many Yemenis probably wonder that.

The second is, did the U.S. military give Yemen or Saudi any assistance against the Houthi rebels?

MR. BENJAMIN: Let me answer the second question first with a categorical no on kinetic assistance. We are not involved in that party. We have -- in that conflict, we have told them -- we have told the Yemenis repeatedly that the provision of military supplies is strictly related to the al Qaeda threat and is not to be used elsewhere. And we have very, very comprehensive end-use monitoring. There was, of course, an attack against Saudi forces that went across the border -- that is to say, Houthi forces that went across the border and attacked Saudi. So in that particular case, although I don't have the specifics in front of me, the Saudis would certainly be well within their rights to use whatever we had delivered to them in terms of military assistance over the years. So let me just be clear about that one.

There is only one U.S. government policy in Yemen. It is hammered out in the interagency process in which the State Department, the Defense Department, the intelligence community and others all participate in. There isn't anyone that has an upper voice. If anyone has a dominant voice, it's the president, and he's been quite clear that he wants to see this two-pronged strategy proceed with all possible haste.

MR. HEYDEMANN: And sir, I think you have the last question for our session for our guest.

Q I'm Sid Mahanta with Mother Jones magazine. I wondered how human rights abuses on the part of the Yemeni government would contribute to radicalization and perhaps undermine an effective counterterrorist strategy in Yemen.

MR. BENJAMIN: Human rights abuses are a driver of radicalization. I don't think there's any question about that. I had the opportunity to deliver the U.S. view on that in a meeting at the U.N. Security Council earlier this year. We're quite categorical that human rights abuses, together with poor governance, the non-delivery of services, all these things are drivers of radicalization. And it is for that reason that we communicate to our international partners and those we work with on counterterrorism all the time that this is a key part of dealing with their threat.

When we do lots of different kinds of counterterrorism training around the world, whether it's through the Antiterrorism Assistance Program that my office runs jointly with diplomatic

security, or whether it's with any number of other kinds of assistance that are delivered, we include human rights training so that our partners understand just how vital it is to maintain standards to avoid anything that will violate human rights. And that is something that we do because it is appropriate in its own right, but also because we are concerned about how it will contribute to radicalization. And this is something my office is very concerned about. I believe it's something that the Department of Defense is concerned about. There's now a deputy assistant secretary for human rights at DOD, something there wasn't before. And, you know, it's part of the whole policy. So I hope that answers your question.

And it's been a great pleasure. (Laughs.)

MR. HEYDEMANN: Ambassador Benjamin, thank you very much. Before you leave for the day, on behalf of the institute, you have not only our thanks, but I wanted to give you a copy of a very recent USIP publication. "Crescent and Dove: Peace and Conflict Resolution in Islam." We hope that you will find ways to make it useful in your work, with our thanks again for your insights into a very complex set of challenges we're wrestling with in the Middle East. Thank you. (Applause).

September 9, 2010

Dr. Robert M. Gates

Secretary of Defense

Dr. Robert M. Gates was sworn in on December 18, 2006, as the 22nd Secretary of Defense. Dr. Gates is the only Secretary of Defense in U.S. history to be asked to remain in that office by a newly elected President. President Barack Obama is the eighth president Dr. Gates has served.

Before entering his present post, Dr. Gates was the President of Texas A&M University, the nation's seventh largest university. Prior to assuming the Texas A&M presidency, on August 1, 2002, he served as Interim Dean of the George Bush School of Government and Public Service at Texas A&M from 1999 to 2001.

Secretary Gates joined the Central Intelligence Agency in 1966 and spent nearly 27 years as an intelligence professional. During that period, he spent nearly nine years at the National Security Council, The White House, serving four presidents of both political parties.

Dr. Gates served as Director of Central Intelligence from 1991 until 1993. He is the only career officer in CIA's history to rise from entry-level employee to Director. He served as Deputy Director of Central Intelligence from 1986 until 1989 and as Assistant to the President and Deputy National Security Adviser at the White House from January 20, 1989, until November 6, 1991, for President George H.W. Bush.

Secretary Gates has been awarded the National Security Medal, the Presidential Citizens Medal, has twice received the National Intelligence Distinguished Service Medal, and has three times received CIA's highest award, the Distinguished Intelligence Medal.

He is the author of the memoir, From the Shadows: The Ultimate Insiders Story of Five Presidents and How They Won the Cold War, published in 1996.

Until becoming Secretary of Defense, Dr. Gates served as Chairman of the Independent Trustees of The Fidelity Funds, the nation's largest mutual fund company, and on the board of directors of NACCO Industries, Inc., Brinker International, Inc. and Parker Drilling Company, Inc.

Dr. Gates has also served on the Board of Directors and Executive Committee of the American Council on Education, the Board of Directors of the National Association of State Universities and Land-Grant Colleges, and the National Executive Board of the Boy Scouts of America. He has also been President of the National Eagle Scout Association.

A native of Kansas, Secretary Gates received his bachelor's degree from the College of William and Mary, his master's degree in history from Indiana University, and his doctorate in Russian and Soviet history from Georgetown University.

In 1967 he was commissioned a second lieutenant in the U.S. Air Force and served as an intelligence officer at Whiteman Air Force Base in Missouri.

Office of the Attorney General
Washington, D. C. 20530

September 23, 2009

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES
MEMORANDUM FOR THE HEADS OF DEPARTMENT COMPONENTS

FROM: THE ATTORNEY GENERAL

SUBJECT: Policies and Procedures Governing Invocation of the State Secrets Privilege

I am issuing today new Department of Justice policies and administrative procedures that will provide greater accountability and reliability in the invocation of the state secrets privilege in litigation. The Department is adopting these policies and procedures to strengthen public confidence that the U.S. Government will invoke the privilege in court only when genuine and significant harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests. The policies and procedures set forth in this Memorandum are effective as of October 1, 2009, and the Department shall apply them in all cases in which a government department or agency thereafter seeks to invoke the state secrets privilege in litigation.

1. **Standards for Determination**

A. Legal Standard. The Department will defend an assertion of the state secrets privilege ("privilege") in litigation when a government department or agency seeking to assert the privilege makes a sufficient showing that assertion of the privilege is necessary to protect information the unauthorized disclosure of which reasonably could be expected to cause significant harm to the national defense or foreign relations ("national security") of the United States. With respect to classified information, the Department will defend invocation of the privilege to protect information properly classified pursuant to Executive Order 12958, as amended, or any successor order, at any level of classification, so long as the unauthorized disclosure of such information reasonably could be expected to cause significant harm to the national security of the United States. With respect to information that is nonpublic but not classified, the Department will also defend invocation of the privilege so long as the disclosure of such information reasonably could be expected to cause significant harm to the national security of the United States.

B. Narrow Tailoring. The Department's policy is that the privilege should be invoked only to the extent necessary to protect against the risk of significant harm to national security. The Department will seek to dismiss a litigant's claim or case on the basis of the state secrets privilege only when doing so is necessary to protect against the risk of significant harm to national security.

C. Limitations. The Department will not defend an invocation of the privilege in order to: (i) conceal violations of the law, inefficiency, or administrative error; (ii) prevent embarrassment to a person, organization, or agency of the United States government; (iii) restrain competition; or (iv) prevent or delay the release of information the release of which would not reasonably be expected to cause significant harm to national security.

2. Initial Procedures for Invocation of the Privilege

A. Evidentiary Support. A government department or agency seeking invocation of the privilege in litigation must submit to the Division in the Department with responsibility for the litigation in question[1] a detailed declaration based on personal knowledge that specifies in detail: (i) the nature of the information that must be protected from unauthorized disclosure; (ii) the significant harm to national security that disclosure can reasonably be expected to cause; (iii) the reason why unauthorized disclosure is reasonably likely to cause such harm; and (iv) any other information relevant to the decision whether the privilege should be invoked in litigation.

B. Recommendation from the Assistant Attorney General. The Assistant Attorney General for the Division responsible for the matter shall formally recommend in writing whether or not the Department should defend the assertion of the privilege in litigation. In order to make a formal recommendation to defend the assertion of the privilege, the Assistant Attorney General must conclude, based on a personal evaluation of the evidence submitted by the department or agency seeking invocation of the privilege, that the standards set forth in Section 1(a) of this Memorandum are satisfied. The recommendation of the Assistant Attorney General shall be made in a timely manner to ensure that the State Secrets Review Committee has adequate time to give meaningful consideration to the recommendation.

3. State Secrets Review Committee

A. Review Committee. A State Secrets Review Committee consisting of senior Department of Justice officials designated by the Attorney General will evaluate the

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[1] The question whether to invoke the privilege typically arises in civil litigation. Requests for invocation of the privilege in those cases shall be addressed to the Civil Division. The question whether to invoke the privilege also may arise in cases handled by the Environment and Natural Resources Division (ENRD), and requests for invocation of the privilege shall be addressed to ENRD in those instances. It is also possible that a court may require the Government to satisfy the standards for invoking the privilege in criminal proceedings. *See United States v. Aref*, 533 F.3d 72, 78-80 (2d Cir. 2008); *but see United States v. Rosen*, 557 F.3d 192, 198 (4th Cir. 2009). In such instances, requests to submit filings to satisfy that standard shall be directed to the National Security Division.

Assistant Attorney General's recommendation to determine whether invocation of the privilege in litigation is warranted.

B. Consultation. The Review Committee will consult as necessary and appropriate with the department or agency seeking invocation of the privilege in litigation and with the Office of the Director of National Intelligence. The Review Committee must engage in such consultation prior to making any recommendation against defending the invocation of the privilege in litigation.

C. Recommendation by the Review Committee. The Review Committee shall make a recommendation to the Deputy Attorney General, who shall in turn make a recommendation to the Attorney General.[2] The recommendations shall be made in a timely manner to ensure that the Attorney General has adequate time to give meaningful consideration to such recommendations.

4. Attorney General Approval

A. Attorney General Approval. The Department will not defend an assertion of the privilege in litigation without the personal approval of the Attorney General (or, in the absence or recusal of the Attorney General, the Deputy Attorney General or the Acting Attorney General).

B. Notification to Agency or Department Head. In the event that the Attorney General does not approve invocation of the privilege in litigation with respect to some or all of the information a requesting department or agency seeks to protect, the Department will provide prompt notice to the head of the requesting department or agency.

C. Referral to Agency or Department Inspector General. If the Attorney General concludes that it would be proper to defend invocation of the privilege in a case, and that invocation of the privilege would preclude adjudication of particular claims, but that the case raises credible allegations of government wrongdoing, the Department will refer those allegations to the Inspector General of the appropriate department or agency for further investigation, and will provide prompt notice of the referral to the head of the appropriate department or agency.

[2] In civil cases, the review committee's recommendation should be made through the Associate Attorney General to the Deputy Attorney General, who shall in turn make a recommendation to the Attorney General.

5. Reporting to Congress

The Department will provide periodic reports to appropriate oversight committees of Congress with respect to all cases in which the Department invokes the privilege on behalf of departments or agencies in litigation, explaining the basis for invoking the privilege.

6. Classification Authority

The department or agency with classification authority over information potentially subject to an invocation of the privilege at all times retains its classification authority under Executive Order 12958, as amended, or any successor order.

7. No Substantive or Procedural Rights Created

This policy statement is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

PRESS ROOM
U.S. DEPARTMENT OF THE TREASURY

July 16, 2010
TG-779

**Treasury Designates Anwar Al-Aulaqi,
Key Leader of Al-Qa'ida in the Arabian Peninsula**

Treasury Targets al-Qa'ida Leader with Ties to Umar Farouk Abdulmutallab

WASHINGTON – The U.S. Department of the Treasury today designated Anwar al-Aulaqi, a key leader for al-Qa'ida in the Arabian Peninsula (AQAP), a Yemen-based terrorist group. Aulaqi was designated pursuant to Executive Order 13224 for supporting acts of terrorism and for acting for or on behalf of AQAP. Since its inception in January 2009, AQAP has claimed responsibility for numerous terrorist attacks against Saudi, Korean, Yemeni and U.S. targets. Executive Order 13224 freezes any assets Aulaqi has under U.S. jurisdiction and prohibits U.S. persons from engaging in any transactions with him.

"Anwar al-Aulaqi has proven that he is extraordinarily dangerous, committed to carrying out deadly attacks on Americans and others worldwide," said Under Secretary for Terrorism and Financial Intelligence Stuart Levey. "He has involved himself in every aspect of the supply chain of terrorism -- fundraising for terrorist groups, recruiting and training operatives, and planning and ordering attacks on innocents."

Aulaqi has pledged an oath of loyalty to AQAP emir, Nasir al-Wahishi, and plays a major role in setting the strategic direction for AQAP. Aulaqi has also recruited individuals to join AQAP, facilitated training at camps in Yemen in support of acts of terrorism, and helped focus AQAP's attention on planning attacks on U.S. interests.

Since late 2009, Aulaqi has taken on an increasingly operational role in the group, including preparing Umar Farouk Abdulmutallab, who attempted to detonate an explosive device aboard a Northwest Airlines flight from Amsterdam to Detroit on Christmas Day 2009, for his operation. In November 2009, while in Yemen, Abdulmutallab swore allegiance to the emir of AQAP and shortly thereafter received instructions from Aulaqi to detonate an explosive device aboard a U.S. airplane over U.S. airspace. After receiving this direction from Aulaqi, Abdulmutallab obtained the explosive device he used in the attempted Christmas Day attack.

Aulaqi was imprisoned in Yemen in 2006 on charges of kidnapping for ransom and being involved in an al-Qa'ida plot to kidnap a U.S. official but was released from jail in December 2007 and subsequently went into hiding in Yemen.

"Aulaqi has sought to encourage his supporters to provide money for terrorist causes. Those who provide material support to Aulaqi or AQAP violate sanctions and expose themselves to serious consequences," continued Levey.

Today's action supports the international effort to degrade AQAP's capabilities to execute violent attacks and to disrupt, dismantle, and defeat its financial and support networks. The U.S. Government will continue to work with allies to identify and take action against persons acting for or on behalf of, or providing financial and other prohibited support to, Aulaqi and AQAP.

Identifying Information

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI,
on his own behalf and as Next Friend of
Anwar Al-Aulaqi
Al-Zubairi Street
Al-Saeed Center
Sana'a, Yemen,

Plaintiff,

v.

BARACK H. OBAMA,
in his official capacity as President of
the United States
1600 Pennsylvania Avenue NW
Washington, DC 20500;

LEON C. PANETTA,
in his official capacity as Director of
the Central Intelligence Agency
Central Intelligence Agency
Washington, DC 20505;

ROBERT M. GATES,
in his official capacity as Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1010,

Defendants.

No. 10-cv-____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
(Violation of constitutional rights and international law – targeted killing)

INTRODUCTION

1. This case concerns the executive's asserted authority to carry out "targeted killings" of U.S. citizens suspected of terrorism far from any field of armed conflict. According to numerous published reports, the government maintains lists of suspects—"kill lists"—against whom lethal force can be used without charge, trial, or conviction.

Individuals, including U.S. citizens, are added to the lists based on executive determinations that secret criteria have been satisfied. Executive officials are thus invested with sweeping authority to impose extrajudicial death sentences in violation of the Constitution and international law.

2. The right to life is the most fundamental of all rights. Outside the context of armed conflict, the intentional use of lethal force without prior judicial process is an abridgement of this right except in the narrowest and most extraordinary circumstances.

3. The United States is not at war with Yemen, or within it. Nonetheless, U.S. government officials have disclosed the government's intention to carry out the targeted killing of U.S. citizen Anwar Al-Aulaqi, who is in hiding there. In early 2010, several newspapers reported that U.S. government officials had confirmed Anwar Al-Aulaqi's placement on government kill lists; these lists amount to standing authorizations to use lethal force. Numerous subsequent reports have corroborated those accounts. According to one media report, there have already been as many as a dozen unsuccessful attempts on Anwar Al-Aulaqi's life. Anwar Al-Aulaqi has been in hiding since at least January 2010. Plaintiff Nasser Al-Aulaqi is Anwar Al-Aulaqi's father: he brings this action on his own behalf and as next friend to his son.

4. Outside of armed conflict, both the Constitution and international law prohibit targeted killing except as a last resort to protect against concrete, specific, and imminent threats of death or serious physical injury. The summary use of force is lawful in these narrow circumstances only because the imminence of the threat makes judicial process infeasible. A targeted killing policy under which individuals are added to kill

lists after a bureaucratic process and remain on these lists for months at a time plainly goes beyond the use of lethal force as a last resort to address imminent threats, and accordingly goes beyond what the Constitution and international law permit.

5. The government's refusal to disclose the standard by which it determines to target U.S. citizens for death independently violates the Constitution: U.S. citizens have a right to know what conduct may subject them to execution at the hands of their own government. Due process requires, at a minimum, that citizens be put on notice of what may cause them to be put to death by the state.

6. Plaintiff seeks a declaration from this Court that the Constitution and international law prohibit the government from carrying out targeted killings outside of armed conflict except as a last resort to protect against concrete, specific, and imminent threats of death or serious physical injury; and an injunction prohibiting the targeted killing of U.S. citizen Anwar Al-Aulaqi outside this narrow context. Plaintiff also seeks an injunction requiring the government to disclose the standards under which it determines whether U.S. citizens can be targeted for death.

JURISDICTION AND VENUE

7. Jurisdiction is proper pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) over causes of action arising under the Fourth and Fifth Amendments to the U.S. Constitution, and 28 U.S.C. § 1350 (Alien Tort Statute) over a cause of action arising under customary international law and treaty law. Jurisdiction is also proper pursuant to 5 U.S.C. § 702 *et seq.* (Administrative Procedure Act) and 28 U.S.C. § 2201 *et seq.* (Declaratory Judgment Act).

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391.

PARTIES

9. Plaintiff Nasser Al-Aulaqi is the father of Anwar Al-Aulaqi, a U.S. citizen whose targeted killing Defendants have authorized. Nasser Al-Aulaqi is a citizen and resident of Yemen. He acts on his own behalf and as next friend to his son. He acts in the latter capacity because his son is in hiding under threat of death and cannot access counsel or the courts to assert his constitutional rights without disclosing his whereabouts and exposing himself to possible attack by Defendants. He brings the Alien Tort Statute claim on his own behalf to prevent the injury he would suffer if Defendants were to kill his son.

10. Defendant Barack H. Obama is President of the United States. As President, he is Commander-in-Chief of the U.S. armed forces and serves as Chair of the National Security Council, which authorizes the targeted killing of suspected terrorists who are U.S. citizens. President Obama is sued in his official capacity.

11. Defendant Leon C. Panetta is the Director of the Central Intelligence Agency ("CIA"). As CIA Director, he has ultimate authority over the CIA's operations worldwide. Upon information and belief, Defendant Panetta approves the addition of individuals to the kill list maintained by the CIA, and signs off on individual targeted killing operations conducted by the CIA outside of armed conflict, including those against U.S. citizens. Director Panetta is sued in his official capacity.

12. Defendant Robert M. Gates is the Secretary of Defense. As Defense Secretary, he has ultimate authority over the U.S. armed forces worldwide, including the

Joint Special Operations Command ("JSOC"). Upon information and belief, JSOC is involved in carrying out targeted killings, including of U.S. citizens outside of armed conflict. In his capacity as Secretary of Defense, Defendant Gates is also a statutory member of the National Security Council, which authorizes the targeted killing of U.S. citizens. Secretary Gates is sued in his official capacity.

FACTUAL ALLEGATIONS

Targeted Killings by the United States Outside of Armed Conflict

13. Since 2001, the United States has carried out targeted killings in connection with the "war on terror." While many of these killings have been conducted by the U.S. military in the context of the armed conflicts in Afghanistan and Iraq, the United States has also carried out targeted killings outside the context of armed conflict, and it is these killings that are at issue here. Upon information and belief, both the CIA and JSOC are involved in authorizing, planning, and carrying out targeted killings, including of U.S. citizens, outside the context of armed conflict.

14. The first reported post-2001 targeted killing by the U.S. government outside Afghanistan occurred in Yemen in November 2002, when a CIA-operated Predator drone fired a missile at a suspected terrorist traveling in a car with other passengers. The strike killed all passengers in the vehicle, including a U.S. citizen. The United Nations Special Rapporteur on Extrajudicial Killings later stated that the strike constituted "a clear case of extrajudicial killing" and set an "alarming precedent." Since 2001, there has been an increase in targeted killings by the United States against terrorism suspects outside of Afghanistan and Iraq.

15. The government has publicly claimed the authority to carry out targeted killings of civilians, including U.S. citizens, outside the context of armed conflict. For example, in February 2010, then-Director of National Intelligence Dennis Blair, in response to a question by a member of Congress about the targeted killing of U.S. citizens. stated that the United States takes "direct action" against suspected terrorists and that "if we think that direct action will involve killing an American, we get specific permission to do that." In June 2010, Deputy National Security Advisor John Brennan responded to questions about the targeted killing program by stating, "If an American person or citizen is in Yemen or in Pakistan or in Somalia or another place, and they are trying to carry out attacks against U.S. interests, they will also face the full brunt of a U.S. response."

16. Although the government has publicly claimed the authority to carry out targeted killings of civilians outside the context of armed conflict. it has not explained on what basis individuals are added to kill lists, or the circumstances in which the asserted authority to carry out targeted killings will actually be exercised.

Specific Authorization to Kill Plaintiff's Son Anwar Al-Aulaqi

17. Plaintiff Nasser Al-Aulaqi moved to the United States in 1966 to pursue his studies as a Fulbright scholar at New Mexico State University. Plaintiff's son, Anwar Al-Aulaqi, was born in New Mexico in 1971. Plaintiff remained in the United States with his family for the next seven years, until 1978, when they moved back to Yemen. Plaintiff went on to serve as Minister of Agriculture and Fisheries in the Government of Yemen, and later founded and served as president of Ibb University and served as

president of Sana'a University. Plaintiff currently resides in Yemen with his wife, who is an American citizen, and their family.

18. In 1991, Plaintiff's son Anwar Al-Aulaqi returned to the United States to attend college at Colorado State University. Anwar Al-Aulaqi went on to obtain his master's degree at San Diego State University and later enrolled in a Ph.D. program at George Washington University, which he attended through December 2001. He married and had three children while living in the United States. He moved to the United Kingdom in 2003, and to Yemen in 2004.

19. In January 2010, the Washington Post reported that Anwar Al-Aulaqi had been added to "a shortlist of U.S. citizens" that JSOC was specifically authorized to kill. The same article reported that Anwar Al-Aulaqi had survived a JSOC-assisted strike in Yemen in late December 2009. That strike reportedly killed 41 civilians, mostly children and women. Another January 2010 news report stated that Anwar Al-Aulaqi was "all but certain" to be added to a list of suspects that the CIA was specifically authorized to kill. In April 2010, the Washington Post and other media sources reported that Anwar Al-Aulaqi had been added to the CIA's list.

20. Numerous news reports have corroborated that Defendants have authorized the targeted killing of Anwar Al-Aulaqi and are actively pursuing him. According to one media report, he has already been the target of as many as a dozen unsuccessful strikes. One U.S. official stated that "he's in everybody's sights." In the context of a discussion about targeted killing, Defendant Panetta stated that Anwar Al-

Aulaqi is "someone that we're looking for" and that "there isn't any question that he's one of the individuals that we're focusing on."

21. Defendants added Anwar Al-Aulaqi to the CIA and JSOC kill lists after a closed executive process. In the course of that process, Defendants and other executive officials determined that Anwar Al-Aulaqi satisfied secret criteria that determine whether a U.S. citizen can be killed by his own government. Upon information and belief, Anwar Al-Aulaqi is now subject to a standing order that permits the CIA and JSOC to kill him. Upon information and belief, the authorization for Anwar Al-Aulaqi's killing by the CIA and JSOC involved the approval or recommendation of all Defendants.

22. Upon information and belief, individuals placed on the CIA and JSOC targeted killing lists remain on those lists for months at a time. An intelligence official who was questioned about the CIA's kill list stated that individuals would be removed from the kill list if their names "hadn't popped on the screen for over a year, or there was no intelligence linking [them] to known terrorists or plans."

23. Upon information and belief, Defendants have authorized the CIA and JSOC to kill Anwar Al-Aulaqi without regard to whether, at the time lethal force will be used, he presents a concrete, specific, and imminent threat to life, or whether there are reasonable means short of lethal force that could be used to address any such threat.

24. Executive officials have condemned Anwar Al-Aulaqi's public statements and sermons; they have also alleged that he has "cast his lot" with terrorist groups and taken on an "operational" role in a terrorist organization. The U.S. government has not, however, publicly indicted Anwar Al-Aulaqi for any terrorism-related crime.

25. In response to reports that the United States has placed Anwar Al-Aulaqi on kill lists, Yemeni officials, including the Prime Minister, the Foreign Minister, and the Director of the National Security Agency, have publicly stated that their government's security forces are taking measures to arrest Anwar Al-Aulaqi for possible charge and trial. Yemeni cabinet members have also publicly requested that the United States provide the Yemeni government with any evidence against Anwar Al-Aulaqi to support arresting him and bringing him to trial. The Yemeni government has prosecuted other residents of Yemen for terrorism-related crimes, and the Yemeni government is currently prosecuting at least one U.S. citizen who is alleged to be a member of a terrorist organization. Anwar Al-Aulaqi has in the past been detained by the Yemeni government and was imprisoned for 18 months in 2006 and 2007.

26. Anwar Al-Aulaqi has been in hiding in Yemen since at least January 2010. Plaintiff has had no communication with his son during that time. Anwar Al-Aulaqi cannot communicate with his father or counsel without endangering his own life.

CAUSES OF ACTION

First Claim for Relief
Fourth Amendment: Right to be Free from Unreasonable Seizure

27. Defendants' policy of targeted killings violates the Fourth Amendment by authorizing, outside of armed conflict, the seizure, in the form of targeted killing, of U.S. citizens, including Plaintiff's son, in circumstances in which they do not present concrete, specific, and imminent threats to life or physical safety, and where there are means other than lethal force that could reasonably be employed to neutralize any such threat. Plaintiff brings this claim as next friend for his son.

Second Claim for Relief
Fifth Amendment: Right Not to be Deprived of Life Without Due Process

28. Defendants' policy of targeted killings violates the Fifth Amendment by authorizing, outside of armed conflict, the killing of U.S. citizens, including Plaintiff's son, without due process of law in circumstances in which they do not present concrete, specific, and imminent threats to life or physical safety, and where there are means other than lethal force that could reasonably be employed to neutralize any such threat. Plaintiff brings this claim as next friend for his son.

Third Claim for Relief
Alien Tort Statute: Extrajudicial Killing

29. Defendants' policy of targeted killings violates treaty and customary international law by authorizing, outside of armed conflict, the killing of individuals, including Plaintiff's son, without judicial process in circumstances in which they do not present concrete, specific, and imminent threats to life or physical safety, and where there are means other than lethal force that could reasonably be employed to neutralize any such threat. Plaintiff brings this claim in his own right to prevent the injury he would suffer if Defendants were to kill his son.

Fourth Claim for Relief
Fifth Amendment: Due Process Notice Requirements

30. Defendants' policy of targeted killings outside of armed conflict violates the Fifth Amendment by authorizing the killing of U.S. citizens, including Plaintiff's son, on the basis of criteria that are secret. Plaintiff brings this claim as next friend for his son.

PRAYER FOR RELIEF

For the foregoing reasons, Plaintiff Nasser Al-Aulaqi requests that the Court:

a. Declare that, outside of armed conflict, the Constitution prohibits Defendants from carrying out the targeted killing of U.S. citizens, including Plaintiff's son, except in circumstances in which they present concrete, specific, and imminent threats to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threats.

b. Declare that, outside of armed conflict, treaty and customary international law prohibit Defendants from carrying out the targeted killing of individuals, including Plaintiff's son, except in circumstances in which they present concrete, specific, and imminent threats to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threats.

c. Enjoin Defendants from intentionally killing U.S. citizen Anwar Al-Aulaqi unless he presents a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat.

d. Order Defendants to disclose the criteria that are used in determining whether the government will carry out the targeted killing of a U.S. citizen.

e. Grant any other and further relief as is appropriate and necessary.

Respectfully submitted,

/s/ Arthur B. Spitzer

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August 30, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI, Plaintiff, v. BARACK H. OBAMA, *et al.*, Defendants.	No. 10-cv-_____

DECLARATION OF BEN WIZNER

I, Ben Wizner, under penalty of perjury declare as follows:

1. I represent Plaintiff Nasser al-Aulaqi in this action concerning the executive's asserted authority to carry out, far from any field of armed conflict, "targeted killings" of U.S. citizens suspected of terrorism and, in particular, of Plaintiff's son Anwar al-Aulaqi.

2. I submit this declaration in support of Plaintiff's motion for a preliminary injunction. The purpose of this declaration is to bring to the Court's attention official government disclosures, as well as information in the public domain, about the government's targeted killing policy, its specific standing authorization to kill Plaintiff's son, and related matters.

The United States' Targeted Killing Policy

3. Since 2001 the United States has carried out many targeted killings outside of the armed conflicts in Afghanistan and Iraq. The first reported targeted killing by the U.S. government outside of the context of armed conflict occurred in Yemen in November 2002 and was conducted by the CIA using a Predator drone. Among those killed was a U.S. citizen wanted in connection with a terrorism investigation and prosecution in Buffalo, New York.

a. Attached hereto as Exhibit A is a true and correct copy of David Johnston & David E. Sanger, *Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. Times, Nov. 6, 2002 (quoting several government officials acknowledging and defending the CIA's targeted killing in Yemen and describing the strike as being "carried out under broad authority that President Bush has given the C.I.A. over the past year to pursue the terror network well beyond the borders of Afghanistan.").

b. Attached hereto as Exhibit B is a true and correct copy of Michael Powell & Dana Priest, *Officials: American Killed in Yemen Led New York Cell*, Wash. Post, Nov. 10, 2002 ("The U.S. citizen killed by a missile launched from a drone aircraft over Yemen was the ringleader of an alleged terrorist sleeper cell in Lackawanna, N.Y., administration officials said Friday.").

c. Attached hereto as Exhibit C is a true and correct copy of Howard Witt, *U.S.: Killing of al Qaeda Suspects Was Lawful*, Chi. Trib., Nov. 24, 2002 (describing concerns about legality of 2002 targeted killing in Yemen that killed U.S. citizen, and quoting then-National Security Advisor Condoleezza Rice and then-Secretary of State Colin Powell defending the strike).

d. Attached hereto as Exhibit D is a true and correct copy of the relevant portions of Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Report of the Special Rapporteur*, ¶¶ 37-39, *delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/2003/3 (Jan. 13, 2003) ("The Special Rapporteur is extremely concerned that should the information received be accurate, an alarming precedent might have been set for extrajudicial execution by consent of Government. . . . In the opinion of the Special Rapporteur, the attack in Yemen constitutes a clear case of extrajudicial killing.")

4. The Central Intelligence Agency ("CIA") and the armed forces' Joint Special Operations Command ("JSOC") both conduct targeted killings and maintain separate lists of individuals who can be targeted and killed.

a. Attached hereto as Exhibit E is a true and correct copy of Greg Miller, *From Memo to Missile: The CIA's Hit List*, L.A. Times, Jan. 31, 2010 (describing in detail the procedures surrounding the CIA's targeting killing list and adding that "[t]he U.S. military, which has expanded its presence in Yemen, keeps a separate list of individuals to capture or kill.").

b. Attached hereto as Exhibit F is a true and correct copy of Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, Wash. Post, Jan. 27, 2010 ("Both the CIA and the JSOC maintain lists of individuals, called 'High Value Targets' and 'High Value Individuals,' whom they seek to kill or capture.").

c. Attached hereto as Exhibit G is a true and correct copy of Ellen Nakashima, *Intelligence Chief Acknowledges U.S. May Target Americans Involved in Terrorism*, Wash. Post., Feb. 4, 2010 (quoting then-Director of National Intelligence Dennis Blair, testifying before the House Intelligence Committee: "We take direct action against terrorists in the intelligence community.").

d. Attached hereto as Exhibit H is a true and correct copy of Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. Times, Apr. 6, 2010 ("Both the C.I.A. and the military maintain lists of terrorists linked to Al Qaeda and its affiliates who are approved for capture or killing, former officials said.").

5. The CIA and JSOC targeted killing lists can include U.S. citizens.

a. Exhibit G, Ellen Nakashima, *Intelligence Chief Acknowledges U.S. May Target Americans Involved in Terrorism*, Wash. Post., Feb. 4, 2010 (quoting then-

Director of National Intelligence Dennis Blair, testifying before the House Intelligence Committee: "We take direct action against terrorists in the intelligence community. If that direct action, we think that direct action will involve killing an American, we get specific permission to do that.").

b. Attached hereto as Exhibit I is a true and correct copy of Eli Lake, *Dozens of Americans Believed to Have Joined Terrorists*, Wash. Times, June 24, 2010 (quoting current Deputy National Security Adviser for Homeland Security and Counterterrorism John O. Brennan: "If an American person or citizen is in a Yemen or in a Pakistan or in Somalia or another place, and they are trying to carry out attacks against U.S. interests, they also will face the full brunt of a U.S. response. And it can take many forms.").

c. Exhibit E, Greg Miller, *From Memo to Missile: The CIA 's Hit List*, L.A. Times, Jan. 31, 2010 ("Awlaki's status as a U.S. citizen requires special consideration, according to former officials familiar with the criteria for the CIA's targeted killing program.").

d. Exhibit F, Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, Wash. Post, Jan. 27, 2010 ("After the Sept. 11 attacks, Bush gave the CIA, and later the military, authority to kill U.S. citizens abroad if strong evidence existed that an American was involved in organizing or carrying out terrorist actions against the United States or U.S. interests, military and intelligence officials said. . . . The Obama administration has adopted the same stance. . . . Both the CIA and the JSOC maintain lists of individuals . . . whom they seek to kill or capture. The JSOC list includes three Americans, including Aulaqi, whose name was added late last year.").

e. Attached hereto as Exhibit J is a true and correct copy of Keith Johnson, *U.S. Seeks Cleric Backing Jihad*, Wall St. J., Mar. 26, 2010 ("An order to kill an

American, however, 'has to meet legal thresholds,' the official said. He declined to be more specific.")

6. Names are added to the JSOC and CIA lists after a secret bureaucratic process conducted entirely within the executive branch.

a. Attached hereto as Exhibit K is a true and correct copy of Transcript of Press Briefing by Press Secretary Robert Gibbs, The White House (Aug. 3, 2010) (Press Secretary Robert Gibbs states that "[t]here's a process in place that I'm not at liberty to discuss" in response to a question about whether "there is a process in place that we don't know about" with regard to the targeted killing of U.S. citizens.)

b. Exhibit G, Ellen Nakashima, *Intelligence Chief Acknowledges U.S. May Target Americans Involved in Terrorism*, Wash. Post., Feb. 4, 2010 ("[Former Director of National Intelligence] Blair told members of the House intelligence committee that he was speaking publicly about the issue to reassure Americans that intelligence agencies and the Department of Defense 'follow a set of defined policy and legal procedures that are very carefully observed' in the use of lethal force against U.S. citizens.").

c. Exhibit E, Greg Miller, *From Memo to Missile: The CIA's Hit List*, L.A. Times, Jan. 31, 2010 (describing the CIA process in detail and stating that "From beginning to end, the CIA's process for carrying out Predator strikes is remarkably self-contained. Almost every key step takes place within the Langley, Va., campus, from proposing targets to piloting the remotely controlled planes.").

7. In order to add the name of a U.S. citizen to the CIA's targeted killing list, approval must be obtained from the National Security Council.

a. Attached hereto as Exhibit L is a true and correct copy of Greg Miller, *Muslim Cleric Aulaqi Is 1st U.S. Citizen on List of Those CIA Is Allowed To Kill*, Wash.

Post, Apr. 7, 2010 ("Because he is a U.S. citizen, adding Aulaqi to the CIA list required special approval from the White House, officials said.").

b. Attached hereto as Exhibit M is a true and correct copy of Adam Entous, *U.S. Targets American-Born Cleric in Yemen: Officials*, Reuters, Apr. 6, 2010 ("The decision to add Anwar al-Awlaki, of al Qaeda in the Arabian Peninsula, to the target list followed a National Security Council review prompted by his status as a U.S. citizen.").

8. The names of individuals placed on the CIA and JSOC targeted killing lists remain on those lists for months at a time. The CIA list is subject to review approximately every six months.

a. Exhibit E, Greg Miller, *From Memo to Missile: The CIA's Hit List*, L.A. Times, Jan. 31, 2010 ("The [CIA] list is scrutinized every six months, officials said, and in some cases names are removed if the intelligence on them has grown stale.").

b. Exhibit L, Greg Miller, *Muslim Cleric Aulaqi Is 1st U.S. Citizen on List of Those CIA Is Allowed To Kill*, Wash. Post, Apr. 7, 2010 (reporting that Anwar al-Aulaqi was added to the CIA's target list months after being added to the JSOC list).

9. Placement of a name on a list constitutes a standing authorization to kill that person. Subsequent review of specific strikes does not involve a determination that the person constitutes an imminent threat at that time.

a. Attached hereto as Exhibit N is a true and correct copy of Peter Finn & Joby Warrick, *Under Panetta, A More Aggressive CIA*, Wash. Post., Mar. 21, 2010 (describing the process by which the CIA Director gave final approval to a particular strike and making clear that such approval does not involve a determination that the person constituted an imminent threat at the time).

b. Attached hereto as Exhibit O is a true and correct copy of Jane Mayer, *The Predator War*, The New Yorker (Oct. 26, 2009) ("A top military expert, who declined to be named, spoke of the military's system, saying, 'There's a whole taxonomy of targets.' Some people are approved for killing on sight. For others, additional permission is needed. A target's location enters the equation, too. If a school, hospital, or mosque is within the likely blast radius of a missile, that, too, is weighed by a computer algorithm before a lethal strike is authorized.").

c. Exhibit H, Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. Times, Apr. 6, 2010 ("Both the C.I.A. and the military maintain lists of terrorists linked to Al Qaeda and its affiliates who are approved for capture or killing, former officials said.").

10. Targeted killing operations have resulted in the deaths of many civilians. One strike in Yemen resulted in the death of 41 civilians, along with 14 terrorism suspects.

a. Attached hereto as Exhibit P is a true and correct copy of Scott Shane, *CIA to Expand Drone Use in Pakistan*, N.Y. Times, Dec. 3, 2009 ("The New America Foundation, a policy group in Washington, studied press reports and estimated that since 2006 at least 500 militants and 250 civilians had been killed in the drone strikes. A separate count, by The Long War Journal, found 885 militants' deaths and 94 civilians'. But the government official insisted on the accuracy of his far lower figure of approximately 20 civilian deaths.").

b. Attached hereto as Exhibit Q is a true and correct copy of the relevant portions of Amnesty International, Yemen: Cracking Down Under Pressure 29-33 (2010) (detailing investigations into a December 17, 2009 strike that killed 41 civilians).

c. Attached hereto as exhibit R is a true and correct copy of Scott Shane, Mark Mazzetti & Robert F. Worth, *Secret Assault on Terrorism Widens on Two Continents*, N.Y. Times, Aug. 14, 2010 (confirming that the December 17, 2009 strike that killed 41 individuals was launched from a U.S. Navy ship).

Specific Authorization to Kill Plaintiff's Son and Related Issues

11. In January 2010, government officials disclosed that Anwar al-Aulaqi had been added to "a shortlist of U.S. citizens" that JSOC is specifically authorized to kill.

a. Exhibit E, Greg Miller, *From Memo to Missile: The CIA's Hit List*, L.A. Times, Jan. 31, 2010 ("Awlaki is already on the military's list, which is maintained by the U.S. Joint Special Operations Command.").

b. Exhibit F, Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, Wash. Post, Jan. 27, 2010 ("[Aulaqi] has since been added to a shortlist of U.S. citizens specifically targeted for killing or capture by the JSOC, military officials said.").

12. In April 2010, government officials disclosed that Anwar al-Aulaqi had been added the list of individuals that the CIA is specifically authorized to kill.

a. Exhibit M, Adam Entous, *U.S. Targets American-Born Cleric in Yemen: Officials*, Reuters, Apr. 6, 2010 (quoting a U.S. official stating, with regards to Anwar al-Aulaqi: "He's being targeted.").

b. Exhibit L, Greg Miller, *Muslim Cleric Aulaqi Is 1st U.S. Citizen on List of Those CIA Is Allowed To Kill*, Wash. Post, Apr. 7, 2010 ("A Muslim cleric tied to the attempted bombing of a Detroit-bound airliner has become the first U.S. citizen added to a list of suspected terrorists the CIA is authorized to kill, a U.S. official said Tuesday.

Anwar al-Aulaqi, who resides in Yemen, was previously placed on a target list maintained by the U.S. military's Joint Special Operations Command. . . . 'He's in everybody's sights,' said the U.S. official.").

c. Exhibit H, Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. Times, Apr. 6, 2010 (quoting and citing government officials for the proposition that "[t]he Obama administration has taken the extraordinary step of authorizing the targeted killing of an American citizen, the radical cleric Anwar al-Awlaki").

13. The United States has already conducted at least one strike – and as many as 12 according to one account – with the intent of killing Anwar al-Aulaqi. The United States continues to attempt to kill him.

a. Exhibit L, Greg Miller, *Muslim Cleric Aulaqi Is 1st U.S. Citizen on List of Those CIA Is Allowed To Kill*, Wash. Post, Apr. 7, 2010 ("Anwar al-Aulaqi, who resides in Yemen, was previously placed on a target list maintained by the U.S. military's Joint Special Operations Command and has survived at least one strike carried out by Yemeni forces with U.S. assistance against a gathering of suspected al-Qaeda operatives.").

b. Exhibit F, Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, Wash. Post, Jan. 27, 2010 ("Obama approved a Dec. 24 strike against a compound where a U.S. citizen, Anwar al-Aulaqi, was thought to be meeting with other regional al-Qaeda leaders.").

c. Attached hereto as Exhibit S is a true and correct copy of the transcript of Dina Temple-Raston, *U.S. Turns Up Heat on Internet Imam Awlaki*, Nat'l Pub. Radio Morning Edition (July 29, 2000) ("Intelligence sources tell NPR that there have been almost a dozen drone and airstrikes targeting Awlaki in Yemen.").

14. Executive officials have condemned Anwar al-Aulaqi's public statements and sermons and also allege that he has "cast his lot" with terrorist groups and assumed an "operational" role in a terrorist organization.

a. Exhibit M, Adam Entous, *U.S. Targets American-Born Cleric in Yemen: Officials*, Reuters, Apr. 6, 2010 ("U.S. intelligence agencies had viewed Awlaki as chiefly an al Qaeda sympathizer and recruiter for Islamist causes with possible ties to some of the September 11, 2001, hijackers.")

b. Exhibit H, Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. Times, Apr. 6, 2010 (quoting an American official stating: "'The danger Awlaki poses to this country is no longer confined to words . . . . He's gotten involved in plots.'")

c. Attached hereto as Exhibit T is a true and correct copy of Press Release, U.S. Department of the Treasury, *Treasury Designates Anwar Al-Aulaqi, Key Leader of Al-Qa'ida in the Arabian Peninsula* (July 16, 2010) (quoting Under Secretary for Terrorism and Financial Intelligence Stuart Levey stating: "He has involved himself in every aspect of the supply chain of terrorism -- fundraising for terrorist groups, recruiting and training operatives, and planning and ordering attacks on innocents.").

d. Exhibit K, Transcript of Press Briefing by Press Secretary Robert Gibbs, The White House (Aug. 3, 2010) (quoting Press Secretary Robert Gibbs stating: "Anwar al-Awlaki has in videos cast his lot with al Qaeda and its extremist allies. Anwar al-Awlaki is acting as a regional commander for al Qaeda in the Arabian Peninsula.").

15. Yemeni officials have publicly stated that Yemen's security forces are taking measures to arrest Anwar al-Aulaqi for possible charge and trial in Yemen.

a. Attached hereto as Exhibit U is a true and correct copy of *Yemen Won't Extradite Radical Cleric*, Assoc. Press, June 8, 2010 ("Yemen's Islamic Affairs Minister Hamoud al-Hitar told The Associated Press that Yemen is encouraging al-Awlaki to turn himself in, but if and when in Yemeni custody, he will not be extradited to the U.S. 'There are constitutional and legal texts the government cannot get around,' al-Hitar said. He said the U.S. should provide any proof it has of al-Awlaki's terrorist ties 'to the Yemeni justice system, so it can do its job.'")

b. Attached hereto as Exhibit V is a true and correct copy of Maamoun Youssef, *Anwar al Awlaki, Yemeni Cleric, Advocates Killing Americans in Al Qaeda Video*, Assoc. Press, May 23, 2010 ("Ali Mohammed al-Ansi, Yemen's national security chief and head of the president's office, said in remarks published Sunday in Yemen's ruling-party newspaper that the country's security forces will continue to pursue al-Awlaki until he turns himself in or he is arrested. Yemen has indicated that if its security forces capture al-Awlaki, it wants to try the cleric on Yemeni soil.")

c. Attached hereto as Exhibit W is a true and correct copy of *Al-Qirbi: Yemen Will Not Extradite al-Awlaki to U.S.*, Yemen News Agency (Saba), May 10, 2010 (quoting Yemeni Foreign Minister Abu Bakr al-Qirbi stating: "We have clearly said that because of his recent terrorist activity, al-Awlaki is now wanted by the Yemeni government; hence, he must be tried once he is captured and convicted in his homeland but never by other governments. . . . Yemen's position over handing the man to the U.S. is clear and firm because we refuse to hand our people to other countries.")

d. Exhibit F, Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, Wash. Post, Jan. 27, 2010 ("Yemeni Foreign Minister Abubaker al-Qirbi said in Washington last week that his government's present goal is to

persuade Aulaqi to surrender so he can face local criminal charges stemming from his contacts with the Fort Hood suspect. Aulaqi is being tracked by the country's security forces, the minister added, and is now thought to be in the southern province of Shabwa.").

e. Attached hereto as Exhibit X is a true and correct copy of Margaret Coker & Charles Levinson, *Yemen in Talks for Surrender of Cleric*, Wall St. J., Jan. 15, 2010 ("Ali Mohamed Al Anisi, the director of Yemen's National Security Agency and a senior presidential adviser, said talks were under way with members of Mr. Awlaki's tribe in an effort to convince the cleric to turn himself in. . . . He said Yemeni forces were prepared to bring him in forcibly if negotiations fail. 'We are ready to launch more operations to hunt him down,' he said.")

16. Yemeni cabinet members have publicly requested that the United States provide the Yemeni government with additional evidence against Anwar al-Aulaqi so as to permit them to arrest him and bring him to trial in Yemen.

a. Attached hereto as Exhibit Y is a true and correct copy of *Yemen Says Seeks Cleric, Yet to Get U.S. Intelligence*, Reuters, Apr. 11, 2010 ("'He (Awlaki) is wanted by Yemeni justice for questioning, so that he can clear his name ... or face trial,' Yemeni Foreign Minister Abubakr al-Qirbi told Al Jazeera television. . . . Qirbi said Yemen had not received U.S. intelligence on Awlaki's contacts with a Nigerian suspect in the attempted bombing of the transatlantic passenger plane and with a U.S. Army psychiatrist accused of shooting dead 13 people at a military base in Texas in November. 'The detailed information . . . and evidence gathered by U.S. agencies has not been given to Yemen,' Qirbi said.")

b. Exhibit U, *Yemen Won't Extradite Radical Cleric*, Assoc. Press, June 8, 2010 ("Yemen's Islamic Affairs Minister Hamoud al-Hitar . . . said the U.S. should provide any proof it has of al-Awlaki's terrorist ties 'to the Yemeni justice system, so it can do its job.'")

17. The Yemeni government is currently prosecuting at least one U.S. citizen who is alleged to be a member of al Qaeda and has deported others.

a. Attached hereto as Exhibit Z is a true and correct copy of Ahmed al-Haj, *American al-Qaida Suspect to Go on Trial in Yemen*, Assoc. Press, Aug. 24, 2010 ("An American al-Qaida suspect will go on trial in Yemen next month over the killing of a Yemeni soldier and the wounding of another during a failed escape attempt, a security official said Tuesday. . . . [A]uthorities have since June deported 25 foreigners, including Americans, suspected of having links to al-Qaida.").

18. The Yemeni government has in the past arrested Anwar al-Aulaqi and detained him for 18 months prior to his release in December 2007. He was released only after the United States signaled that it no longer insisted on his continued incarceration.

a. Attached hereto as Exhibit AA is a true and correct copy of Scott Shane & Souad Mekhennet, *Imam's Path From Condemning Terror to Preaching Jihad*, N.Y. Times, May 8, 2010 ("In mid-2006, after he intervened in a tribal dispute, Mr. Awlaki was imprisoned for 18 months by the Yemeni authorities. . . . Two F.B.I. agents questioned him in the Yemeni prison, and Mr. Awlaki blamed the United States for his prolonged incarceration. He was right; John D. Negroponte, then the director of national intelligence, told Yemeni officials that the United States did not object to his detention, according to American and Yemeni sources. But by the end of 2007, American officials, some of whom were disturbed at the imprisonment without charges of a United States

citizen, signaled that they no longer insisted on Mr. Awlaki's incarceration, and he was released.").

19. Anwar al-Aulaqi is in hiding and cannot communicate with his father or counsel because of the United States' attempts to kill him.

a. Exhibit AA, Scott Shane & Souad Mekhennet, *Imam's Path From Condemning Terror to Preaching Jihad*, N.Y. Times, May 8, 2010 ("Last October, friends said, [Anwar al-Aulaki] heard the distant whine of a drone aircraft circling overhead. Worried that he was endangering his relatives, he fled to the mountains.").

b. Attached hereto as Exhibit AB is a true and correct copy of Lee Keath & Ahmed al-Haj, *Tribe in Yemen Protecting U.S. Cleric Anwar al-Awlaki*, Assoc. Press, Jan. 19, 2010 (reporting extensively on Anwar al-Aulaqi's circumstances in Yemen).

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on August 30, 2010.

Ben Wizner

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI, Plaintiff, v. BARACK H. OBAMA, *et al.*, Defendants.	No. 10-cv-_____

DECLARATION OF DR. NASSER AL-AULAQI

I, Dr. Nasser Al-Aulaqi, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am the Plaintiff in the above-captioned case. I act on my own behalf and as next friend to my son, Anwar Al-Aulaqi, a citizen of the United States.

2. I am a citizen of Yemen and reside in Yemen with my wife, an American citizen, and my family.

3. I came to the United States in 1966 on a Fulbright scholarship to study at New Mexico State University. I lived in the United States for the next 12 years, until 1978, when my family and I moved back to Yemen. After returning to Yemen, I served as Minister of Agriculture and Fisheries in the Government of Yemen. I later founded and served as president of Ibb University and then served as president of Sana'a University. I am currently a Professor of Economics at Sana'a University.

4. My son Anwar was born in the United States in 1971 in New Mexico during my studies there. He went back to the United States in 1991 when he was ready to go to college. He received his bachelor's degree from Colorado State University, went on to

obtain his master's degree from San Diego State University, and later enrolled in a Ph.D. program at George Washington University, which he attended through December 2001. He married and had three children while living in the United States. In 2003, he moved to the United Kingdom and, in 2004, he moved to Yemen.

5. It is my understanding that my son has been authorized for killing by the United States and is actively being targeted by the CIA and the U.S. military.

6. I learned of the United States' authorization to kill my son through numerous news reports of U.S. officials stating that he has been added to government "kill lists." I have also heard and read statements from U.S. officials referring to my son as a threat to the United States and confirming that he is being pursued. In January 2010, after published reports of my son's addition to the U.S. military's kill list, I wrote a letter to President Obama asking him to cease the targeting of my son.

7. News reports have indicated that the United States has deployed armed drones over Yemen, ready to attack my son "at a moment's notice" if the military receives credible intelligence about his whereabouts. I myself have seen these drones flying overhead in Yemen. The media has reported that my son has already been the subject of several unsuccessful strikes.

8. My son is currently in hiding in Yemen. He has been in hiding continuously since at least January 2010, when the United States' intention to kill him became clear.

9. Since the time my son went into hiding, neither I nor any of my family members have had any contact or communication with him. Anyone attempting to meet or communicate with him would place his or her life and safety in jeopardy because of my son's targeting by the United States.

10. Because the U.S. government is seeking to kill my son, as reported, he cannot access legal assistance or a court without risking his life.

11. As Anwar's father, I only want to do what is in his best interests. I believe taking legal action to stop the United States from killing him is in his best interests.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on August 28, 2010

Dr. Nasser Al-Aulaqi

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI, Plaintiff, v. BARACK H. OBAMA, *et al.*, Defendants.	No. 10-cv._____

[PROPOSED] PRELIMINARY INJUNCTION

Upon consideration of Plaintiff's motion for a preliminary injunction, of any opposition thereto, and of the entire record in this action;

It appearing to the Court that the Plaintiff is likely to succeed on the merits of his action, that he will suffer irreparable injury if the requested relief is not issued, that the Defendants will not be harmed if the requested relief is issued, and that the public interest favors the entry of such an order, it is, therefore,

ORDERED that Plaintiff's motion for a preliminary injunction is hereby GRANTED; and it is further

DECLARED that, outside of armed conflict, the Constitution prohibits Defendants from carrying out the targeted killing of U.S. citizens, including Plaintiff's son, except in circumstances in which they present concrete, specific, and imminent threats to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threats; and it is further

DECLARED that, outside of armed conflict, treaty and customary international law prohibit Defendants from carrying out the targeted killing of individuals, including Plaintiff's son, except in circumstances in which they present concrete, specific, and imminent threats to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threats; and it is further

ORDERED that the Defendants Barack H. Obama, Leon C. Panetta, and Robert M. Gates are hereby PROHIBITED, pending further order of this Court, from intentionally killing U.S. citizen Anwar Al-Aulaqi unless he is found to present a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat; and it is further

ORDERED, in accordance with Fed. R. Civ. P. 65(c), that this injunction shall be effective upon Plaintiff's giving of security in the amount of $10 by depositing that amount with the Clerk of the Court.

Date: _____

_____
Judge, United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI, Plaintiff, v. BARACK H. OBAMA, *et al.*, Defendants.	No. 10-cv.____

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65(a), Plaintiff Nasser Al-Aulaqi moves for the issuance of a preliminary injunction (1) declaring that, outside of armed conflict, the Constitution prohibits Defendants from carrying out the targeted killing of U.S. citizens, including Plaintiff's son, except in circumstances in which they present concrete, specific, and imminent threats to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threats; (2) declaring that, outside of armed conflict, treaty and customary international law prohibit Defendants from carrying out the targeted killing of individuals, including Plaintiff's son, except in circumstances in which they present concrete, specific, and imminent threats to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threats; and (3) prohibiting Defendants from intentionally killing U.S. citizen Anwar Al-Aulaqi unless he is found to present a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat; or, in the alternative, (4)

ordering the Defendants to disclose the criteria that are used in determining whether the government will carry out the targeted killing of a U.S. citizen.

The grounds for this motion are that Plaintiff has a substantial probability of success on the merits of his claim that the executive's asserted authority to carry out "targeted killings" of U.S. citizens suspected of terrorism far from any field of armed conflict violates the Fourth and Fifth Amendments to the United States Constitution and is contrary to treaty and customary international law; that absent immediate relief, Plaintiff will suffer irreparable harm; that the requested relief will not injure Defendants; and that the public interest supports granting the requested relief.

In support of this application, Plaintiff respectfully refers the Court to the Complaint, the Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, the Declaration of Nasser Al-Aulaqi, and the Declaration of Ben Wizner.

A proposed order is attached.

Respectfully submitted,

/s/ Arthur B. Spitzer
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August 30, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI, Plaintiff, v. BARACK H. OBAMA, *et al.*, Defendants.	No. 10-cv-_____

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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August 30, 2010

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INTRODUCTION

This case concerns the executive's asserted authority to carry out "targeted killings" of U.S. citizens suspected of terrorism far from any field of armed conflict. According to numerous published reports, the government maintains lists of suspects—"kill lists"—against whom lethal force can be used without charge, trial, or conviction. Individuals, including U.S. citizens, are added to the lists based on executive determinations that secret criteria have been satisfied. Executive officials are thus invested with sweeping authority to impose extrajudicial death sentences in violation of the Constitution and international law.

The right to life is the most fundamental of all rights. Outside the context of armed conflict, the intentional use of lethal force without prior judicial process is an abridgement of this right except in the narrowest and most extraordinary circumstances.

The United States is not at war with Yemen, or within it. Nonetheless, U.S. government officials have disclosed the government's intention to carry out the targeted killing of U.S. citizen Anwar Al-Aulaqi, who is in hiding there. In early 2010, several newspapers reported that U.S. government officials had confirmed Anwar Al-Aulaqi's placement on government kill lists; these lists amount to standing authorizations to use lethal force. Numerous subsequent reports have corroborated those accounts. According to one media report, there have already been as many as a dozen unsuccessful attempts on Anwar Al-Aulaqi's life. Anwar Al-Aulaqi has been in hiding since at least January 2010. Plaintiff Nasser Al-Aulaqi is Anwar Al-Aulaqi's father; he brings this action on his own behalf and as next friend to his son.

Outside of armed conflict, both the Constitution and international law prohibit targeted killing except as a last resort to protect against concrete, specific, and imminent threats of death or serious physical injury. The summary use of force is lawful in these narrow circumstances only because the imminence of the threat makes judicial process infeasible. A targeted killing policy under which individuals are added to kill lists after a bureaucratic process and remain on these lists for months at a time plainly goes beyond the use of lethal force as a last resort to address imminent threats, and accordingly goes beyond what the Constitution and international law permit.

The government's refusal to disclose the standard by which it determines to target U.S. citizens for death independently violates the Constitution: U.S. citizens have a right to know what conduct may subject them to execution at the hands of their own government. Due process requires, at a minimum, that citizens be put on notice of what may cause them to be put to death by the state.

Through this action, Plaintiff seeks a declaration from this Court that the Constitution and international law prohibit the government from carrying out targeted killings outside of armed conflict except as a last resort to protect against concrete, specific, and imminent threats of death or serious physical injury; and an injunction prohibiting the targeted killing of U.S. citizen Anwar Al-Aulaqi outside this narrow context. Plaintiff also seeks an injunction requiring the government to disclose the standards under which it determines whether U.S. citizens can be targeted for death.

FACTUAL BACKGROUND

Targeted Killings by the United States Outside of Armed Conflict

Since 2001, the United States has carried out targeted killings in connection with the "war on terror." Declaration of Ben Wizner ("Wizner Decl.") ¶ 3, Ex. O-P. While many of these killings have been conducted by the U.S. military in the context of the armed conflicts in Afghanistan and Iraq, the United States has also carried out targeted killings outside the context of armed conflict, *id.* ¶ 3, Ex. A-D, and it is these killings that are at issue here. Both the Central Intelligence Agency ("CIA") and the U.S. military's Joint Special Operations Command ("JSOC") are involved in authorizing, planning, and carrying out targeted killings, including of U.S. citizens, outside the context of armed conflict. *Id.* ¶ 4, Ex. E-H.

The first reported post-2001 targeted killing by the U.S. government outside Afghanistan occurred in Yemen in November 2002, when a CIA-operated Predator drone fired a missile at a suspected terrorist traveling in a car with other passengers. *Id.* ¶ 3, Ex. A-D. The strike killed all passengers in the vehicle, including a U.S. citizen. *Id.* Ex. B-C. The United Nations Special Rapporteur on Extrajudicial Killings later stated that the strike constituted "a clear case of extrajudicial killing" and set an "alarming precedent." *Id.* Ex. D. Since 2001, there has been an increase in targeted killings by the United States against terrorism suspects outside of Afghanistan and Iraq.

The government has publicly claimed the authority to carry out targeted killings of civilians, including U.S. citizens, outside the context of armed conflict. *Id.* ¶¶ 3-5, Ex. A-J, L-P, R-S. For example, in February 2010, then-Director of National Intelligence Dennis Blair, in response to a question by a member of Congress about the targeted

killing of U.S. citizens, stated that the United States takes "direct action" against suspected terrorists and that "if we think that direct action will involve killing an American, we get specific permission to do that." *Id.* ¶ 5(a), Ex. G. In June 2010, Deputy National Security Advisor John Brennan responded to questions about the targeted killing program by stating, "If an American person or citizen is in Yemen or in Pakistan or in Somalia or another place, and they are trying to carry out attacks against U.S. interests, they will also face the full brunt of a U.S. response." *Id.* ¶ 5(b), Ex. H.

Although the government has publicly claimed the authority to carry out targeted killings of civilians outside the context of armed conflict, it has not explained on what basis individuals are added to kill lists, or the circumstances in which the asserted authority to carry out targeted killings will actually be exercised.

Specific Authorization to Kill Plaintiff's Son Anwar Al-Aulaqi

Plaintiff Nasser Al-Aulaqi moved to the United States in 1966 to pursue his studies as a Fulbright scholar at New Mexico State University. Declaration of Nasser Al-Aulaqi ("Al-Aulaqi Decl.") ¶ 3. Plaintiff's son, Anwar Al-Aulaqi, was born in New Mexico in 1971. *Id.* ¶ 4. Plaintiff remained in the United States with his family for the next seven years, until 1978, when they moved back to Yemen. *Id.* ¶ 3. Plaintiff went on to serve as Minister of Agriculture and Fisheries in the Government of Yemen, and later founded and served as president of Ibb University and served as president of Sana'a University. *Id.* Plaintiff currently resides in Yemen with his wife, who is an American citizen, and their family. *Id.* ¶ 2.

In 1991, Plaintiff's son Anwar Al-Aulaqi returned to the United States to attend college at Colorado State University. *Id.* ¶ 4. Anwar Al-Aulaqi went on to obtain his

master's degree at San Diego State University and later enrolled in a Ph.D. program at George Washington University, which he attended through December 2001. *Id.* He married and had three children while living in the United States. *Id.* He moved to the United Kingdom in 2003, and to Yemen in 2004. *Id.*

In January 2010, the Washington Post reported that Anwar Al-Aulaqi had been added to "a shortlist of U.S. citizens" that JSOC was specifically authorized to kill. Wizner Decl. ¶ 11(b), Ex. F. The same article reported that Anwar Al-Aulaqi had survived a JSOC-assisted strike in Yemen in late December 2009. *Id.*; *see also* ¶ 13(a), Ex. L. That strike reportedly killed 41 civilians, mostly children and women. *Id.* ¶ 10(b)-(c), Ex. Q-R. Another January 2010 news report stated that Anwar Al-Aulaqi was "all but certain" to be added to a list of suspects that the CIA was specifically authorized to kill. *Id.* ¶ 11(a), Ex. E. In April 2010, the Washington Post and other media sources reported that Anwar Al-Aulaqi had been added to the CIA's list. *Id.* ¶ 12, Ex. H, L-M.

Numerous news reports have corroborated that Defendants have authorized the targeted killing of Anwar Al-Aulaqi and are actively pursuing him. According to one media report, he has already been the target of as many as a dozen unsuccessful strikes. *Id.* ¶ 13, Ex. S. One U.S. official stated that "he's in everybody's sights." *Id.* ¶ 12(b), Ex. L. In the context of a discussion about targeted killing, Defendant CIA Director Leon Panetta stated that Anwar Al-Aulaqi is "someone that we're looking for" and that "there isn't any question that he's one of the individuals that we're focusing on." *Id.* Ex. J.

Defendants added Anwar Al-Aulaqi to the CIA and JSOC kill lists after a closed executive process. *Id.* ¶ 6, Ex. E, G, K. In the course of that process, Defendants and other executive officials determined that Anwar Al-Aulaqi satisfied secret criteria that

determine whether a U.S. citizen can be killed by his own government. Anwar Al-Aulaqi is now subject to a standing order that permits the CIA and JSOC to kill him. *Id.* ¶¶ 9, 11-13, Ex. E-I, L-O, R-S.

Individuals placed on the CIA and JSOC targeted killing lists remain on those lists for months at a time. *Id.* ¶ 8, Ex. E, L. An intelligence official who was questioned about the CIA's kill list stated that individuals would be removed from the kill list if their names "hadn't popped on the screen for over a year, or there was no intelligence linking [them] to known terrorists or plans." *Id.* Ex. E.

Defendants have authorized the CIA and JSOC to kill Anwar Al-Aulaqi without regard to whether, at the time lethal force will be used, he presents a concrete, specific, and imminent threat to life, or whether there are reasonable means short of lethal force that could be used to address any such threat.

Executive officials have condemned Anwar Al-Aulaqi's public statements and sermons; they have also alleged that he has "cast his lot" with terrorist groups and assumed an "operational" role in a terrorist organization. *Id.* ¶ 14, Ex. H, K, M, T. The U.S. government has not, however, publicly indicted Anwar Al-Aulaqi for any terrorism-related crime.

In response to reports that the United States has placed Anwar Al-Aulaqi on "kill lists," Yemeni officials, including the Prime Minister, the Foreign Minister, and the Director of the National Security Agency, have publicly stated that their government's security forces are taking measures to arrest Anwar Al-Aulaqi for possible charge and trial. *Id.* ¶ 15, Ex. F, U-X. Yemeni cabinet members have also publicly requested that the United States provide the Yemeni government with any evidence against Anwar al-

Aulaqi to support arresting him and bringing him to trial. The Yemeni government has prosecuted other residents of Yemen for terrorism-related crimes, and the Yemeni government is currently prosecuting at least one U.S. citizen who is alleged to be a member of a terrorist organization. *Id.* ¶ 17, Ex. Z. Anwar Al-Aulaqi has in the past been detained by the Yemeni government and was imprisoned for 18 months in 2006 and 2007. *Id.* ¶ 18, Ex. AA.

Anwar Al-Aulaqi has been in hiding in Yemen since at least January 2010. *Id.* ¶ 19, Ex. AA-AB. Plaintiff has had no communication with his son during that time. Al-Aulaqi Decl. ¶ 9. Anwar Al-Aulaqi cannot communicate with his father or counsel without endangering his own life. *Id.*

ARGUMENT

Plaintiff is entitled to a preliminary injunction because (1) he has "a substantial likelihood of success on the merits"; (2) he and his son "would suffer irreparable injury were an injunction not granted"; (3) an injunction would not "substantially injure other interested parties"; and (4) "the grant of an injunction would further the public interest." *Ark. Dairy Coop. Ass'n v. U.S. Dep't of Agric.*, 573 F.3d 815, 821 (D.C. Cir. 2009). "These factors interrelate on a sliding scale and must be balanced against each other." *Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356, 360-61 (D.C. Cir. 1999) (citation omitted).

"'If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.'" *Belbacha v. Bush*, 520 F.3d 452, 459 (D.C. Cir. 2008) (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995)). When a plaintiff "makes a very strong showing of irreparable

harm and there is no substantial harm to the non-movant, then a correspondingly lower standard can be applied for likelihood of success." *Davis*, 571 F.3d at 1292 (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)); *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986) ("Injunctive relief may be granted with either a high likelihood of success and some injury, or *vice versa*." (citation omitted)). Even where success on the merits is "far from clear," a motion for preliminary injunction cannot fail as a matter of law if the prospective harm is sufficiently grave. *See Belbacha*, 520 F.3d at 459 (finding risk of torture sufficiently grave to warrant preliminary injunction).

Plaintiff meets the threshold necessary for a preliminary injunction. His claims that the targeting of his son for killing is unconstitutional and violates international law are extremely strong on the merits. Plaintiff's son will suffer the most irreparable of harms, and Plaintiff will also suffer irreparable harm, if Defendants are allowed to carry out an unlawful killing. A preliminary injunction will not, however, harm Defendants; the injunction would leave undisturbed Defendants' authority, recognized under domestic and international law, to use lethal force as a last resort against individuals who pose an imminent threat of death or physical injury. The public interest also strongly favors upholding the U.S. Constitution and laws and preventing unlawful government killings.

A. PLAINTIFF HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

1. The Constitution has extraterritorial application to the government's conduct against U.S. citizens abroad.

It is "well settled that the Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens." *In re Terrorist*

Bombings of U.S. Embassies in E. Afr., 552 F.3d 157, 167 (2d Cir. 2008) (discussing the applicability of the Fourth Amendment to citizens abroad) (internal quotation marks omitted); *see also Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion) ("[W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990) ("[*Reid v. Covert*] decided that United States citizens stationed abroad could invoke the protection of the Fifth and Sixth Amendments.").

The Constitution applies with full force to the government conduct challenged here. While the government has argued in some contexts that the Constitution applies differently in the context of armed conflict, *but see Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that the Due Process Clause applies even to U.S. citizen captured on the battlefield in the context of armed conflict), the United States is not engaged in armed conflict with Yemen, or within it. *See Rise of the Drones II: Hearing Before the Subcomm. on Nat'l Security and Foreign Affairs of the H. Comm. on Gov't Oversight and Reform*, 111th Cong. 2-4 (2010) (testimony of Mary Ellen O'Connell).[1] That the United States is engaged in an armed conflict in Afghanistan does not mean that the law of war applies in Yemen, or anywhere else in the world that a suspected terrorist may be found. *See* Report of the Special Rapporteur, Study on Targeted Killings, U.N. Doc. A/HRC/14/24/Add.6, ¶¶ 52-56 (discussing the criteria for non-international armed conflict and concluding that these factors "make it problematic for the U.S. to show

[1] Available at: http://www.fas.org/irp/congress/2010_hr/042810oconnell.pdf.

that—outside the context of the armed conflicts in Afghanistan or Iraq—it is in a transnational non-international armed conflict against 'al Qaeda, the Taliban, and other associated forces'"); Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. Rich. L. Rev. 845, 858 (2009) ("In addition to exchange, intensity, and duration, armed conflicts have a spatial dimension. It is not the case that if there is an armed conflict in one state—for example, Afghanistan—that all the world is at war, or even that Afghanis and Americans are at war with each other all over the planet."); *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment, ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) (distinguishing non-international armed conflicts from "banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law."); *cf. Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866) ("Martial rule . . . is . . . confined to the locality of actual war.").

The Constitution thus applies with full force to the government conduct challenged in this case.

2. Outside the context of armed conflict, the government's targeted killing of a U.S. citizen violates the Fourth Amendment unless the citizen poses an imminent threat of death or serious physical injury and the use of lethal force is a last resort.

The Supreme Court has held that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985); *see also Graham v. Connor*, 490 U.S. 386, 395 (1989) ("Today we make explicit what was implicit in *Garner*'s analysis, and hold that all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be

analyzed under the Forth Amendment and its 'reasonableness' standard . . . .").[2] Determining whether the force used to effect a particular seizure is "reasonable" involves "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Scott v. Harris*, 550 U.S. 372, 383 (2007) (internal quotation marks omitted). Whether a seizure is justified requires consideration of the "totality of the circumstances." *Garner*, 471 U.S. at 9.

The Supreme Court has made clear that there is no special analytical framework for analyzing, under the Fourth Amendment, the reasonableness of the government's intentional use of lethal force. *Scott*, 550 U.S. at 382 ("*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'"). However, among the factors the courts consider in evaluating such claims are the seriousness and nature of the threat, the imminence of the threat, and whether there are non-lethal means that could reasonably be used to neutralize the threat. The government's use of lethal force against a citizen is constitutional only if, at the time lethal force is employed, the citizen poses an imminent threat of death or serious physical injury and there are no non-lethal means that could reasonably be used to neutralize the threat.

In *Tennessee v. Garner*, for example, the Supreme Court considered the use of lethal force by police officers who had sought to prevent the escape of an apparently unarmed burglary suspect. *Garner*, 471 U.S. at 1. In holding that the use of lethal force

[2] "[A] Fourth Amendment seizure . . . occur[s] . . . when there is a governmental termination of freedom of movement *through means intentionally applied*." *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) (emphasis in original).

by police had been unreasonable under the Fourth Amendment, the Court stated: "Where the suspect poses *no immediate threat* to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Id.* at 11 (emphasis added). The Court also emphasized that the reasonableness of the use of lethal force turns at least in part on the seriousness and nature of the threat. *Id.* (indicating that reasonableness turns in part on whether "the police officer has probable cause to believe that the suspect poses a threat of serious physical harm"). In analyzing the reasonableness of the officer's use of deadly force, the Court acknowledged the "governmental interests in effective law enforcement," but also observed that "the intrusiveness of a seizure by means of deadly force is unmatched." *Id.* at 9. The Court explained: "The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." *Id.*

In *Scott v. Harris*, the Court considered whether a police officer had acted unreasonably by terminating the flight of a high-speed motorist by ramming the rear bumper of the suspect's vehicle, causing an accident that rendered the suspect a quadriplegic. In holding that the police had acted reasonably, the Court wrote: "[I]t is clear . . . that respondent posed *an actual and imminent threat* to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the case." 550 U.S. at 384 (emphasis added); *see also id.* at 386 (holding that use of lethal force was not unreasonable because respondent had "posed *a substantial and immediate risk* of serious physical injury to others" (emphasis added)). The Court also noted that the police officer had considered non-lethal means to neutralize the threat, and

resorted to lethal force only after concluding that other means would be ineffective. *Id.* at 385.

The circuit courts have considered the same factors—the seriousness and nature of the threat, the imminence of the threat, and the availability of alternatives to lethal force—in their analyses of reasonableness under the Fourth Amendment. Thus, the circuits have emphasized that lethal force is reasonable only in response to a threat of serious physical harm. *See, e.g.*, *Graham v. Davis*, 880 F.2d 1414, 1419 (D.C. Cir. 1989) (officer was "only entitled to use an amount of force that was reasonably required to protect himself"); *Estate of Escobedo v. Bender*, 600 F.3d 770, 780 (7th Cir. 2010) ("[T]he excessive force inquiry looks to whether the force used to seize the suspect was excessive in relation to the danger he posed—to the community or to the arresting officers—if left unattended." (internal quotation marks omitted)); *Floyd v. City of Detroit*, 518 F.3d 398, 407 (6th Cir. 2008) ("As a matter of law, an unarmed and nondangerous suspect has a constitutional right not to be shot by police officers."); *Gray-Hopkins v. Prince George's County, Md.*, 309 F.3d 224, 231 (4th Cir. 2002) ("Deadly force . . . is justified only where a reasonable officer would have sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others." (internal quotation marks and alteration omitted)).

The courts have also insisted that deadly force may be used only against concrete, specific, and imminent threats. *See, e.g.*, *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir. 2010) ("Case law has clearly established that an officer may not use deadly force to apprehend a suspect where the suspect poses no immediate threat to the officer or others."); *Cordova v. Aragon*, 569 F.3d 1183, 1190 (10th Cir. 2009) ("When an officer

employs such a level of force that death is nearly certain, he must do so based on more than the general dangers posed by reckless driving."); *cf. Hundley v. District of Columbia*, 494 F.3d 1097 (D.C. Cir. 2007) (holding that jury could not find officer's use of lethal force against a suspect reasonable in light of the jury's specific finding that the suspect did not lunge at police officer in a threatening manner).

In one particularly relevant series of cases, the Ninth Circuit found unconstitutional "special rules of engagement" that permitted FBI agents involved in the Ruby Ridge standoff to shoot on sight "any armed adult male" seen in the vicinity of a particular cabin, without regard to whether those individuals posed any imminent threat. *Harris v. Roderick*, 126 F.3d 1189, 1202 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998); *Idaho v. Horiuchi*, 253 F.3d 359, 377 (9th Cir. 2001) (en banc) (per Kozinski, J.) ("[T]his is not a case where a law enforcement agent fired his weapon under a mistaken belief that his fellow agents or members of the public were in immediate danger. Rather, a group of FBI agents formulated rules of engagement that permitted their colleagues to hide in the bushes and gun down men who posed no immediate threat. Such wartime rules are patently unconstitutional for a police action."), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001).

Furthermore, the courts have consistently examined whether the force used was "greater than [was] reasonable under the circumstances." *Espinosa v. City and County of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010) (internal quotation marks omitted). In conducting that inquiry, courts have considered whether less intrusive measures were attempted before the state resorted to greater force. *See, e.g., Scott*, 550 U.S. at 385;

Smith v. City of Hemet, 394 F.3d 689, 701 (9th Cir. 2005) ("the availability of alternative methods of capturing or subduing a suspect may be a factor to consider.").

To be sure, the Fourth Amendment's reasonableness inquiry is context-specific; what is unreasonable in one context may be reasonable in another. *Graham*, 490 U.S. at 396 ("The test of reasonableness under the Fourth Amendment . . . requires careful attention to the facts and circumstances of each particular case . . . ." (internal quotation marks omitted)). As the Supreme Court noted in *Garner*, however, there is no seizure more intrusive than one that employs deadly force, and the individual's interest in his own life is "unmatched." *Garner*, 471 U.S. at 9; *see also Davenport v. Causey*, 521 F.3d 544, 551 (6th Cir. 2008) ("Given the extreme intrusion caused by use of deadly force, the countervailing governmental interests must be weighty indeed; only in rare instances may an officer seize a suspect by use of deadly force." (internal quotation marks omitted)). Accordingly, in *every* context the government's authority to use lethal force against its own citizens must be narrowly circumscribed.

The standing order to kill Anwar Al-Aulaqi runs afoul of the Fourth Amendment. As the cases make plain, the reasonableness of the government's use of lethal force turns on the imminence of the threat, the gravity of the threat, and the availability of other alternatives *at the time lethal force is actually applied.* The government cannot reasonably use lethal force now to address a threat that was determined to be imminent months ago but is no longer imminent now. The use of lethal force is reasonable only if, at the time lethal force is actually employed, the targeted individual presents a concrete, specific, and imminent threat to life or physical safety. Kill lists—to the extent that they

authorize individuals to be killed irrespective of the threat they pose at the time lethal force is used—are fundamentally inconsistent with this principle.

3. **Outside the context of armed conflict, the government's targeted killing of a U.S. citizen violates the Fifth Amendment unless the citizen poses an imminent threat of death or serious physical injury and the use of lethal force is a last resort.**

While the Fourth Amendment protects against unreasonable seizures, the Fifth Amendment provides more general protection against the deprivation of life without due process of law in circumstances where no seizure has occurred. *Graham*, 490 U.S. at 395 (discussing relationship between Fourth and Fifth Amendments in the context of excessive force claims). Should the Court conclude that targeted killings abroad are not properly analyzed under the Fourth Amendment, it must then apply a Fifth Amendment standard to the allegations in the Complaint. *See County of Sacramento v. Lewis*, 523 U.S. 833, 842-45 (1998) (holding, in the context of lethal force claim against police, that "substantive due process analysis is . . . inappropriate . . . only if [a] claim is 'covered by' the Fourth Amendment"). In this context, the Fourth and Fifth Amendment standards are virtually identical.

The Fifth Amendment's protection against the deprivation of life "without due process of law" is perhaps the most important of the Constitution's guarantees, reflecting a principle that has been central to the Anglo-American legal tradition since at least the 13th century. *See* Magna Carta, ch. 39 (1215) ("No freeman shall be taken or imprisoned or disseised or exiled *or in any way destroyed*, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." (emphasis added)). In the language of Fifth Amendment doctrine, the right to life is "fundamental." *See, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (recognizing that the

right to life is afforded substantive protection by the Due Process Clause); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . . and to establish them as principles to be applied by the courts. One's right to life . . . may not be submitted to vote; [it] depend[s] on the outcome of no elections.").

Because the right to life is fundamental, a government policy that permits that right to be extinguished is evaluated under the strictest scrutiny. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Reno v. Flores*, 507 U.S. 292, 302 (1993) (stating that Due Process clause forecloses government from "infring[ing] . . . fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest" (internal quotation marks omitted)). Indeed, because "the action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action," *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977), the courts have applied the strictest scrutiny even where the government takes life pursuant to a sentence imposed after trial and conviction. *See, e.g., Baze v. Rees*, 553 U.S. 35, 84 (2008) ("[A] number of our decisions rel[y] on the premise that 'death is different' from every other form of punishment to justify rules minimizing the risk of error in capital cases."); *California v. Ramos*, 463 U.S. 992, 998-99 (1983) ("The Court . . . has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny . . . ."); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("[T]he imposition of death by public authority is . . . profoundly different from all other penalties . . . .").

Government policies that deprive a citizen of life can be justified only if the governmental interest is compelling, and only if the taking of life is narrowly tailored to that interest. Outside the context of armed conflict, this generally means that the government cannot deprive a citizen of life except pursuant to a sentence imposed after trial and conviction based on proof beyond a reasonable doubt. *See, e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-67 (1963) ("Our forefathers 'intended to safeguard the people of this country from punishment without trial by duly constituted courts.'" (quoting *United States v. Lovett*, 328 U.S. 303, 317 (1946))); *Screws v. United States*, 325 U.S. 91, 106 (1945) (plurality opinion of Douglas, J.) ("Those who decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner plainly act to deprive a prisoner of the trial which due process of law guarantees him."); *In re Winship*, 397 U.S. 358 (1970). Even after trial and conviction, of course, the government's power to deprive a citizen of life is not without limit. *See, e.g.*, *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (rejecting death penalty for child rape); *Coker v. Georgia*, 433 U.S. 584 (1977) (rejecting death penalty for rape).

Outside the context of armed conflict, the government's targeted killing of a citizen can survive strict scrutiny only if the citizen poses a concrete, specific, and imminent threat to life or physical safety, and only if there are no non-lethal means that can reasonably be employed to neutralize the threat. In other words, the Fifth Amendment prescribes the same limitations that the Fourth Amendment does.

1. Threat to life or physical safety. Absent a threat to life or serious physical injury, the government's interest in neutralizing a threat is insufficient to justify the use of lethal force. The Supreme Court has stated this principle clearly in the context of the

Fourth Amendment, *see, e.g.*, *Garner*, 471 U.S. at 11 (distinguishing "threat[s] of serious physical harm" from threats insufficient to warrant use of lethal force), but the same principle can be drawn from the Fifth Amendment. *See, e.g.*, *Garner v. Memphis Police Dep't*, 710 F.2d 240, 247 (6th Cir. 1983) (holding, under the Fifth Amendment, that the government's interest in using lethal force to stop a fleeing felon "[is] compelling when the fleeing felon poses a danger to the safety of others" but not when it seeks "to protect only property rights"), *aff'd on Fourth Amd't grounds sub nom. Tennessee v. Garner*, 471 U.S. 1; *Mattis v. Schnarr*, 547 F.2d 1007, 1019 (8th Cir. 1976) ("The state . . . must demonstrate the existence of an interest equivalent to, or greater than, the right to life to justify the use of deadly force against fleeing felons."), *vacated as moot sub nom. Ashcroft v. Mattis*, 431 U.S. 171 (1977). *Cf. Beard v. United States*, 158 U.S. 550, 562 (1895) (holding that "[t]he weight of modern authority" establishes that deadly force may be used in lawful self-defense only where the person "being without fault, and in a place where he has a right to be, is violently assaulted"); Wayne R. LaFave, *Substantive Criminal Law* § 10.4(b) (2009) (explaining that "the law recognizes that the amount of force which he may justifiably use [in self-defense] must be reasonably related to the harm which he seeks to avoid.") (collecting cases). Given the magnitude of the private interest at stake (the citizen's interest in his own life), only the weightiest government interest can suffice to justify the use of lethal force.

2. Imminence. To justify the use of lethal force against a citizen without judicial process, the threat in question must not only be grave but be imminent as well. Where a threat is imminent, judicial process is infeasible by definition. Where a threat is more remote, however, the state has no legitimate interest in depriving the citizen of an

opportunity to know the charges against him and to be heard. To the contrary, the state has an affirmative interest in providing this process, because a judicial process separates the innocent from the guilty and gives legitimacy to the state's actions. *See, e.g.*, *Garner*, 471 U.S. at 10. Simply put, the government has no legitimate interest in using *immediate* lethal force against a citizen who does not present an *immediate* threat. *Cf.* LaFave, *Substantive Criminal Law* § 10.4(d) ("Case law and legislation concerning self-defense require that the defendant reasonably believe his adversary's unlawful violence to be almost immediately forthcoming. Most of the modern codes require that the defendant reasonably perceive an 'imminent' use of force, although other language making the same point is sometimes to be found.") (collecting cases).

The "imminence" requirement also follows from basic principles of *procedural* due process. Under *Mathews v. Eldridge*, what process is due turns on the significance of (i) the private interest that will be affected by the official action; (ii) 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; and (iii) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. 319, 334-35 (1976). Except where a threat to life is imminent, each of these factors weighs decisively in favor of requiring judicial process.

First, a citizen's interest in his own life is uniquely weighty. Second, without judicial process, the risk that the government will execute an innocent citizen—or, for that matter, a citizen who has engaged in criminal conduct but who does not present a grave and imminent threat to life—is high. The risk is particularly high where targeting

decisions are made on the basis of intelligence rather than admissible evidence, because intelligence often includes hearsay, information obtained through the use of coercive methods, information obtained from sources with complex motives and of questionable reliability, information that has never been subjected to public scrutiny, and information whose reliability has never been tested in court.[3] At the same time, there is no question that additional procedural safeguards would reduce the risk of error—indeed, our entire criminal justice system is based on the theory that procedural safeguards help sort the innocent from the guilty. *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that due process requires some process for a U.S. citizen detained in the United States by military authorities even when that citizen was captured on the battlefield in the context of armed conflict).[4] Finally, the burden of a criminal trial, while certainly not insubstantial, is minimal in relation to the significance of the private interest at stake. To be sure, the burden of providing a criminal trial is substantial *if the threat in question is imminent*, because in that context the requirement of process would entirely defeat the government's ability to act before the threat is fully realized. Where a threat is more remote, however,

[3] 51 prisoners at Guantánamo Bay have now had their cases decided by courts. In each one of those cases, the government argued that the intelligence and other information in its possession established that the prisoner was "part of" or "substantially supported" Al Qaeda, the Taliban or affiliated groups. Yet in nearly three-quarters (37) of those cases, the government's evidence failed to withstand scrutiny when submitted to review by a *habeas* court on a preponderance-of-the-evidence standard. *See* Center for Constitutional Rights, Guantanamo Habeas Scorecard (Aug. 17, 2010), available at http://ccrjustice.org/learn-more/faqs/guantanamo-bay-habeas-decision-scorecard.

[4] There is also, of course, the risk that the government's use of lethal force will result in the deaths of innocent bystanders. *See, e.g.*, Dexter Filkins, *Operators of Drones are Faulted in Afghan Deaths*, N.Y. Times, May 29, 2010; Peter Bergen & Katherine Tiedemann, *The Year of the Drone*, Foreign Policy Magazine, Apr. 26, 2010; Scott Shane, *CIA to Expand Drone Use in Pakistan*, N.Y. Times, Dec. 3, 2009; Daniel L. Byman, *Do Targeted Killings Work?*, The Brookings Institution, July 14, 2009.

the government's interest in neutralizing the threat is not impaired by requiring it to provide ordinary judicial process.[5]

3. Last resort. If the state's interest in preventing death or serious injury can be served by means that do not violate the right to life, then killing is, by definition, unnecessary. In other words, if a threat can be defused by means short of killing, the government is constitutionally required to use those means. Killing must be a genuinely last resort, used only if other means have been attempted or are unavailable. A policy of targeted killing without exhausting less intrusive options that could avert a threat is simply not narrowly tailored to serve the government's legitimate interests.

The government's standing authorization to kill Anwar Al-Aulaqi violates these Fifth Amendment principles for the same reasons that it violates Fourth Amendment principles. Under the Fifth Amendment, as under the Fourth Amendment, the question whether a citizen presents a concrete, specific, and imminent threat to life or physical safety, and the question whether there are non-lethal alternatives that can reasonably be used to neutralize the threat, must be answered at the time lethal force is actually employed. The government's kill lists—which give the CIA and JSOC standing authority to use lethal force against specific individuals—are fundamentally inconsistent with that rule. This is certainly true of kill lists on which names remain for months at a time. A threat that was determined months ago to be imminent but is no longer imminent does not satisfy the constitutional "imminence" requirement. The government cannot impose an extrajudicial death sentence on a citizen on the ground that he presented a

[5] A corollary of the imminence requirement is that the government may not use lethal force solely as retribution for past acts. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979) (holding that under the Fifth Amendment pre-trial detainees may not be punished "prior to an adjudication of guilt in accordance with due process of law").

threat in the past or that he might present a threat in the future. Indeed, to invest the government with this kind of power, outside the context of armed conflict, would do profound and lasting damage to the rule of law.

The existence of a terrorist threat to the United States does not permit the government to cast aside the principles that Americans have fought to safeguard for more than two centuries. The Supreme Court has long recognized that "[t]he imperative necessity for safeguarding [the right] to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action." *Kennedy*, 372 U.S. at 164-65; *see also Ex Parte Milligan*, 72 U.S. at 120-21 ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.").

4. Outside of armed conflict, international law prohibits targeted killing unless the targeted individual poses an imminent threat of death or serious physical injury and the use of lethal force is a last resort.

a. Extrajudicial killing is actionable under the Alien Tort Statute.

Arbitrary deprivation of life by the state is universally prohibited and condemned under international law, as expressed in both treaty and customary law.[6] Like the

[6] *See, e.g.*, Universal Declaration of Human Rights, art. 3, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, art. 6, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (Dec. 16, 1966); European Convention on Human Rights, art. 2, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights, art. 4, Nov. 21, 1969, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights, art. 4, June 27, 1981, 1520 U.N.T.S. 217; American Declaration of the Rights and Duties of Man, art. 1, O.A.S.

prohibitions against genocide, slavery, and torture, the prohibition against arbitrary killing, including extrajudicial killing, has the rare status of a *jus cogens* norm—a fundamental rule of international law accepted and recognized by the international community as a whole as permitting no derogation under any circumstances.[7]

The Alien Tort Statute ("ATS") confers jurisdiction upon district courts for "any civil action by an alien for a tort ... committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.[8] In *Sosa v. Alvarez-Machain*, the Supreme Court held that claims under the statute must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Sosa*, 542 U.S. 692, 725 (2004). Endorsing the reasoning of previous courts, the Court clarified that the underlying norms must be "specific, universal and obligatory." *Id.* at 732 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) and *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

Res. XXX (May 2, 1948); *see also* Nils Melzer, *Targeted Killing in International Law* 184-89 (2008) (discussing evidence of the customary nature of the prohibition against arbitrary deprivation of life).

[7] *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Merits, 1986 I.C.J. 218 (June 27); Human Rights Committee, Gen. Cmt. No. 24, ¶ 10, 52nd Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Apr..11, 1994), and Gen. Cmt. No. 29, ¶ 11, 1950th mtg., U.N. Doc. CCPR/C/21/Rev.1/Add.11 (July 21, 2001); *see also* Melzer, *supra* note 6, at 215-20 (discussing evidence of the *jus cogens* character of the prohibition against arbitrary deprivation of life).

[8] The injunctive relief Plaintiff seeks is available under the ATS. The court in *Kadic v. Karadzic*, in exercising its "equitable powers . . . and the Court's authority under the Alien Tort Claims Act," granted plaintiffs with ATS claims against Radovan Karadzic a permanent injunction to enjoin him from committing or facilitating various acts, including extrajudicial killings. *Kadic*, No. 93-1163, at 2 (S.D.N.Y. Aug. 16, 2000) (order granting permanent injunction).

Federal courts have uniformly held that claims of extrajudicial killing—a deliberate killing without judicial process that is not otherwise lawful—by the state are actionable under the ATS, both before and after *Sosa*. *See, e.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 383 (S.D.N.Y. 2009); *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 593 (E.D. Va. 2009); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1178-79 (C.D. Cal. 2005); *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987). From the beginning of modern ATS jurisprudence, extrajudicial killing has been identified as the subject of "unequivocal international condemnation" and one of "a handful of heinous actions—each of which violates definable, universal and obligatory norms." *Tel-Oren*, 726 F.2d at 781, 791 (Edwards, J., concurring). Indeed, "every instrument or agreement that has attempted to define the scope of international human rights has 'recognized a right to life coupled with a right to due process to protect that right.'" *Xuncax v. Gramajo*, 886 F. Supp. 162, 185 (D. Mass. 1995) (internal citation omitted).

When it enacted the Torture Victim Protection Act of 1991 ("TVPA"), Congress explicitly included a prohibition against extrajudicial killing which, Congress recognized, had already "assumed the status of customary international law."[9] *See Wiwa*, 626 F. Supp. 2d at 383 (citing the TVPA and finding "unpersuasive Defendants' argument that there is no customary international law norm against summary execution . . . that meets the *Sosa* standard"); *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d at 593 (citing the TVPA as "support for the existence of an international norm prohibiting official summary executions"). Indeed, the Supreme Court in *Sosa* read the TVPA as providing a "clear

[9] S. Rep. No. 102-249, at 3 (1991); H.R. Rep. No. 102-367, at 2-3 (1991).

mandate" for federal courts to recognize claims of extrajudicial killing and torture, including under the ATS. 542 U.S. at 728, 731.

Section 3(a) of the TVPA defines extrajudicial killing as

> a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

28 U.S.C. § 1350 note.

Given the TVPA's clear definition of extrajudicial killing codifying customary international law,[10] and *Sosa*'s endorsement of the TVPA as establishing "an unambiguous and modern basis for federal claims of ... extrajudicial killing," 542 U.S. at 728 (internal citation and quotation marks omitted), a killing that meets the TVPA definition would be actionable under the ATS as well.[11]

b. A deliberate killing without judicial process where lethal force is not a last resort to prevent an imminent threat to life or serious physical injury violates the international norm against extrajudicial killing.

Defendants' authorization of the targeted killing of Plaintiff's son followed an executive determination based on secret criteria, and is being implemented outside the context of the armed conflicts involving the United States in Afghanistan and Iraq. The deliberate nature of the authorized killing pursuant to a process devoid of any of the basic procedural protections required before the state may take an individual's life plainly satisfies the TVPA definition of "a deliberated killing" that was "not authorized by a

[10] S. Rep. No. 102-249, at 6 (1991).

[11] This claim is brought by Plaintiff Nasser Al-Aulaqi on his own behalf for the injury he would suffer if Defendants were to kill his son.

previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

In the absence of due process, under the body of international law applicable outside armed conflict, a state may intentionally deprive an individual of life only when the use of lethal force meets certain stringent criteria—of "proportionality," "necessity" and "precaution."[12] To be lawful, a targeted killing must satisfy all three of these criteria.

As a general rule, the threshold requirement of proportionality ensures that lethal force will be used only to prevent threats to life. It prohibits the use of lethal force except "in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape." Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, princ. 9, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (Aug. 27-Sept. 7, 1990). In the context of counter-terrorism operations, a general threat emanating from an organization as a whole, or a threat based on allegations of past conduct, does not

[12] International law does not recognize a territorial limitation on the right to life. While human rights treaties restrict their applicability to individuals who are subject to the "jurisdiction" of a given state, jurisdiction is not determined by the territory in which a violation has occurred, but by the "relationship between the individual and the State" in relation to the violation, wherever it has occurred. *Burgos v. Uruguay*, Comm. No. R.12/52, Human Rights Committee, U.N. Doc. Supp. No. 40 (A/36/40) at 176, ¶ 12.2 (1981); *see also Coard v. United States*, Case No. 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, ¶ 37 (1999); *Alejandre*, Case 11.589, Inter-Am. Comm'n H.R., ¶ 23. The concept of jurisdiction under human rights law focuses on conduct rather than territory, and requires states to comply with human rights standards with respect to all individuals who may be under their effective control or directly affected by their actions. In the context of targeted killings in particular, killings by state agents occurring outside the territory of the acting state "brings[] the targeted person within the jurisdiction of that state" within the meaning of international law. Melzer, *supra* note 6, at 138; *see generally id.* at 122-138, 212 (discussing the extraterritorial scope of the right to life).

justify an intentional killing. Rather, a threat must be concrete, specific and imminent. *See Aytekin v. Turkey*, App. No. 22880/93, Eur. Comm'n H.R., ¶¶ 95-96 (1997) (in the absence of specific circumstances justifying the fatal shooting of a suspect, finding that "the fact that the area was subject to terrorist activity does not of its own accord give the security forces the right to open fire upon people or persons that they deem suspicious"); *Andronicou and Constantinou v. Cyprus*, App. No. 25052/94, Eur. Ct. H.R., ¶ 191 (1997) (finding that a fatal shooting was justified in light of a perceived "real and immediate danger" to life); *Neira-Alegría v. Peru*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 20, ¶ 74 (Jan. 19, 1995) (finding that the actual danger under the circumstances did not justify the use of lethal force even where the targets were "highly dangerous and [] in fact armed"). Responding with lethal force to threats that fall short of these standards can never be proportionate or lawful, even if the failure to use lethal force results in a lost opportunity to arrest the suspect. *See Nachova and Others v. Bulgaria*, App. No. 43577/98, Eur. Ct. H.R., ¶ 95 (2005).

Even where justified in light of the gravity of a given threat and thus proportionate, the use of lethal force must also be "strictly unavoidable" and thus necessary to prevent the loss of life[13]—a measure of last resort only after non-lethal means to avert the threat have been exhausted. *See Andronicou*, App. No. 25052/94, ¶¶

[13] Basic Principles, princ. 9 (permitting intentional lethal force only when "strictly unavoidable in order to protect life"); *see also* Code of Conduct for Law Enforcement Officials, art. 3 and cmt., G.A. res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (Dec. 17, 1979) (permitting force "only when strictly necessary" as an "extreme measure"); *McCann*, App. No. 18984/91, ¶ 148 (1995) ("[t]he use of force ... must be no more than "absolutely necessary"); Report on Terrorism and Human Rights, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., ¶ 87 (Oct. 22, 2002) (permitting lethal force only where "strictly unavoidable" and "strictly necessary and proportionate").

183-85 (finding that the use of lethal force was "a considered one of last resort" after negotiations had been attempted "right up to the last possible moment" and failed); *McCann and Others v. United Kingdom*, App. No. 18984/91, Eur. Ct. H.R., ¶¶ 201-13 (1995) (holding that the fatal shooting of terrorist suspects was not "absolutely necessary" because the suspects could have been apprehended at an earlier moment in time); *Alejandre v. Cuba*, Case 11.589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 586, ¶ 42 (1999) (finding that government agents "made no effort to use means other than lethal force" in violation of the right to life); *see also* Basic Principles, princ. 4 (requiring "as far as possible ... non-violent means before resorting to the use of force and firearms"), princ. 9 (permitting lethal force "only when less extreme means are insufficient to achieve lawful objectives"); Code of Conduct, art. 3 cmt. (permitting lethal force only when "less extreme measures are not sufficient to restrain or apprehend the suspected offender"); Report of the Special Rapporteur on Extrajudicial Executions, Comm'n H.R., 62nd Sess., ¶ 48, E/CN.4/2006/53 (Mar. 8, 2006) (by Philip Alston) ("[n]on-lethal tactics for capture or prevention must always be attempted if feasible" and "law enforcement officers must ... employ a graduated resort to force"). Necessity also has a temporal element, requiring that potential recourse to lethal force be constantly reassessed and necessary at the very moment of application.[14] The question of necessity can thus "hardly be determined in advance." Report of the Special Rapporteur on Extrajudicial Executions, G.A., 61st Sess., ¶ 41, G.A. Res. 59/197, A/61/311 (Sept. 5, 2006) (by Philip Alston).

[14] *See* Melzer, *supra* note 6, at 101, 116, 228 (citing cases).

Lethal force that is both proportionate and necessary must further satisfy the requirement of precaution, which compels states to plan, organize, and control operations to the greatest extent possible so as to minimize recourse to lethal force. *See McCann*, App. No. 18984/91, ¶¶ 201-13 (finding that the failure to apprehend terrorist suspects prior to fatally shooting them, the failure to allow for the possibility of erroneous intelligence assessments, and the automatic recourse to lethal force were evidence of a lack of requisite care in the organization and control of the operation); *see also Nachova*, App. No. 43577/98, ¶ 103 (holding that the authorities had failed to comply with the obligation to minimize the risk to loss of life "since the arresting officers were instructed to use all available means to arrest [the victims], in disregard of the fact that the fugitives were unarmed and posed no danger to life or limb"). To be lawful, the summary use of lethal force by a state must satisfy all three of these criteria.

It bears noting that where a targeted killing entails the use of force by one state in the territory of another outside the context of armed conflict, the legality of the extraterritorial use of force by the targeting state is separate and distinct from the question whether the targeting of the individual himself is lawful. Article 2(4) of the U.N. Charter imposes a general ban on the use of extraterritorial force by states outside a situation of armed conflict, except when a state has consented to the use of force in its territory, or when the targeting state has asserted a right to use force in self-defense because the second state is unwilling or unable to stop attacks from its territory. *See* U.N. Charter, art. 2, para. 4; Report of the Special Rapporteur on Extrajudicial Executions, Human Rights Council, 14th Sess., ¶ 35, A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston). But even a state's consent, or a targeting state's asserted right to self-defense, does not

render a targeted killing permissible if the individual himself is not a lawful object of lethal force under the applicable international law.

On its face, a policy predicated on "kill lists" of approved targets against whom the government has predetermined to use lethal force, where names remain on lists for months at a time, cannot be consistent with the requirements governing the use of lethal force by states. These standards limit force to imminent and specific threats (proportionality), permit lethal force only as a last resort and require constant reassessment of its need, including at the moment of application (necessity), and require states to minimize recourse to lethal force to the greatest degree possible in planning operations (precaution).

The danger of creating exceptions to this rule in the face of terrorist threats was articulated by the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in 2004:

> Empowering Governments to identify and kill "known terrorists" places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other alternative has been exhausted. While it is portrayed as a limited "exception" to international norms, it actually creates the potential for endless expansion of the relevant category to include any enemies of the State, social misfits, political opponents, or others. And it makes a mockery of whatever accountability mechanisms may have otherwise constrained or exposed such illegal action under either humanitarian or human rights law.

Report of the Special Rapporteur on Extrajudicial Executions, Comm'n H.R., 61st Sess., ¶ 41, E/CN.4/2005/7 (Dec. 22, 2004) (by Philip Alston).

For these reasons, international law expressly prohibits the use of lethal force against civilians outside of armed conflict except as a last resort to prevent an imminent attack that is likely to cause death or serious physical injury. A targeted killing policy

under which names are added to "kill lists" after a bureaucratic process and remain there for months at a time cannot be limited to the use of lethal force as a last resort to address imminent threats.

5. Defendants' targeted killing policy violates the Fifth Amendment by subjecting U.S. citizens to the possibility of death on the basis of standards that are secret or non-existent.

The government's refusal to disclose the standard by which it targets U.S. citizens for death is independently unconstitutional: U.S. citizens have a right to know what conduct may subject them to extrajudicial execution at the hands of their own government so that they may conform their conduct accordingly. Due process requires, at a minimum, that citizens be put on notice of what may cause them to be put to death.

It is "the first essential of due process of law" that the government must provide notice of what it forbids before it takes a person's life, liberty or property. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The Supreme Court has repeatedly made clear that all persons "are entitled to be informed as to what the State commands or forbids," *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (internal quotation marks omitted), and that providing "fair warning . . . of what the law intends to do if a certain line is passed" has "long been part of our tradition." *United States v. Bass*, 404 U.S. 336, 348 (1971) (internal quotation marks omitted).

The Due Process Clause's notice requirement is animated by several concerns that are engaged here. First, a notice requirement reflects the principle that basic notions of fairness would be violated if penalties were visited on individuals who had no reasonable notice that their conduct would result in such penalties, and thus had no meaningful opportunity to conform their behavior to the law. *Landgraf v. USI Film Prods.*, 511 U.S.

244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly"); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.").

Second, in the absence of clearly stated rules, there is little to restrain the government from acting arbitrarily. As the Court has explained, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Grayned*, 408 U.S. at 108; *see also Kolender v. Lawson*, 461 U.S. 352, 357, 361 (1983) (holding statute in question unconstitutionally vague "because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute"); *Smith v. Goguen*, 415 U.S. 566, at 572-73 (1974) ("[The due process doctrine of vagueness] requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement.") (internal quotation marks omitted).

Applying these principles, courts have invalidated criminal statutes that fail to put individuals on fair notice as to what is prohibited. *See, e.g., Cline v. Frink Dairy Co.*, 274 U.S. 445, 458 (1927) ("[Due process] certainly imposes upon a state an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required."); *Connally*, 269 U.S. at 391 (holding that "the terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties"). Where

serious deprivations may be imposed in a civil proceeding, courts have applied the same notice standard. *See, e.g.*, *Jordan v. De George*, 341 U.S. 223, 231 (1951); *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (holding that stringent fair notice requirements apply "when sanctions are drastic").

It follows that when the government seeks to impose the gravest of all deprivations—death—the notice requirements of the Due Process Clause are fully engaged. That the government has targeted a U.S. citizen for death without the typical pre-deprivation process of a criminal trial only heightens the government's obligation to provide clear notice of its targeting criteria. In these circumstances, the Court is not tasked with interpreting uncertain or imprecise terms, nor is it asked to divine whether a published standard provides a reasonably clear line between illegal and legal conduct. The government has gone beyond mere imprecision; it has failed to provide any public language whatsoever to guide either this Court or an individual contemplating the consequences of his actions.

Due process demands fair notice of what conduct will expose an individual to government sanctions, particularly where the penalty involved is severe. A policy of targeted killing predicated on executive determinations that U.S. citizens meet a secret definition of threat cannot survive constitutional scrutiny. If the government is to adopt a policy permitting the lethal targeting of U.S. citizens, it may not do so constitutionally without informing the public of the criteria that it applies.

B. PLAINTIFF WILL SUFFER IRREPARABLE INJURY ABSENT AN INJUNCTION.

The irreparable injury in this case—death—is obvious and could not be greater. In order to obtain a preliminary injunction, Plaintiff need not demonstrate that irreparable

injury is certain, but only that it "is *likely* in the absence of an injunction." *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 375 (2008) (emphasis in original). Here, absent a preliminary injunction, Plaintiff's son could be killed at any moment so long as he remains on a targeted "kill list."

Death is precisely the type of irreparable harm preliminary injunctions are designed to prevent. *See, e.g.*, *Wilson v. Group Hospitalization & Med. Servs., Inc.*, 791 F. Supp. 309, 313-314 (D.D.C. 1992) (granting preliminary injunction where, absent injunctive relief preventing denial of medical benefits, plaintiff "faced nearly certain death, the ultimate irreparable injury"); *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 286 (D.D.C. 2005) (finding irreparable harm where plaintiff faced a "great risk of harm and death as a result of his continuing service" on active duty in Iraq); *Williams v. Chrans*, 50 F.3d 1363, 1364 (7th Cir. 1995) (per curiam) ("In this case, as in all death cases, there is no question of irreparable injury."); *Henderson v. Bodine Aluminum, Inc.*, 70 F.3d 958, 961 (8th Cir. 1995) ("It is hard to imagine a greater harm than losing a chance for potentially life-saving medical treatment." (citation omitted)); *Harris v. Bd. of Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004) (holding that "pain, infection, amputation, medical complications, and death" constitute irreparable harm).

Indeed, by threatening Anwar Al-Aulaqi with the imminent loss of his constitutionally protected right to life, defendants have *ipso facto* threatened him with irreparable injury. *See Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (holding, in the context of a Fourth Amendment challenge, that "[i]t has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury'" (quoting *Elrod v. Burns*, 427 U.S. 347,

373 (1976)); *Seretse-Khama v. Ashcroft*, 215 F. Supp. 2d 37, 53 (D.D.C. 2002) (deprivation of liberty in violation of Due Process Clause "is an undeniably substantial and irreparable harm").

Finally, the threatened killing of Plaintiff's son has obvious severe consequences for Plaintiff in his own right as well as in his next friend capacity. If injunctive relief is not granted, Plaintiff will suffer the irreparable and irreplaceable loss of his son and the grave psychological, emotional, and potentially physical pain that results from such loss. *See, e.g., Vencor Nursing Ctrs, L.P. v. Shalala*, 63 F. Supp. 2d 1, 12 (D.D.C. 1999) ("court may consider subjective, psychological harm in its irreparable-harm analysis"); *see also, Petties v. District of Columbia*, 881 F. Supp. 63, 70 (D.D.C. 1995) (finding irreparable harm where, inter alia, defendant's actions "exact[ed] a psychological, emotional and physical toll"). Even the temporary loss of contact with family can constitute irreparable harm. *See, e.g., Parrish v. Brownlee*, 335 F. Supp. 2d 661, 668 (E.D.N.C. 2004) (finding loss of "companionship of family" during time of unjustified call to active military duty "significant and irreparable"); *see also Keirnan v. Utah Transit Auth.*, 339 F.3d 1217, 1220 (10th Cir. 2003) (finding lost "contact with friends and family" helped demonstrate irreparable harm).

C. DEFENDANTS WILL NOT SUFFER SUBSTANTIAL HARM AS A RESULT OF A PRELIMINARY INJUNCTION.

A preliminary injunction to enjoin the government from killing a U.S. citizen outside of armed conflict in violation of the Constitution and international law will not "substantially harm" Defendants. *Davis*, 571 F.3d at 1291. The government cannot suffer harm by being required to comply with the law, and the notion that it could runs contrary to the most basic elements of our legal system. Preventing Defendants from

carrying out an unlawful killing does not prevent them from pursuing Anwar Al-Aulaqi with constitutional law enforcement tools.

An injunction that confines the government's behavior to its lawful bounds and checks the overreach of executive power protects us all. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.'").

D. THE PUBLIC INTEREST STRONGLY FAVORS GRANTING AN INJUNCTION.

The public has an exceedingly strong interest in ensuring that the government abides by the Constitution and laws of the United States. The deliberate and premeditated killing of a U.S. citizen without any judicial process, outside the narrow circumstances that permit the use of lethal force by the state, is contrary to the unambiguous language of the Fifth Amendment, and is abhorrent to a well-functioning democracy. An injunction ensuring that the United States conducts its operations within legal confines would substantially "further the public interest." *Ark. Dairy Coop. Ass'n*, 573 F.3d at 821.

The public interest is served when a preliminary injunction seeks to uphold constitutional protections. *See, e.g., O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) ("[I]ssuance of a preliminary injunction would serve the public's interest in maintaining a system of laws free of unconstitutional racial classifications."); *Kotz v. Lappin*, 515 F. Supp. 2d 143, 152 (D.D.C. 2007) ("The public certainly has an interest in the judiciary intervening when prisoners raise allegations of constitutional violations." (citing *Rhodes v. Chapman*, 452 U.S. 337, 362 (1981));

Seretse-Khama, 215 F. Supp. 2d at 54 (public interest served by release of detainee where "continued indefinite detention [would] pose[] serious constitutional risks"); *Cortez III Serv. Corp. v. Nat'l Aeronautics & Space Admin.*, 950 F. Supp. 357, 363 (D.D.C. 1996) (public interest served by upholding the Constitution); *see also G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."). This same consideration applies to ensuring government actors abide by the law generally. *See, e.g.*, *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) (noting "the general public interest served by agencies' compliance with the law" in context of preliminary injunctions).

Claims of "national security" do not override these core legal principles, especially where significant individual rights are at stake. In *Al-Marri v. Bush*, the court granted a Guantanamo Bay detainee's motion for a preliminary injunction seeking 30 days notice before a transfer, rejecting the government's argument that the relief was contrary to the public interest "because it could frustrate the Government's ability to conduct foreign policy, which ultimately could harm the nation by impairing the effectiveness of the war on terrorism." No. 04-2035, 2005 U.S. Dist. LEXIS 6259, at *20 (D.D.C. Apr. 4, 2005). The court observed that the government's argument "'simply conflate[d] the public interest with [the Government's] own position'" *Id.* (quoting *Mahmoad Abdah v. Bush*, 2005 U.S. Dist. LEXIS 4942 (D.D.C. Mar. 29, 2005)). "In contrast, the public interest undeniably is served by ensuring that Petitioner's constitutional rights can be adjudicated in an appropriate manner." *Id.* at *20-21.

Furthermore, the injunction sought by Plaintiff would not prevent the government from taking a variety of appropriate and lawful actions to address any threat of harm. It would not prohibit the government from using lethal force, as a last resort, against individuals, including U.S. citizens, who present concrete, specific, and imminent threats of death or physical injury.

Any purported national security interest the government may assert is far outweighed by the dangers of allowing Defendants to carry out targeted killings of citizens on the basis of secret criteria in a closed executive process, insulated from any kind of judicial review. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 2277 (2008) ("Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."). *See also, Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) ("[E]ven the war power does not remove constitutional limitations safeguarding essential liberties."). Granting preliminary injunctive relief will further serve the public interest by permitting the judicial review necessary for this extraordinary government policy.

CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the Court (i) declare that, outside of armed conflict, the Constitution prohibits Defendants from carrying out the targeted killing of U.S. citizens, including Plaintiff's son, except in circumstances in which they present concrete, specific, and imminent threats to life or

physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threats; (ii) declare that, outside of armed conflict, treaty and customary international law prohibit Defendants from carrying out the targeted killing of individuals, including Plaintiff's son, except in circumstances in which they present concrete, specific, and imminent threats to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threats; (iii) enjoin defendants from intentionally killing U.S. citizen Anwar Al-Aulaqi unless he is found to present a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat; and (iv) order Defendants to disclose the criteria that are used in determining whether the government will carry out the targeted killing of a U.S. citizen.

Respectfully submitted,

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9.013. **Surrender; denial of quarter prohibited**. Military personnel and others entitled to prisoner of war status become prisoners of war when they surrender or otherwise fall into the hands of enemy forces. This may occur because the individual is *hors de combat* due to wounds or sickness, or because he or she either is in the hands of an adverse Party or clearly expresses his or her intention to surrender.[1]

The law of war obligates a party to a conflict to accept the surrender of enemy military personnel. Denial of quarter, that is the refusal to accept an enemy's surrender, is expressly prohibited.[2]

The codified law of war does not define precisely when surrender takes effect or how it may be accomplished in practical terms. *Surrender* involves an offer by the surrendering party (a unit or an individual soldier), properly communicated to the opposing force, received by the opposing force or its members, and the ability of the opposing force to accept the offer of surrender under the circumstances ruling at the time. An offer of surrender may not be refused when communicated, but that communication must be timely and such that it may be properly acted upon. An offer or attempt at surrender in the midst of a hard-fought battle may not be easily communicated nor received. The test is one of reasonableness on the part of each party to the situation in the circumstances ruling at the time.[3] There is no legal consequence if a soldier offering to surrender is killed or wounded incidental to an engagement between opposing forces.[4]

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[1] For discussion of *hors de combat*. see ¶ 7.004b.

[2] Article 23 (c) and (d), Annex to Hague IV; and Article 40, API. U.S. Army law of war manuals of the Twentieth Century, the codified law of war, and war crimes trials decisions constitute a conscious rejection of Article 65 of U.S. Army General Orders No. 100 (1863), which stated in part "a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners." See, for example, ¶ 85 of U.S. Army FM 27-10 (1956), which states:

> A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears that they will regain their liberty through the impending success of their forces. It is likewise unlawful for a commander to kill his prisoners on the grounds of self-preservation, even in the case of airborne or commando operations, although the circumstances of the operation may make necessary rigorous supervision of and restraint upon the movement of prisoners of war.

The codified law of war prohibiting the denial of quarter is contained in Article 23(d) of the Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, and Article 40, API. War crimes cases involving conviction of individuals for murder of prisoners of war are numerous, and include the *High Command Case (United States v. Wilhelm von Leeb, et al.)*, Volumes X and XI, *Trials of War Criminals Before the Nuernberg Military Tribunals* (1951), in which General Georg Karl Freidrich-Wilhelm von Kuechler was convicted of criminal neglect in permitting the illegal execution of Russian prisoners of war captured and held by units under his command; see XI T.W.C., pp. 568-569. See also *Trial of S.S. Brigadefuhrer Kurt Meyer* ("*The Abbaye Ardenne Case*"), IV LRTWC (1948), pp. 97-112; *Trial of Major Karl Rauer and Six Others*, IV LRTWC (1948), pp. 113-117; and *Trial of Kurt Student*, IV LRTWC (1948), pp. 118-124.

[3] See, for example, DoD, *Final Report to Congress* (1992), pp. 629-630. In the 1991 Persian Gulf War, Iraqi soldiers deep in Iraqi-held territory were photographed by an unmanned reconnaissance drone as they ran out, endeavoring to surrender to the drone as it flew over, perhaps fearing an artillery barrage or air strike that would follow, a circumstance in which acceptance of surrender was not possible. It is equally possible that, knowing the impossibility of accomplishing surrender, they were feigning surrender to avoid follow-on attack.

An offer of surrender must be accompanied by an immediate cessation of all hostile acts or resistance, or manifestations of hostile intent, including efforts to escape or to destroy items, documents or equipment in the custody or charge of the individual offering to surrender.

During the 1944 breakout of four German divisions from the Falaise Gap, individual German vehicles began displaying white flags while retreating with other German military and armored vehicles. Display of the white flag does not constitute surrender. Nor were the vehicles and personnel displaying white flags while continuing to attempt the break out acting in a manner consistent with surrender. Similarly, enemy soldiers may not man an antiaircraft gun, shooting at an enemy aircraft, then raise their hands as if to surrender seconds prior to a second aircraft attacks the position. They have not communicated a desire to surrender that can be accepted effectively. Neither may a soldier fifty meters from an enemy defensive position in the midst of an infantry assault by his unit throw down his weapon and raise his arms (as if to indicate his desire to surrender) expect that the defending unit will be able to accept and accomplish his surrender while resisting the on-going assault by his unit.

[4] Article 113, U.S. Army General Orders No. 100 (1863).