

THE CURIOUS CASE OF ANWAR AL–AULAQI:
IS TARGETING A TERRORIST FOR EXECUTION BY
DRONE STRIKE A DUE PROCESS VIOLATION WHEN
THE TERRORIST IS A UNITED STATES CITIZEN?

Michael Epstein *

INTRODUCTION	723
I. APPROVAL FOR EXECUTION WITHOUT DUE PROCESS?.....	724
A. Who is Anwar al-Aulaqi?.....	724
B. The Justice Department’s Response	727
C. The ACLU’s Arguments	729
II. TERRORISM, NATIONAL SECURITY, AND THE POST–SEPTEMBER 11	
LEGAL FRAMEWORK	732
A. Terrorism and “Enemy Combatants”	732
B. Due Process Abroad	734
1. <i>9/11 and the War on Terror Due Process Abroad</i>	734
2. <i>Applicable Due Process Framework</i>	736
3. <i>The Political Question Doctrine</i>	737
III. IS TARGETING AL-AULAQI A DUE PROCESS VIOLATION?	739
IV. THE DECISION AND DISMISSAL	741
CONCLUSION	744

INTRODUCTION

In response to the horrific attacks of September 11, 2001 by al-Qaeda upon the United States, the U.S. Government has responded with a vast “War on Terror,” both domestically and abroad. The U.S.’s pursuit of al-Qaeda and other affiliated terrorists abroad has led to increased use of advanced technology, which in turn allows the U.S. to pursue terrorists and enemy combatants in far away countries where they have little or no troop presence. These operations, occurring most often in the form of remote–controlled drone strikes, have been the increasingly favored method of combating terrorists both in Afghanistan, where the U.S. is at war, as well as territories where Taliban and al-Qaeda operatives have fled, such as

* Michael Epstein is a Juris Doctor Candidate (Expected May 2011) at Michigan State University’s College of Law, and served as the Editor-in-Chief of the Journal of International Law for Volume 19. He is grateful for the hard work and dedication of the Journal’s staff and editorial board, as well as the support and guidance of Professor Bruce W. Bean. Any errors remain his own.

Pakistan and Afghanistan.¹ President Barack Obama allegedly even has a secret kill list of high-risk terrorists who have been pre-approved for killing if they are found by U.S. operatives.

This increased use of allegedly pre-approved strikes has led to significant controversy. This Article explores the claims of Nasser al-Aulaqi on behalf of his son, Anwar al-Aulaqi, who has allegedly been placed on the Obama Administration's pre-approved terrorist kill list. Part I of this Article introduces Anwar al-Aulaqi and his father's proposed injunction to have him taken off the targeted kill list. Part II of this Article lays out all of the current statutory and case law that the U.S. government currently acts under when pursuing and prosecuting terrorists. Part III of this Article explores the applicability of this legal framework to al-Aulaqi's case and the merits of the plaintiff's case in light of the government's motion to dismiss. Part IV examines the D.C. Circuit's grant of the government's motion to dismiss. Ultimately, this case raises fundamental issues regarding the Due Process owed to U.S. citizens engaged in acts of terrorism abroad, but the sensitive nature of national security and military concerns and prudential requirements will ultimately keep full adjudication of these issues awaiting their day in court.

I. APPROVAL FOR EXECUTION WITHOUT DUE PROCESS?

A. Who is Anwar al-Aulaqi?

Who is Anwar al-Aulaqi, and why does President Obama want him dead? In April, 2010, President Obama allegedly added al-Aulaqi to the list of terrorism suspects pre-approved for targeted killing.² The Obama Administration has identified al-Aulaqi as a leader of al-Qaeda in the Arabian Peninsula (AQAP), and alleges that he has "recruited individuals to join AQAP, facilitated training at camps in Yemen in support of acts of terrorism, and helped to focus AQAP's attention on attacking U.S.

1. For a full discussion of the U.S. military and C.I.A. use of increased drone strikes in Afghanistan and Pakistan, see, e.g., for Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* (Brookings Inst., Georgetown Univ. Law Ctr., Hoover Inst., Working Paper, 2009), available at <http://ssrn.com/abstract=1415070>; Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*. (Notre Dame Law Sch., Legal Studies Research Paper No. 09-43, 2010), available at <http://ssrn.com/abstract=1501144>.

2. Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 7, 2010, at A12, available at <http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html>. Much information about al-Aulaqi is publicly known due to extensive reporting of the New York Times; none of the information in this Article was gleaned from any documents released by Wikileaks.

interests.”³ AQAP has been taken responsibility for several attacks on South Korean, Yemeni, Saudi Arabian and U.S. targets.⁴ Al-Aulaqi has been designated a “Specially Designated Global Terrorist” (SDGT) by the Obama Administration,⁵ as well as placed on the United Nations’ list of known associates of al-Qaeda.⁶ Specifically, al-Aulaqi is accused of training and aiding Umar Farouk Abdulmutallab, the attempted Detroit Christmas Day airline bomber,⁷ and has also been linked to Major Nidal Hasan, who is the accused killer of thirteen people at Fort Hood, Texas.⁸ Al-Aulaqi is well known for his multitude of postings on YouTube; Abdulmutallab, Hasan, and several others suspected of crimes or attacks have cited al-Aulaqi’s YouTube postings as inspirations for their actions.⁹ In March of 2011, a former British Airways employee was convicted of conspiring with al-Aulaqi to blow up a United States-bound airplane.¹⁰

The fact that the Obama Administration has approved military action in the form of targeted killing of a terror suspect is not unique¹¹ and is justified

3. Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum in Support of Defendant’s Motion to Dismiss at 5, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-01469) [hereinafter Motion to Dismiss].

4. Unclassified Declaration in Support of Formal Claim of State Secrets Privilege by James R. Clapper, Director of National Intelligence at 8, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No.10-cv-1469) [hereinafter Clapper Declaration].

5. 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, 42334 (July 23, 2010) [hereinafter Al-Aulaqi Executive Order].

6. Press Release, Security Council, Security Council Al-Qaida and Taliban Sanctions Committee Adds Names of Four Individuals to Consolidated List, U.N. Press Release SC/9989 (July 20, 2010).

7. Robert F. Worth, *Cleric in Yemen Admits Meeting Airliner Plot Suspect, Journalist Says*, N.Y. TIMES, Feb. 1, 2010, at A7, available at http://www.nytimes.com/2010/02/01/world/middleeast/01yemen.html?ref=umar_farouk_abdulmutallab. In an interview with a Yemeni journalist, al-Alaqui admitted that he communicated with Abdulmutallab and that he was a “student” of his. Al-Alaqui denied having any knowledge about the attack before it occurred, but noted that he supported the attack and was proud of Abdulmutallab. *Id.*

8. *Muslim Clergyman Speaks*, N.Y. TIMES (Dec. 24, 2009), http://www.nytimes.com/2009/12/24/us/24hood-002.html?ref=nidal_malik_hasan.

9. John F. Burns & Miguel Helft, *YouTube Withdraws Cleric’s Video*, N.Y. TIMES, Nov. 4, 2010, http://www.nytimes.com/2010/11/05/world/05britain.html?ref=anwar_al_awlaki. Roshonara Choudhury, a British theology student who was convicted of attempted murder of British legislator Stephen Timms, stated that she was inspired to “punish” Timms for his Iraq War vote after watching hundreds of hours of al-Aulaqi’s videos online. *Id.* The videos have since been removed from YouTube. *Id.*

10. *Britain: Former Airline Employee Gets 30 Years in Terrorism Case*, N.Y. TIMES., Mar. 18, 2011, <http://www.nytimes.com/2011/03/19/world/europe/19briefs-ART-Britain.html?ref=anwaralawlaki>.

11. In September of 2010 alone, the C.I.A. launched 20 targeted drone attacks on militants in Pakistan accused of aiding the Taliban in Afghanistan. See Mark Mazzetti & Eric Schmitt, *C.I.A. Steps Up Drone Attacks on Taliban in Pakistan*, N.Y. TIMES, Sept. 28, 2010, at A1, available at <http://www.nytimes.com/2010/09/28/world/asia/28drones.html>.

under the Congressional Authorization of Use of Military Force (AUMF)¹² and international legal principles of self-defense;¹³ al-Aulaqi's case raises questions of both domestic and international law because he is a U.S. citizen.¹⁴ The approval of the targeted killing of a U.S. citizen is believed to be without precedent,¹⁵ although the classified nature of such designations makes this difficult to confirm.¹⁶

After President Obama allegedly placed al-Aulaqi on the designated kill list, his father, Nasser al-Aulaqi,¹⁷ retained the American Civil Liberties Union and Center for Constitutional Rights to "provide him with legal representation in connection with the government's reported decision to add his son . . . to its list of suspected terrorists authorized to be killed."¹⁸ Nasser al-Aulaqi sought to prevent the Obama Administration (specifically the President, the Secretary of Defense, and the Director of the C.I.A.) from killing Anwar al-Aulaqi without articulating a "concrete, specific, and imminent threat to life or physical safety" that he may pose; the proposed injunction also sought that, even if al-Aulaqi was found to pose such a threat, targeted killing be the last resort once it is determined that "there are no means other than lethal force that could reasonably be employed."¹⁹

The plaintiffs' complaint alleged that the government's policy of targeting U.S. Citizens abroad without articulating a specific crime or threat violated said citizens' "Fourth Amendment right to be free from unreasonable seizures and . . . [their] Fifth Amendment right not to be

12. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

13. U.N. Charter art.51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations."). See also North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (recognizing individual or collective right to self-defense).

14. See Motion to Dismiss, *supra* note 3, at 5; Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, April 7, 2010, at A12. Al-Alaqui was born in New Mexico. *Id.* at A12.

15. Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 7, 2010, at A12 ("A former senior legal official in the administration of George W. Bush said he did not know of any American who was approved for targeted killing under the former president.").

16. *Id.* Although the Los Angeles Times and New York Times were able to confirm that al-Aulaqi was placed on either the C.I.A. or D.O.D. "kill lists," they were only able to do so through anonymous sources.

17. Nasser al-Aulaqi, a citizen of Yemen, brought his suit under the Alien Tort Statute, 28 U.S.C. § 1350 (2006).

18. Complaint for Declaratory and Injunctive Relief, American Civil Liberties Union v. Geithner (No. 1:10-cv-01303) (D.D.C., Aug. 3, 2010). The ACLU first filed for injunctive relief challenging the Office of Foreign Asset Control (OFAC)'s regulation which made providing "legal services" to those designated as "Specially Designated Global Terrorists" ("SDGTs") an inchoate crime under the Global Terrorism Sanctions Regulations. See Al-Aulaqi Executive Order, 75 Fed. Reg. 43233.

19. See Motion to Dismiss, *supra* note 3, at 5 (citing Proposed Preliminary Injunction at 2, Al Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-01469)).

deprived of life without due process of law.”²⁰ The complaint also alleged that “the United States’ 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.”²¹ In other words, al-Aulaqi’s father was essentially asking the U.S. government to not kill his son without charging him with a crime or without specific evidence that he was about to commit a crime.

B. The Justice Department’s Response

On September 24, 2010, the Obama Administration responded with a lengthy motion to dismiss.²² The motion confirmed speculation that the Justice Department would seek to quickly have the motion dismissed and avoid having the particulars of its operations against certain terrorists from being litigated in court; there appeared to be internal debate within the Administration whether to invoke the “political question doctrine” or the “state secrets” doctrine.²³ The state secrets privilege, first articulated in *United States v. Reynolds*, essentially allows the Executive branch to prevent the disclosure in litigation of any “military matters which, in the interests of national security, should not be divulged.”²⁴ There was some question as to whether the Obama Administration would invoke the state secrets doctrine in this case,²⁵ especially in light of President Obama’s Inauguration–pledged changes in policy regarding the War on Terror.²⁶

While the Justice Department’s response articulated several arguments as to why the injunction should not be granted,²⁷ the motion did indeed invoke

20. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 12 (D.D.C. 2010).

21. *Id.*

22. Motion to Dismiss, *supra* note 3, at 1.

23. Charlie Savage, *U.S. Debates Response to Targeted Killing Lawsuit*, N.Y. TIMES, Sept. 16, 2010, at A10.

24. *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

25. Savage, *supra* note 22, at A10.

26. See Editorial, *Shady Secrets*, N.Y. TIMES, Sept. 30, 2010, at A38. The New York Times Editorial Board noted that “[d]espite President Obama’s promises of reform in this area, the public still cannot reliably distinguish between legitimate and self-serving uses of the national security claims.” See also Michael B. Mukasey, *The Obama Administration and the War on Terror*, 33 HARV. L. & POL’Y REV. 953, 955-56 (2010). Mukasey, the United States Attorney General from 2007-2009, stated that the Obama Administration’s proposed sweeping changes to U.S. policy regarding the capture and prosecution of terrorists and “willingness to disclose the limits of how we gather intelligence adds to the risk that defendants will turn legal processes into a source of intelligence for themselves and into a forum for expressing their views.” *Id.* at 961.

27. For example, the motion asserts that “[t]his Court should not recognize the novel [Alien Tort Statute] cause of action plaintiff seeks to assert for the alleged ‘arbitrary killing’ of his son” because doing so would improperly allow injunctive relief under the ATS when, combined with the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), only monetary damages are allowed. See Motion to Dismiss, *supra* note 3, at 40-41.

the state secrets privilege to bar further litigation of the complaint.²⁸ The motion presented several justifications to be considered before the state secrets doctrine; notably, the political question doctrine.²⁹ The political question doctrine excludes political and policy questions from judicial review when said questions are the exclusive purview of the executive or the legislative branches.³⁰ The Administration argued that enforcement of such an injunction would insert the Judiciary into an area of decision-making where the courts are particularly ill-equipped to venture, *i.e.*, in assessing whether a particular threat to national security is imminent and whether reasonable alternatives for the defense of the Nation exist to the use of lethal military force. Courts have neither the authority nor expertise to assume these tasks.³¹

In response to Nasser al-Aulaqi's argument that use of lethal force against Anwar outside of the borders of Iraq and Afghanistan should be barred because it is not a part of any "armed conflict," the Administration asserted that "the very determination of whether and in what circumstances the United States' armed conflict with al-Qaeda might extend beyond the borders of Iraq and Afghanistan is itself a non-justiciable political question."³² The thrust of the argument was essentially that the injunction would force the courts to handcuff the Administration's military operations against al-Qaeda and terrorists abroad by articulating a standard for "what actions the President and U.S. forces may take against an operational leader" of al-Qaeda.³³

The Administration's last main argument against Nasser al-Aulaqi's proposed injunctive relief invoked the state secrets privilege; in doing so, the Justice Department noted that it determined the privilege should be invoked after complying with the Attorney General's detailed policy that the privilege only be invoked when absolutely necessary.³⁴ Specifically, the Administration asserted that the injunction sought by al-Aulaqi would require the disclosure of highly sensitive military and intelligence

28. Motion to Dismiss, *supra* note 3, at 43 ("[I]nformation protected by the military and state secrets privilege and related statutory protections [are] necessary to litigate plaintiff's claims . . . and the case therefore cannot proceed without significant harm to the national security of the United States.").

29. Motion to Dismiss, *supra* note 3, at 19.

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

31. Motion to Dismiss, *supra* note 3, at 19-20 (citing *Aktepe v. United States*, 105 F.3d 1400, 1402-04 (11th Cir. 1997) ("[f]oreign policy and military affairs figure prominently among the areas in which the political question doctrine has been implicated")).

32. *Id.* at 22.

33. *Id.* at 23.

34. *Id.* at 43. The Attorney General's policy noted that the Justice Department would require independent submissions from the pertinent government agencies involved with invocation to determine the exact nature of the information, the possible significant harm, and the reason why release of the information would cause such a harm. *Id.* at 44.

operations and activities abroad.³⁵ The motion attached as exhibits public declarations by Secretary of Defense Robert M. Gates, Director of National Intelligence James R. Clapper and Central Intelligence Agency Director Leon E. Panetta each formally asserting the privilege.³⁶

The motion concludes by noting that without the facts excluded by the state secrets privilege, al-Aulaqi's case could only rely upon the New York Times and other media reports about the alleged targeting which "conflict with each other and vary from allegations in the complaint . . . [a]nd, of course, these media reports are devoid of any substantive discussion of the imminence of a threat . . . or any operational details for implementing alleged lethal force or carrying out the alleged targeting of al-Aulaqi."³⁷ Thus, without any factual basis, the motion for injunctive relief would be essentially stopped in its tracks.³⁸

C. The ACLU's Arguments

On October 8, 2010, the ACLU and CCR responded to the Justice Department's lengthy motion with a lengthy reply brief of their own.³⁹ The plaintiffs' brief summarized the government's argument as being "that the executive, which must obtain judicial approval to monitor a U.S. citizen's communications or search his briefcase, may execute that citizen without any obligation to justify its actions to a court or to the public."⁴⁰ The brief pointedly noted that the Administration's assertion that al-Aulaqi can avoid harm by turning himself in confirms that he is indeed at risk of suffering said harm (death by predator drone strike).⁴¹ Further, the plaintiffs' brief noted that the argument about avoiding the harm through surrender also confirmed the illegality of the government's action because "the government lacks authority to summarily execute fugitives from the law. The government cannot kill its own citizens simply because they refuse to present themselves to the proper authorities."⁴²

35. *Id.* at 44-45.

36. See Clapper Declaration, *supra* note 5; Unclassified Declaration in Support of Formal Claim of State Secrets Privilege by Robert M. Gates, Secretary of Defense, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-01469); Unclassified Declaration in Support of Formal Claim of State Secrets Privilege by Leon E. Panetta, Director of the Central Intelligence Agency, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-01469).

37. Motion to Dismiss, *supra* note 3, at 57-58.

38. With the proper invocation of the state secrets doctrine, al-Aulaqi and the ACLU's chances of success were rather slim.

39. Reply Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction and In Opposition to Defendants' Motion to Dismiss, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-01469) [hereinafter Reply Memorandum].

40. *Id.* at 1.

41. *Id.* at 3.

42. *Id.* at 9. The Plaintiff's brief also points out that, as of the time of filing, Al-Aulaqi had not been charged with a crime by either the United States or Yemen, but on

On the issue of relief, the plaintiffs' brief argued that the claim is not speculative and is indeed tied to a particular fact situation: the anticipated use of "lethal force against a specific American whom the government has labeled an enemy of the state."⁴³ The plaintiffs' brief also asserted that the relief sought by the injunction is not necessarily an abstract judicial command, but a declaration of what law applies to this particular situation.⁴⁴ Specifically, the plaintiffs pointed out that the administration has couched this situation in terms of the law of armed conflict, but was asking the court to declare what law applies and order the compliance with the specific legal constraints that apply to "the government's avowed intent to use lethal force against a citizen outside armed conflict."⁴⁵ The plaintiffs admitted that, due to the sensitive nature of military operations abroad, the injunction may only be enforceable in an after-the-fact contempt motion or judgment for damages, as opposed to judicial command of the military mid-operation.⁴⁶

The plaintiff strongly asserted that the government is being overbroad in declaring that judicial review could never apply to military situations, noting the various Guantanamo detention cases as recent and prominent examples of judicial review of military conduct; specifically, that the D.C. Circuit has become "accustomed to evaluating information that is sensitive for reasons of foreign policy, military strategy, and national security."⁴⁷ The plaintiffs also attacked the government's reliance on *Gilligan*, the Kent State University National Guard case, as standing for the proposition that the courts will not second guess or interfere with complex military procedures and training.⁴⁸ The plaintiff also noted that the *Gilligan* court encouraged damages or injunctive relief for specific unlawful actions, as opposed to the broad potential violations of National Guard procedures at issue in *Gilligan*.⁴⁹

The plaintiff argued that the political question doctrine does not bar these claims because the supposedly non-justiciable questions that it is raising have already been litigated.⁵⁰ The plaintiff argued that "the question of

November 6, 2010, a Yemeni court ordered the "forcible arrest" of Al-Aulaqi after AQAP claimed responsibility for a foiled bombing plot using packages on cargo planes. Robert F. Worth, *Yemen Judge Orders Arrest of Qaeda-linked Cleric*, N.Y. TIMES, Nov. 7, 2010 at A14.

43. Reply Memorandum, *supra* note 38, at 15.

44. *Id.* at 16.

45. *Id.* at 17.

46. *Id.*

47. *Id.* at 18.

48. *Id.* at 19. Specifically, the plaintiff's brief points out that mootness was one of the reasons the court did not grant the requested relief in *Gilligan*: The injunction sought compliance with new procedures that had been implemented by the time the argument got to the court, and there was no allegation of violation of the newly installed procedures. *Id.*; see also *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

49. Reply Memorandum, *supra* note 38, at 20.

50. *Id.* at 22.

whether and in what circumstances the government may target and kill an American citizen in Yemen is no less justiciable than the question of whether the executive branch could indefinitely detain an American citizen captured in Afghanistan, a question the Supreme Court addressed in *Hamdi*.⁵¹ The plaintiff also argued that the interpretation of the AUMF itself, and the determination of the appropriate force involved in its use, is an issue of statutory interpretation which necessarily falls to the judicial branch.⁵² The plaintiff again noted that the Administration's reliance on *Gilligan* is faulty because *Gilligan* itself specifically noted that it did not stand for the assertion that unlawful conduct by the military could not be litigated in a judicial forum.⁵³

One of the plaintiff's strongest arguments comes from *El-Shifa*.⁵⁴ The D.C. Circuit previously held in *El-Shifa* that there is a substantive difference between evaluating military action as proper or improper, versus evaluation of whether action taken by the military was within proper legal authority.⁵⁵ The plaintiffs' summary of the argument frames the case as a purely legal one: "whether the targeted killing of [a] U.S. citizen . . . outside of armed conflict, and in absence of an imminent threat that cannot be addressed with non-lethal means, violated the Constitution and international law."⁵⁶ Because the plaintiffs were asking for injunctive relief, they argued that they are merely seeking the injunction to lay the groundwork for a later judicial determination of whether the future government actions taken against al-Aulaqi are legal, and this would itself be a legal determination and not a policy judgment.⁵⁷

Regarding the AUMF, the plaintiffs assert that it is inapplicable to AQAP.⁵⁸ The plaintiff notes that "by its plain terms the AUMF . . . requires a nexus to the individuals and organizations responsible for the September 11 attacks. While al-Qaeda and the Taliban fall under this rubric, AQAP is a separate and distinct group that is not known to have any actual association with al-Qaeda, whether in terms of command structure or activities, and no connection to September 11."⁵⁹

In response to the invocation of the state secrets doctrine, the plaintiffs allege that the leak of al-Aulaqi's placement on the "kill" list was a

51. *Id.*

52. *Id.* at 23.

53. *Id.* at 28. The plaintiff also cites *Laird v. Tatum*, 408 U.S. 1, 16 (1972) (noting that "[t]here is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.").

54. Reply Memorandum, *supra* note 38, at 29 (citing *El-Shifa Pharm. Indus. Co. v. U.S.*, 607 F.3d 836 (D.C. Cir. 2010)).

55. *Id.*

56. *Id.*

57. *Id.* at 30.

58. *Id.* at 38.

59. *Id.*

deliberate leak by the administration, and thus the most important secrets regarding this particular issue have already been revealed and been made publicly known.⁶⁰ The plaintiffs assert that if the government really did not want the fact that al-Aulaqi was being targeted to be known that it would be restrained the senior intelligence officials who allegedly leaked the information to the *New York Times* and *Washington Post*.⁶¹

Finally, the plaintiffs close by noting that they are aware that the case raises broad and important questions of national security, but assert that “no principle can be more firmly embedded in our constitutional system than the centrality of the right to life, and the gravity of its deprivation at the hands of the government.”⁶²

II. TERRORISM, NATIONAL SECURITY, AND THE POST–SEPTEMBER 11 LEGAL FRAMEWORK

A. Terrorism and “Enemy Combatants”

In the wake of the terrorist attacks of September 11, 2001, Congress passed the AUMF.⁶³ One of the difficulties presented by the terrorist attacks of 9/11 was defining exactly who the U.S. was fighting; the AUMF granted the President the power to:

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁶⁴

The broad scope of the AUMF has raised significant questions about the “necessary and appropriate force” required to fight terrorists abroad.⁶⁵ In identifying broadly the parties responsible for the attacks of September 11 and those who aided or harbored them, it would appear that this was intended to allow the military to use the AUMF when it inevitably came

60. Reply Memorandum, *supra* note 38, at 45.

61. *Id.*

62. *Id.* at 49.

63. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

64. *Id.*

65. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); Tung Yin, *Procedural Due Process to Determine “Enemy Combatant” Status in the War on Terrorism*, 73 TENN. L. REV. 351 (2006); Elizabeth Sepper, *The Ties that Bind: How the Constitution Limits the CIA’s Actions in the War on Terror*, 81 N.Y.U. L. REV. 1805 (2006).

into conflict with those it later discovered harbored and aided al-Qaeda; i.e., the Taliban in Afghanistan.

On September 23, 2001, President Bush issued Executive Order 13224, “Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism.”⁶⁶ This order authorized the seizing of property and prohibitions of transactions with anyone who posed a:

significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States,” as well as those who “assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism.”⁶⁷

The Office of Foreign Assets Control passed regulations to implement Executive Order 13224, which took specific actions against those identified by the Order as “Specially Designated Global Terrorists” (SDGTs).⁶⁸ The regulations define terrorism as:

an activity that:

- (a) Involves a violent act or an act dangerous to human life, property, or infrastructure; and
- (b) Appears to be intended:
 - (1) To intimidate or coerce a civilian population;
 - (2) To influence the policy of a government by intimidation or coercion; or
 - (3) To affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.⁶⁹

These regulations include specific provisions that require applying for a license to provide legal aid to anyone accused of violating the statute, either by committing a terrorist act or aiding someone through assistance, sponsorship or other “financial, material, or technological support.”⁷⁰ Although some applications of the Order have been held unconstitutionally vague, the civil and criminal liabilities for providing “material support”

66. Exec. Order No. 13,224, 66 Fed. Reg. 49079 (Sept. 5, 2001) [hereinafter Exec. Order].

67. *Id.*

68. 31 C.F.R. §§ 594.101-594.901 (2009).

69. *Id.* § 311.

70. *Id.* § 594.506(a); Exec. Order, *supra* note 65.

have been upheld.⁷¹ The regulations provide that material support includes “legal, accounting, financial, brokering, freight forwarding, transportation, public relations, educational, or other services to a person whose property or interests in property are blocked pursuant to § 594.201(a).”⁷² Thus, the regulations provide civil and criminal penalties for providing any training or services to potential terrorists.⁷³

The force authorized for use against al-Qaeda following September 11 and the advanced criminal sanctions for those SDGTs would seem to be meant for tandem use, as both target terrorist groups. However, while the foreign asset regulations impose civil and criminal sanctions for violations of statutory law, “[b]ecause the [AUMF] contemplates warfare, it is reasonable to assume that . . . Congress intended to authorize the President to take at least those actions permitted by the laws of war.”⁷⁴ As will be explored *infra*, the Supreme Court authorized detention of detainees and other acts under the AUMF as bound by the laws of war;⁷⁵ however, the Court has also held that certain minimum due process is required even in the theater of war.⁷⁶

B. Due Process Abroad

1. 9/11 and the War on Terror Due Process Abroad

One of the first cases the U.S. Supreme Court heard arguments stemming from the War in Afghanistan was *Hamdi v. Rumsfeld*.⁷⁷ Yaser Esam Hamdi was captured on the battlefield in Afghanistan, and eventually transferred to Guantanamo Bay once the U.S. military realized that Hamdi was a U.S. citizen.⁷⁸ The Bush Administration declared Hamdi an “enemy combatant,” and stated that such status justified “holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process is warranted.”⁷⁹ Hamdi, through his father,⁸⁰ eventually challenged his “enemy combatant” status all the way to the Supreme Court, which granted certiorari on the question of “whether the Executive has the authority to

71. See *Humanitarian Law Project v. Gonzales*, 380 F.Supp.2d 1134 (C.D. Cal. 2005).

72. 31 C.F.R. § 594.406 (2009).

73. *Id.*; 18 U.S.C. § 3571 (2006) (specifying that the felony criminal conviction could carry a maximum of a \$250,000 fine per count).

74. Bradley, *supra* note 64, at 2091.

75. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion).

76. See *Boumediene v. Bush*, 553 U.S. 723 (2008).

77. 542 U.S. 507.

78. *Id.* at 510.

79. *Id.* at 510-11.

80. *Id.* Hamdi’s father filed a petition for a writ of habeas corpus in the Eastern District of Virginia, as next friend. *Id.* at 510.

detain citizens who qualify as ‘enemy combatants.’”⁸¹ The Court noted that although the Bush Administration had not provided a definition for “enemy combatant,” that “[t]here can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al-Qaeda terrorist network responsible for [9/11] . . . are individuals Congress sought to target in passing the AUMF.”⁸²

While Hamdi’s argument hinged on whether he could be held *indefinitely* while challenging his enemy combatant status, the Court noted in its plurality opinion that U.S. citizens were not exempt from becoming enemy combatants and treating U.S. citizens as such on the battlefield was a necessary incident of warfare.⁸³ In its narrow plurality holding, the Court held that a citizen detained as an enemy combatant was due the opportunity to challenge his status before a neutral decision-maker after receiving the government’s factual basis for detaining him.⁸⁴ However, in the opinion, Justice O’Connor noted that “[s]triking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship.”⁸⁵

The cases and petitions that followed *Hamdi* have laid out some of the challenges involved with the due process owed to combatants abroad. In *Rasul v. Bush*, the Court held that 28 U.S.C. § 2241 extended statutory habeas corpus jurisdiction to Guantanamo Bay.⁸⁶ In *Boumediene v. Bush*, the Court held that the Military Commissions Act (MCA)⁸⁷ unconstitutionally suspended habeas corpus by not following the mandates of the Suspension Clause.⁸⁸ The Court noted that “[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing . . . [i]n this context the need for habeas corpus is more urgent.”⁸⁹ Writing for the majority, Justice Kennedy noted that:

[t]he political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism . . . [t]he laws and Constitution are designed to

81. *Id.* at 516; *Rodriguez v. Bexar Cnty.*, 540 U.S. 1099 (2004) (granting cert.).

82. *Hamdi*, 542 U.S. at 516.

83. *Id.* at 519.

84. *Id.* at 533.

85. *Id.* at 532.

86. *See Rasul v. Bush*, 542 U.S. 466, 473 (2004).

87. 28 U.S.C. § 2241 (2006).

88. *See Boumediene*, 553 U.S. at 770.

89. *Id.* at 783.

survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.⁹⁰

Kennedy's opinion built its moral authority and reasoning, among other things, upon the original motivations of the Framers in including the writ in the Constitution; specifically, Kennedy noted that the Framers were highly paranoid of a strong central government and saw habeas as an essential protection of individual liberty.⁹¹

Thus, even in the War on Terror, a framework of legal protection was afforded to those captured in the battlefield. The question which remains unanswered is what process is due actors, such as al-Aulaqi, *before* they are captured. As the Administration has argued, the actions authorized by the Executive Branch under the AUMF, to be carried out by the military branches abroad, may fall outside the scope of judicial review before any action is taken.

2. *Applicable Due Process Framework*

The Supreme Court has a well established line of cases and legal basis for due process claims.⁹² Specifically, the Court has held that “[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount.”⁹³ The Court recognized that enemy combatants, such as Hamdi, had a cognizable liberty interest and thus were entitled to some degree of due process.⁹⁴ In determining the process owed to Hamdi, the Court applied the balancing test from *Mathews v. Eldridge*⁹⁵ to determine “the procedures that are necessary to ensure that a citizen is not ‘deprived of life, liberty, or property, without due process of law.’”⁹⁶

The Court articulated the *Mathews* factors as weighing the private life, liberty, or property interest that faces deprivation against the government’s claimed interest in such a deprivation and the burden the government would face if such process were granted; the scale of the private interest versus the government interest is then balanced “through an analysis of ‘the risk of an

90. *Id.* at 798.

91. *Id.* at 742.

92. *See* *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that constitutional due process restraints apply to deprivation of property, including public benefits); *Bd. Of Regents v. Roth*, 408 U.S. 564 (1972) (holding that no process is due without a cognizable liberty or property interest).

93. *Roth*, 408 U.S. at 570.

94. *Hamdi*, 542 U.S. at 529; Tung Yin, *Procedural Due Process to Determine “Enemy Combatant” Status in the War on Terrorism*, 73 TENN. L. REV. 351 (2006).

95. 424 U.S. 319 (1976).

96. *Hamdi*, 542 U.S. at 529 (citing U.S. Const., amend. V.).

erroneous deprivation' of the private interest if the process were reduced and the 'probable value, if any, of additional or substitute procedural safeguards.'"⁹⁷ The Court held that Hamdi's freedom was a basic liberty right that implicated this test;⁹⁸ it seems logical to conclude that the potential deprivation of life would trigger the same balancing test to determine what process is due.

While the distinction between U.S. citizens and foreign combatants became an important distinction for the line of cases concerning Guantanamo detainees, the Court specifically recognized the "fundamental nature of a *citizen's* right to be free from involuntary confinement by his own government without *due process of law*."⁹⁹ On the other hand, the Court recognized the exigencies imposed by a state of war and the necessary delegation of broad power to the Executive in carrying out military acts.¹⁰⁰ In balancing the rights owed and the process due to Hamdi and U.S. citizens in the battlefield, the Court recognized the potential burden upon military and the government's argument that "military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would. . . intrude on the sensitive secrets of national defense."¹⁰¹

3. The Political Question Doctrine

The sensitive nature of issues of national security that are inevitably presented by enemy combatant and terrorist claims has brought many of these claims under the scope of the political question doctrine; this has the potential to prevent due process claims from being adjudicated on the merits when this issues are found to implicate the decision-making of the political branches. Although the courts have recently adjudicated several legal issues after detention in the battlefield, as seen in *Hamdi* and *Boumediene*, the question of *prospective* relief regarding potential military action seems to implicate specific policy judgments that may fall outside the scope of judicial review.

In *Baker v. Carr*, the Supreme Court laid out the Political Question doctrine, which prevents the litigation of issues intended for consideration by the political branches and not the judiciary.¹⁰² The Court laid out a specific test, holding that an issue falls under the scope of a political question if any of the following factors are present:

97. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

98. *Id.*

99. *Id.* at 531 (emphasis added).

100. *Id.*

101. *Id.* at 531-32.

102. 369 U.S. 186 (1962).

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁰³

The Court has held that issues of foreign relations¹⁰⁴ and national security¹⁰⁵ can fall outside the scope of judicial review by implicating such factors; however, the Court has also noted that there are circumstances regarding military action where the judiciary has a proper role.¹⁰⁶ In *Gilligan*, although the Court held that the specific questions presented by the petitioners regarding the actions taken by the National Guard were not justiciable under the political question doctrine, the Court stated that:

it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief.¹⁰⁷

Recently the D.C. Circuit has held that “[t]he political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion.”¹⁰⁸ In *El-Shifa*, the owners of a pharmaceutical factory that was destroyed in a preemptive strike against Osama bin Laden and what was believed to be a plant producing chemical weapons brought suit against the U.S. government for the destruction of the property; it was discovered soon after the attack that the plant actually had no connection to bin Laden at all.¹⁰⁹ In dismissing the plaintiff's claim for damages stemming from the destruction of the plant, the court held that the political question doctrine required the dismissal of the claim because “[i]f the political question doctrine means anything in the

103. *Id.* at 217.

104. *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006).

105. *Haig v. Agee*, 453 U.S. 280, 292 (1981).

106. *Gilligan v. Morgan*, 413 U.S. 1 (1973).

107. *Id.* at 12.

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

109. *Id.* at 839. Further factual development did not occur beyond the plaintiff's initial claims because the case came to the D.C. Circuit Court of Appeals from dismissal for lack of subject matter jurisdiction. *Id.*

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, and the plaintiffs ask us to do just that."¹¹⁰

It is important to note, however, that the D.C. Circuit considered the specific question of military action against a foreign target based on a law-of-nations claim.¹¹¹ Examining this alongside *Gilligan*, however, the implication seems to be that U.S. military action against a U.S. citizen and its legality is not automatically outside the scope of judicial review.

III. IS TARGETING AL-AULAQI A DUE PROCESS VIOLATION?

Before any Due Process balancing test can be applied to al-Aulaqi's case, the procedural hurdles pose significant potential difficulty in reaching any discussion of the merits. Arguably, the thrust of the argument that would justify a lack of any legal process in light of the political question doctrine is that the real time military decisions, such as the decision to kill or not to kill al-Aulaqi, is a military policy judgment delegated to the Executive. Further, as argued by the Administration, the exigency involved with an "imminent" threat arising from the military operations in Yemen against al-Qaeda and AQAP is specifically authorized by Congress through the AUMF, bringing it under the dual auspices of the political branches. The Obama Administration argued that in the conflict with al-Qaeda and terrorists:

whether a threat is "imminent," and whether reasonable alternatives exist to the use of lethal force, may depend upon a variety of factors, including the existence of highly sensitive U.S. intelligence information concerning that threat, the capabilities of the 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 the terrorists 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.¹¹²

Essentially, the Administration argued that whether a particular terrorist is a "threat," let alone an "imminent" threat, is a policy determination that can never be properly litigated in a court.¹¹³

The Administration also differentiated the due process claims involved with habeas review from those involved with military engagement, noting

110. *Id.* at 844.

111. *Id.*

112. Motion to Dismiss, *supra* note 3, at 19.

113. *Id.* (citing *El-Shifa*, 607 F.3d at 843, the Administration noted that "[a]ddressing the *Baker* standards, the Court in *El-Shifa* observed that 'whether the terrorist activity of foreign organizations constitute threats to the United States' are 'political judgments' vested in the political branches.'").

that the due process considerations articulated in *Hamdi* only applied to persons held in detention subsequent to capture, and that no such process was due to enemy combatants who had yet to be captured.¹¹⁴ In the *Mathews* balancing test, the government argument is that the weight of terrorist combatants' right to notice and hearing is clearly outweighed by the potential burden upon the military during real time combat operations.

However, the ACLU and CCR made a strong case that the force behind the U.S.'s actions abroad, the AUMF, must have some appreciable limit; they cited *Hamdi* for the proposition that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."¹¹⁵ While the AUMF indeed authorized broad actions against al-Qaeda in the wake of September 11, the connection between al-Qaeda and al-Qaeda in the Arabian Peninsula, or AQAP, name aside, seems more attenuated than the clear aiding and abetting the Taliban provided bin Laden and his cohorts. If anything, AQAP was likely inspired by al-Qaeda and the September 11 attacks, so future acts would be clearly separate acts and not aiding and abetting stemming from the original attack. This can be seen from the AUMF itself, which goes beyond authorizing force against nations, but against "organizations" and "individuals," which implies that "[i]f an individual had no connection to the September 11 attacks, then he is not covered as a "person" under the AUMF even if he subsequently decides to commit terrorist acts against the United States."¹¹⁶ However, under the broad definition of "organization," joining together for a common purpose, either before or after September 11, could bring a group such as AQAP within the realm of affiliation for purposes of the AUMF.¹¹⁷

Further, one of the Administration's main justifications for the non-justiciability of this issue and the invocation of the political question doctrine seems to be hamstrung by two issues. First, *Gilligan* and its progeny do not seem to limit the injunctive relief sought here. Second, as *Hamdi*, *Hamdan*, *Boumediene* and the other Guantanamo cases demonstrate, there has already been significant judicial review and evaluation of the force used abroad by the U.S. military in the War on Terror. Because these cases arose out of the U.S.'s conflict in Afghanistan and Iraq, the real question becomes whether the War on Terror and the AUMF extend beyond the scope of these wars to any military action taken against terrorists in the region. If this is a mere extension of the same conflict, then the potential actions taken against al-Aulaqi would seem to fall in line with the other issues the Supreme Court

114. Motion to Dismiss, *supra* note 3, at 30.

115. Reply Memorandum, *supra* note 38, at 22 (quoting *Hamdi*, 542 U.S. at 536).

116. Bradley, *supra* note 64, at 2108.

117. *Id.* Bradley and Goldsmith note that "a terrorist organization that joins al Qaeda in its conflict with the United States, even after September 11, can be viewed as part of the "organization" against which Congress authorized force . . . [this] is also consistent with Congress's definitions of "terrorist organization" in other statutes, all of which conceptualize terrorist organizations in broad, functional terms." *Id.*

has previously addressed. However, if these actions are separate enforcement or action against terrorists abroad, the AUMF and its broad authorization of force which would justify killing al-Aulaqi without prior judicial action may not necessarily apply. In that case, there would appear to be a significant due process violation.

The Administration's invocation of the state secrets privilege makes sense if it has sensitive and confidential information about future terrorist acts al-Aulaqi may be involved in planning; otherwise it would appear that all of the substantive information about al-Aulaqi's criminal terrorist behavior is known. Any of the support or training he provided to Abdulmutallab to aid him in attempting to bomb Detroit certainly would qualify as "material support" under the global terrorist sanctions, so the lack of any collateral damage due to the attack's failure would not prevent any criminal sanctions. However, the Administration has not yet publicly accused al-Aulaqi of any specific crime under the statute, and has only placed him on the SDGT list due to his affiliation with AQAP. Thus, the main implications of force justifying action against al-Aulaqi seem to come from the AUMF, as claimed by the Administration in its brief.

Inevitably, the process due to al-Aulaqi would seem to necessarily weigh the power granted by the AUMF against the constitutional protections afforded U.S. citizens engaged in or planning terrorist acts abroad. As seen in *Hamdi*, the Supreme Court recognized that U.S. citizens will ultimately be owed some form of due process of liberty deprivations stemming from such conflicts. It would appear that the Court could similarly take into account the burdens and constraints upon the military that such process may pose, and balance the possibility of error causing deprivation of life or liberty in light of the government's concerns in applying the *Mathews* balancing test to this situation. While the government would be able to argue that the potential harm that could occur during military operations is great, it strains the imagination to think of a loss more grave than the erroneous loss of one's own life. Although the government can articulate import national security and policy considerations to balance their side of the *Mathews* scale, the risk of erroneous loss of life would seem to counterbalance it in a way that would demand some sort of due process.

While these important concerns may not be enough to outweigh the potential loss of one's own life once the question of "what process is due" under *Mathews* is reached, as the D.C. Circuit's decision demonstrates, even reaching adjudication of such claims requires overcoming significant obstacles.

IV. THE DECISION AND DISMISSAL

On November 8, 2010, the District Court of D.C. heard oral arguments from the ACLU and CCR on behalf of Yasser al-Aulaqi and the Obama Administration's team from the Justice Department; foreshadowing his

decision, Judge John Bates asked the parties to tailor their arguments to the prudential issues of standing, the political question doctrine and the state secrets privilege.¹¹⁸ The arguments were lengthy, and went on for approximately three hours. Judge Bates posed difficult questions to both sides; he asked the government how “judicial review could be required for electronic surveillance of a citizen overseas, permitted for the taking of property of a citizen overseas, yet forbidden for the killing of a citizen overseas,” he asked the CCR “[i]f the targeting of a pharmaceutical plant in Sudan is a political question, why is not the targeting of a person in Yemen?”¹¹⁹ While Judge Bates seemed sympathetic to some of the plaintiff’s claims, in discussing the state secrets doctrine he did not seem to dispute the notion that “it may simply not be possible to litigate this case without disclosing important secrets.”¹²⁰

On December 7, 2010, Judge Bates released his opinion granting the government’s motion to dismiss.¹²¹ Judge Bates recognized that “[t]his is a unique and extraordinary case. . . . 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?” Judge Bates noted that although these issues are incredibly important, without proper jurisdiction the constitutional and statutory claims cannot be heard.

Judge Bates held that Yasser al-Aulaqi did not qualify as having either next friend or third party standing to bring claims on behalf of his son.¹²² Ultimately, on both issues, the fact that Anwar al-Aulaqi could surrender himself to the U.S. and avail himself of the U.S. courts without what the court found to be an adequate explanation as to why such access was not feasible prevented the court from holding that Anwar was unable to appear on his own behalf.¹²³ While Judge Bates recognized that the plaintiff may have a realistic fear that his son would be held in an indefinite manner similar to the claimants in *Padilla* and *Hamdi*, “[t]o the extent that Anwar Al-Aulaqi is currently incommunicado, that is the result of his own choice.”¹²⁴ Further, because al-Aulaqi has been able to release YouTube videos and other statements criticizing the U.S. government since the commencement of this case, “there is no reason to believe that he could not convey a desire to sue without somehow placing his life in danger.”

As to third-party standing, the Judge Bates noted that Yasser al-Aulaqi could not claim “injury in fact if his adult child is threatened with a future

118. Benjamin Wittes, *Notes from the Al Aulaqi*, LAWFARE (Nov. 8, 2010), <http://www.lawfareblog.com/2010/11/notes-from-the-al-aulaqi-argument/>.

119. *Id.*

120. *Id.*

121. *Al-Aulaqi*, 727 F. Supp. 2d at 8.

122. *Id.* at 35.

123. *Id.* at 17.

124. *Id.* at 21.

extrajudicial killing.”¹²⁵ Although Judge Bates expressed sympathy for the potential loss of an adult child, “a plaintiff can only establish an Article III injury in fact based on emotional harm if that alleged harm stems from” a “legally protected” or “judicially cognizable” right originating from common or statutory law.¹²⁶ Judge Bates noted that “[t]o date . . . 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.”¹²⁷ Because his son’s threatened extrajudicial killing did not rise to the level of violating an international law norm, and because the U.S. had not waived sovereign immunity for such a claim, Judge Bates also dismissed the plaintiff’s Alien Tort Statute claim.¹²⁸ The lack of next friend or third party standing doubly hurt the plaintiff, as not only did a lack of a cognizable claim under the ATS bar litigation, but even if the threat of extrajudicial killing was a cognizable tort under the ATS, the lack of standing prevents the plaintiff from bringing the claim on behalf of his son.¹²⁹

Regarding the political question doctrine, Judge Bates adopted the holding from *El-Shifa* that “national security, military matters and foreign relations are ‘quintessential sources of political questions.’”¹³⁰ Judge Bates notes that the questions that would arise during litigation of this case, specifically questions of Anwar al-Aulaqi’s affiliation with al-Qaeda and AQAP, AQAP’s relationship with al-Qaeda, and whether al-Aulaqi posed a “concrete, specific and imminent threat” are “precisely the types of complex policy questions that the D.C. Circuit has historically held non-justiciable under the political question doctrine.”¹³¹ Judge Bates specifically states that even the injunctive relief and after-the-fact judicial review requested by the plaintiff would be barred by the political question doctrine, as “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.”¹³²

Because Judge Bates found a political question and that itself barred adjudication of plaintiff’s claim, he did not need to reach the invocation of the state secrets privilege.¹³³ Judge Bates makes note in a footnote, however, that the fact that some of the details about al-Aulaqi were leaked

125. *Id.* at 24.

126. *Id.* at 25.

127. *Al-Aulaqi*, 727 F. Supp. 2d at 26.

128. *Id.* at 37 (“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.’”).

129. *Id.* at 38.

130. *Id.* at 45 (citing *El-Shifa*, F.3d at 841 (internal citations omitted)).

131. *Id.* at 46.

132. *Id.* at 448 (citing *El-Shifa*, F.3d at 844).

133. *Al-Aulaqi*, 727 F. Supp. 2d at 53.

to the media did not constitute a full waiver of the weighty state secrets privilege, and that “[p]artial disclosure of some aspects of the relevant subject matter does not warrant disclosure of other information that risks serious harm to the national security.”¹³⁴

CONCLUSION

How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but . . . judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death? . . . 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?¹³⁵

While these questions reach the core of constitutional rights to life and liberty, it appears that proper answers to these questions must await another day.

Judge Bates ultimately recognizes that this case, or at least parts of it, very likely could have been litigated, and still may, because “Anwar Al-Aulaqi could have brought suit on his own behalf, but . . . he has simply declined to do so.”¹³⁶ Whether it be by military tribunal or the criminal process in the U.S. courts, if al-Aulaqi surrendered himself he would take the government’s ability to kill him without process of law off the table, and would instead face specific charges through notice and hearing. Although Judge Bates’ opinion obliquely recognizes that al-Aulaqi could eventually end up with a claim for the violation of his constitutional rights after being held incommunicado like the prisoners in *Hamdi* and *Padilla*, Judge Bates did not see the *potential* years of being held indefinitely without due process to itself be a due process violation. In other words, *fearing* deprivation of due process is not a substantive due process violation in its own right.

It seems terribly ironic that the only way to get the issue of whether the President can unilaterally order the assassination of a U.S. citizen and deprive them of their life into the courts is to surrender yourself to the court system and (at least temporarily) surrender your liberty. However, our life, liberty and property interests are protected by the due process afforded by the courts and guaranteed by the constitution. If Anwar al-Aulaqi really wants a declaration that President Obama cannot legally assassinate him without criminal charges, he can avail himself to the courts for such a declaration. However, it appears that his father will be unable to obtain judicial confirmation that the U.S. government cannot kill his terrorist son via targeted killing in the absence of formal criminal charges.

134. *Id.* at 54, n. 17.

135. *Id.* at 9.

136. *Id.* at 32.