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

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

[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

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).