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Ruairi McDonnell*

INTRODUCTION

In the 1954 Supreme Court case of *Reid v. Covert*,[1] Justice Hugo Black wrote:

> [W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. . . .[2]

To which we might now reply, "some shield."

In the early months of 2010, the news media reported that the United States government, as part of the ongoing "war on terror" that had begun almost a decade

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[1] 342 U.S. 1 (1954).

[2] Reid v. Covert, 342 U.S. 1, 5–6 (1954).

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earlier, had targeted a U.S. citizen for assassination.[3] The target was Muslim cleric Anwar Al-Aulaqi, a U.S. citizen by virtue of his birth in New Mexico in 1971, who was known to be in hiding in Yemen, where he had spent his most of his childhood.[4] Described as a radical who had "declared war against the United States,"[5] government officials claimed that Al-Aulaqi had communicated with both the Christmas day "Underwear Bomber," Umar Farouk Abdulmatallab and the "Fort Hood shooter," Army Major Nidal Malik Hasan.[6] While formal charges were never publicly brought against Al-Aulaqi, anti-terrorism officials also asserted that he was personally involved in terrorist operations carried out by Al Qaeda in the Arab Peninsula.[7]

Nasser Al-Aulaqi, Anwar Al-Aulaqi's father and a Yemeni National, with the legal support of the American Civil Liberties Union and the Center for Constitutional Rights, filed a lawsuit on August 30, 2010 in the United States District Court for the District of Columbia against President Barack Obama, Secretary of Defense Robert Gates, and the director of the Central Intelligence Agency, Leon Panetta.[8] Nasser Al-Aulaqi, appearing as his son's "next friend," asserted that the U.S. government's targeted killing policy violated Anwar Al-Aulaqi's Fourth Amendment right to be free from unreasonable seizures and his Fifth Amendment right not to be deprived of life without due process of law, and that the government's refusal to disclose the criteria by which citizens are targeted independently violated the notice requirement of the Fifth Amendment.[9] The complaint also included a statutory claim brought by Nasser Al-Aulaqi on his own

[3] *See*, *e.g.*, Dana Priest, *U.S. Miltary teams, intelligence, deeply involved in aiding Yemen on strikes*, WASH. POST, Jan. 27, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239.html?hpid=topnews. *See also* Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 7, 2010, at A12; David S. Cloud, *Awlaki is added to CIA target list*, L.A. TIMES, Apr. 7, 2010, at A8.

[4] *See* Scott Shane & Soaud Mekhennet, *From Condemning Terror to Preaching Jihad*, N.Y. TIMES, May 9, 2010, at A1, *available at* http://www.nytimes.com/2010/05/09/world/09awlaki.html?ref=anwaralawlaki.

[5] *Id.*

[6] *See id.*

[7] *See* Aamer Madhani, *What Makes Cleric Al Awlaki so Dangerous: Terrorist Wears Mask of Scholar, Knows His Foe*, USA TODAY, Aug. 25, 2010, at 1A.

[8] Complaint for Declaratory and Injunctive Relief, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-01469).

[9] *Id.* at 9–10.

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behalf under the Alien Tort Statute (hereinafter ATS), alleging that the government's policy of targeted killing violated customary international law.[10] The plaintiff asked the court to declare that "the Constitution and international law prohibit the government from carrying out targeted killings outside of armed conflict except as a last resort to protect against concrete, specific, and imminent threats of death or serious physical injury," as well as an injunction "prohibiting the targeted killing of Anwar Al-Aulaqi outside this narrow context."[11] Nasser Al Aulaqi also sked the court to order the defendants to disclose "the criteria that are used in determining whether the government will carry out the targeted killing of a U.S. citizen."[12]

In response, the defendants filed a motion to dismiss designed to keep the court from hearing the case on its merits.[13] The government defendants asserted that Nasser Al-Aulaqi lacked standing to raise his son's constitutional claims and that, in any event, the political question doctrine barred resolution of the suit.[14] They also argued that the court should exercise its "equitable discretion" to dismiss the plaintiff's complaint,[15] that the plaintiff failed to raise a valid cause of action under the ATS,[16] and that barring all other alternatives, the complaint should be dismissed by virtue of the state secrets privilege.[17]

In his ruling on the motion, Judge John Bates acknowledged that he was presented with a "unique and extraordinary case,"[18] that turned on "stark and perplexing questions."[19] Those questions would go unanswered when Judge Bates dismissed the action.[20] Judge Bates held that Nasser Al-Aulaqi lacked the requisite

[10] *Id.* at 10.

[11] *Id.* at 11.

[12] *Id.*

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

[14] *Id.* at 10–35.

[15] *Id.* at 35.

[16] *Id.* at 39.

[17] *Id.* at 43.

[18] Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

[19] *Id.*

[20] *Id.* at 9.

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standing to litigate his son's constitutional rights[21] and that the complaint did not present a cognizable tort under the ATS.[22] And, although those findings were enough to end Nasser Al-Aulaqi's lawsuit, Judge Bates went on to hold that the facts of the case presented a non-justiciable political question.[23]

On September 30, 2011, Anwar Al-Aulaqi was killed by a hellfire missile fired from a Predator drone in Yemen, along with another U.S. citizen, Samir Khan.[24] President Obama stated "The death of [Al-Aulaqi] is a major blow to Al-Qaeda's most active operational affiliate. He took the lead role in planning and directing efforts to murder innocent Americans."[25] Days later, Anwar Al-Aulaqi's sixteen year old son, Abdulrahman, was also killed in a U.S. airstrike.[26] The case long gone from the court's docket, commentators along the political spectrum speculated on the legality of the killing.[27]

Nasser Al-Aulaqi had come before the court and challenged a highly-publicized plan by the executive branch to summarily assassinate a U.S. citizen far from any declared battlefield.[28] Had the case been argued and heard on its merits, the district court would have had to determine what limits individual constitutional rights place on the President's prosecution of the "war on terror."[29] And yet, not only was the case dismissed because Nasser Al-Aulaqi was deemed to be unable to vindicate his son's rights,[30] but the judge also determined that the entire issue was

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[21] *Id.* at 35.

[22] *Id.* at 40.

[23] *Id.* at 52.

[24] *See* Mark Mazzetti, Eric Schmitt & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1, *available at* http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?ref=anwaralawlaki.

[25] *See id.*

[26] *See* Peter Finn & Greg Miller, *Anwar al-Awlaki's Family Speaks Out Against his Son's Death in Airstrike*, WASH. POST, Oct. 17, 2011, *available at* http://articles.washingtonpost.com/2011-10-17/world/35279713_1_anwar-al-awlaki-ibrahim-al-banna-aqap. U.S. officials suggested that the target of that strike was in fact Ibrahim al-Banna, another Al Qaeda official. *Id.*

[27] *See, e.g.*, Scott Shane, *Judging a Long, Deadly Reach*, N.Y. TIMES, Oct. 1, 2011, at A1; Nat Hentoff, *Will More Citizens Be Snuffed Like Al-Awlaki*, PITTSBURGH POST-GAZETTE, Nov. 2, 2011, at A6; Roger Simon, *America Had Every Right to Kill Terrorist al-Awlaki*, CHI. SUN TIMES, Oct. 7, 2011, at 23.

[28] *Al-Aulaqi*, 727 F. Supp. 2d at 8–13.

[29] *Id.*

[30] *Id.* at 35.

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one beyond the competency of the federal judiciary to decide.[31] The effect of this decision, of course, was to allow the executive branch alone to decide those limits.

This note will examine how the doctrines of standing and political question allowed our legal system to reach an outcome that should be considered on its face a violation of the most basic principles of due process and the true virtue of a system of separated powers. Unsurprisingly, the relevant case law reveals that these doctrines, cited by courts for their prudential virtues, are in fact vices that function as a convenient method for courts to parry challenges to government power and maintain the status quo. And indeed, the *Al-Aulaqi* case shows that they can be invoked at times when the need for the judiciary to say "what the law is"[32] is crucial.

Part I of this note provides a brief background on the doctrines of standing and political question, and examines how they have been used historically to protect government power at the cost of determining the constitutionality of such action, particularly during times of war. Part II reviews the opinion of the district court in *Al-Aulaqi v. Obama*,[33] and discusses how the doctrines of standing and political question were used to dispose of this important case. Part III discusses the ramifications of the *Al-Aulaqi* decision and concludes that the case should be viewed as an abdication of judicial responsibility to openly and honestly determine the appropriate limits of executive power over U.S. citizens.

I. THE DOCTRINES

A. Standing

Courts have held that the standing doctrine serves two important purposes. The first is to ensure that federal courts will be limited to hear only "cases and controversies"[34] as per Article III of the Constitution.[35] The Supreme Court described the method for identifying a "case" or "controversy" when it set forth the three elements of standing in *Lujan v. Defenders of Wildlife*.[36] Justice Scalia wrote:

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[31] *Id.* at 52.

[32] Marbury v. Madison, 5 U.S. 137, 178 (1803).

[33] 727 F. Supp. 2d 1.

[34] U.S. CONST. art. III, § 2, cl. 1.

[35] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[36] 504 U.S. 555.

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> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[37]

The second purpose of the standing doctrine is "prudential," in that it focuses on the "properly limited role of the courts in a democratic society."[38] To this end, standing doctrine encompasses three major prudential principles: "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked."[39] While the Supreme Court has described the prudential requirements as "judicially self-imposed limits," the constitutional requirements (injury, causation, and redressability) are described as a "core component derived directly from the Constitution."[40]

The origin of the standing doctrine has been traced to two cases from the early 1920s.[41] In the 1922 case of *Fairchild v. Hughes*,[42] Justice Brandeis determined that a suit brought by a private citizen to declare the soon-to-be-adopted Nineteenth Amendment unconstitutional was not a "case" under Article III of the Constitution.[43] In his opinion, Justice Brandeis wrote

> Plaintiff has only the right, possessed by every citizen, to require that the government be administered according to law and that the public moneys be not

[37] *Id.* at 560–61 (citations omitted).

[38] Warth v. Sedlin, 422 U.S. 490, 598 (1975).

[39] Allen v. Wright, 468 U.S. 737, 751 (1984).

[40] *Id.* at 751.

[41] *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1375–76 (1998).

[42] 258 U.S. 126 (1922).

[43] *Id.* at 129. The plaintiff had challenged the validity of the procedure for ratification of the Suffrage Amendment.

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> wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit to secure by indirection a determination whether a statute, if passed, or a constitutional amendment, about to be adopted, will be valid.[44]

In 1923, the Court in *Frothingham v. Mellon*[45] dismissed a suit challenging the constitutionality of the Maternity Act, on the grounds that it infringed upon the sovereign right of the states under the Tenth Amendment.[46] The plaintiff in that case had alleged that as a taxpayer, her rights were violated by what she asserted were unconstitutional appropriations by the federal government.[47] The Court in *Frothingham* determined that the plaintiff did not sustain "direct injury."[48] Justice Sutherland stated

> We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. . . . To do so would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess.[49]

These cases, while never formally resting on a carefully defined doctrine of "standing," made clear that the Supreme Court was prepared to view certain challenges to congressional action as outside its purview. In the New Deal era, the standing doctrine gained prominence as a barrier erected to protect the newly created administrative regulatory scheme from attack.[50] In this period the doctrine can be seen to have thwarted "efforts by citizens at large to invoke the Constitution to invalidate democratic outcomes."[51] In the years to come, the standing doctrine

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[44] *Id.* at 129–30.

[45] 262 U.S. 447 (1923).

[46] *Id.* at 489.

[47] *Id.* at 480.

[48] *Id.* at 488–89.

[49] *Id.*

[50] *See* Cass R. Sunstein, *What's Standing after* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 179–80 (1992).

[51] *See id.* at 180.

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has also served as an effective jurisdictional barrier to suits challenging the legality of U.S. military action.[52]

In the 1974 case of *Schlesinger v. Reservists to Stop the War*[53] the plaintiffs were an association of Armed Forces Reservists opposed to U.S. involvement in Vietnam.[54] The plaintiffs had challenged the Reserve membership of members of Congress as being in violation of the Incompatibility Clause of Article I of the Constitution.[55] The Supreme Court held that the plaintiffs lacked standing to sue as citizens as well as taxpayers, as their complaint specified only "generalized grievances"[56] common to all citizens.[57] Reversing the lower court, Chief Justice Warren Burger stated "Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."[58]

Dissenting, Justice Byron Douglas distilled the functional essence of the doctrine. He stated

> The requirement of "standing" to sue is a judicially created instrument [that] protects the status quo by reducing the challenges that may be made to it and to its institutions. . . . Its application in this case serves to make the bureaucracy of the Pentagon more and more immune from the protests of citizens. . . . All that the citizens in this case seek is to have the Constitution enforced as it is written. . . . The interest of citizens in guarantees written in the Constitution

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[52] *See, e.g.*, Campbell v. Clinton, 52 F. Supp. 2d 34 (D.D.C. 1999); Crockett v. Reagan, 720 F.2d 1355, 1357 (D.C. Cir. 1983) (Bork, J., concurring), *cert. denied*, 467 U.S. 1251 (1984).

[53] 418 U.S. 208 (1974).

[54] Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 210 (1974).

[55] *Id.* at 210–11. The Incompatibility Clause states that

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

U.S. CONST. art. I, § 6, cl. 2.

[56] *Id.* at 218.

[57] *Id.* at 222.

[58] *Id.* at 227.

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> seems obvious. Who other than citizens has a better right to have the Incompatibility Clause enforced? It is their interests that the Incompatibility Clause was designed to protect. . . . To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.[59]

In an era marked by an expansion of the national security apparatus, the doctrine has been utilized by courts to Orwellian effect. In the case of *American Civil Liberties Union v. National Security Agency*,[60] the Sixth Circuit Court of Appeals overturned a district court ruling that held that the NSA's warrantless wiretapping program was illegal as a violation of the Fourth Amendment.[61] Writing for the court, Judge Alice Batchelder held that the plaintiffs ("journalists, academics, and lawyers who regularly communicate with individuals located overseas, who the plaintiffs believe are the types of people the NSA suspects of being al Qaeda terrorists, affiliates, or supporters, and are therefore likely to be monitored") did not have standing to challenge the NSA's secret counter-terrorism program—in part because the secrecy of the program meant that they could not confidently assert that they were *actually* being targeted.[62]

B. Political Question

Unlike standing, where the primary focus is whether the plaintiff is the appropriate party to bring the suit, the political question doctrine focuses on the role of the judiciary, and whether by hearing a case the judiciary will encroach on the realms of the "political" branches. Similarly however, the political question doctrine is understood to promote and protect the constitutional interest of separation of powers.[63] And from a practical perspective, the two function in the same way: either the standing or political question doctrine may serve to close the

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[59] *Id.* at 229–38.

[60] 493 F.3d 644 (6th Cir. 2007).

[61] American Civil Liberties Union v. National Security Agency, 493 F.3d 644 (6th Cir. 2007). The NSA's "Terrorist Surveillance Program" included "the interception (i.e., wiretapping), without warrants, of telephone and email communications where one party to the communication is located outside the United States and the NSA has 'a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda.'" *Id.* at 648.

[62] *Id.* at 667.

[63] Baker v. Carr, 369 U.S. 186, 210 (1962).

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doors to plaintiffs seeking a judgment on the legality of government action without the benefit of judicial review.

Unlike standing, the political question doctrine's roots extend to the earliest days of the United States.[64] In *Baker v. Carr*,[65] the leading case on the political question doctrine, Justice Brennan identified the six bases for finding an issue to be a nonjusticiable political question:

> Prominent on the surface of any case held to involve a political question is found (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) or a lack of judicially discoverable and manageable standards for resolving it; (3) or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) or an unusual need for unquestioning adherence to a political decision already made; (6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[66]

Throughout most of the United States' history, courts regularly heard and disposed of war-power cases on their merits.[67] By the time the Supreme Court was tasked with deciding the constitutionality of the internment of Japanese Americans in *Korematsu v. United States*,[68] the majority of the Court had effectively adopted the reasoning underlying the political question doctrine, although it nevertheless decided the constitutional question presented by the case.[69] But by the Vietnam War era, cases that involved challenges to "foreign policy" decisions were

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[64] *See* Marbury v. Madison, 5 U.S. 137, 166 (1803) ("[W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.").

[65] 369 U.S. 186 (1962).

[66] *Id.* at 17.

[67] *See* Louis Fisher, *Judicial Review of the War Power*, 35 PRES. STUD. Q. 466 (2005), *available at* http://www.constitutionproject.org/pdf/422.pdf.

[68] 323 U.S. 214 (1944).

[69] *See* Fisher, *supra* note 67, at 482–83.

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regularly being dismissed as nonjusticiable under the political question doctrine,[70] which even more so than standing has provided a convenient "opt-out" for courts faced with challenges to executive war power.[71] In the decades to come it was also used to dismiss cases relating to the CIA's involvement in the overthrow of the democratically elected government in Chile,[72] and was used to bar challenges to President Ronald Reagan's use of military force in Nicaragua[73] and El Salvador[74] in the 1980s. Later cases involving challenges to President Ronald Reagan's operations in the Persian gulf[75] and President George Bush I's invasion of Iraq[76] were also disposed of by virtue of coming under the scope of the political question doctrine.

II. *AL-AULAQI V. OBAMA*

Judge Bates pulled no punches when he framed the principal issue at the heart of *Al-Aulaqi v. Obama*: "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?"[77]

The answer, for all intents and purposes, would appear to be "yes." While Judge Bates acknowledged that "threshold questions of jurisdiction may seem less significant than the questions posed by the merits of plaintiff's claims"[78] and that the "legal and policy questions posed by this case are controversial and of great public interest,"[79] he concluded that those questions "must await another day or another (non-judicial) forum."[80]

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[70] *See id.* at 479.

[71] *See, e.g.*, Luftig v. McNamara, 252 F. Supp. 819 (D.D.C. 1966); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971).

[72] *See, e.g.*, Schneider v. Kissinger, 412 F.3d 190 (D.C. Cir. 2005).

[73] Sanchez-Espinoza v. Reagan, 720 F.2d 202 (D.C. Cir. 1985).

[74] Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983).

[75] Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987).

[76] Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990).

[77] *Al-Aulaqi*, 727 F. Supp. 2d at 9.

[78] *Id.*

[79] *Id.*

[80] *Id.*

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A. Standing

Because Nasser Al-Aulaqi was asserting that the government's plan to kill his son was a violation of his *son's* constitutional rights under the Fourth and Fifth Amendments, his complaint necessarily maintained that he was able to sue on his son's behalf under one or both of the standing doctrines of "next friend" and "third party" standing.[81]

"Next friend" standing originated in habeas corpus petitions, where courts would allow "next friends" to appear on behalf of detained prisoners unable to seek relief themselves.[82] Judge Bates relied on the Supreme Court case of *Whitmore v. Arkansas*[83] to analyze Nasser Al-Aulaqi's claim that he possessed the necessary "next friend" standing.[84] Citing *Whitmore*, Judge Bates identified the "two firmly rooted prerequisites" for "next friend" standing.[85] The first is an adequate explanation why the real party in interest cannot appear on his own behalf.[86] The second is the requirement that the "next friend" be "truly dedicated to the best interests of the person on whose behalf he seeks to litigate."[87]

Judge Bates held that the plaintiff Nasser failed on both counts. First, he dismissed the plaintiff's claim that "his son cannot bring suit on his own behalf because he is "in hiding under threat of death" and any attempt to access counsel or the courts would "expos[e] him to possible attack by Defendants."[88] Instead, Judge Bates accepted the government's position that if Anwar Al-Aulaqi were to present himself to the U.S. embassy in Yemen, he would be in no danger of being killed.[89] While the Judge acknowledged that the cleric may be arrested and imprisoned were he to turn himself in, he nevertheless held that since traditionally imprisonment is

[81] *Id.* at 15.

[82] *Id.* at 16.

[83] 495 U.S. 149 (1990). In *Whitmore*, the Supreme Court ruled that a third party could not raise the constitutional claims of a death row inmate who had forgone his right to appeal the decision to execute him. *Id.*

[84] *Al-Aulaqi*, 727 F. Supp. 2d at 16.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* at 17.

[89] *Id.*

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no barrier to accessing the courts (and indeed, that "prisoners can, and do, bring civil suits all the time"), such an outcome would fail to satisfy the "inaccessibility" requirement of *Whitmore*.[90] Plaintiff attempted to make a distinction on this point—alleging that Anwar would be unlikely to be "detained as an ordinary federal prisoner," but would likely be "subject to "indefinite detention without charge."[91] While admitting that this may be a possibility, Judge Bates held that "the mere prospect of future detention is insufficient to warrant a finding that Anwar Al-Aulaqi lacks access to the courts."[92]

Judge Bates also held that the second prong of the *Whitmore* analysis was unmet—and that the plaintiff had failed to "provide some evidence that he is acting in accordance with the intentions or wishes of the real party in interest."[93] In coming to this conclusion, Judge Bates relied on the case of D.C. district court decision in *Does 1-570 v. Bush*,[94] where the court denied standing to attorneys seeking to filed habeas corpus petitions as "next friends" on behalf of detainees in Guantanamo Bay that they had never met.[95] In *Does*, the court had observed that "[w]hile it may be fair to assume that the detainees want to be released from detention in Guantanamo Bay . . . certain detainees may mistrust the United States judicial system and choose to avoid participating in such proceedings altogether."[96] Judge Bates likewise concluded that because it appears that Anwar Al-Aulaqi has no interest in standing on his constitutional rights in a U.S. court (citing Anwar's public statements disparaging the U.S. legal system and its government), his father had no right to assert those rights on his behalf.[97]

Nasser Al-Aulaqi had alternatively argued that he had "third party standing" to raise his son's constitutional claims.[98] Citing the Supreme Court case of *Powers*

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[90] *Id.* at 18.

[91] *Id.* at 19.

[92] *Id.* at 20.

[93] *Id.*

[94] 2006 WL 3096685 (D.D.C. 2006).

[95] *Al-Aulaqi*, 727 F. Supp. 2d at 20.

[96] *Does*, 2006 WL 3096685 at *6.

[97] *Al-Aulaqi*, 727 F. Supp. 2d at 20–22.

[98] *Id.* at 23. Third party standing is a "limited exception" to the ordinary standing doctrine, typically utilized in cases where "criminal defendants . . . challenge their convictions by raising the rights of third parties." *See* Powers v. Ohio, 499 U.S. 400, 410–11 (1991) (where a criminal defendant was found to

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v. Ohio,[99] Judge Bates articulated the "three requirements" of third party standing, the first constitutional, the second two prudential: that the litigant must show that he himself suffered an "injury in fact," that the litigant have a "close relation to the third party," and that there is "some hindrance to the third party's ability to protect his or her own interests."[100] He also considered an "additional prudential factor" from the case of *Caplin & Drysdale, Ctd. v. United States*,[101] that is, "the impact of the litigation on third-party interests," specifically, whether conferring third party standing on the litigant would in fact be in conflict with the third party's interests.[102]

Again, Judge Bates concluded that none of these requirements were met. First, the "injury in fact" requirement was unsatisfied.[103] Plaintiff Nasser's claim was that the challenged action would cause him to lose his relationship with his son.[104] Judge Bates observed that the Supreme Court has held that a plaintiff can show such an injury based on emotional harm only if the harm stems from the infringement of a "legally protected" or "judicially cognizable" interest.[105] In this case, there was no legal basis for Nasser's interest in a relationship with his son, either under the Constitution, in statute, or at common law. The D.C. wrongful death statute provided no basis to the plaintiff because by its terms it applied only to person "officially appointed executors or administrators of the child's estate."[106] Likewise, since no circuit court has held that a parent possesses a constitutionally protected liberty interest in maintaining a relationship with an adult child, Judge Bates ruled that Nasser could not rely on the Constitution as a basis for this interest.[107] The plaintiff also failed to show any cases that support the notion that "a

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have standing to object to race-based exclusion of jurors as violation of those excluded jurors' rights to equal protection under the Fourteenth Amendment).

[99] 499 U.S. 400 (1991).

[100] *Al-Aulaqi*, 727 F. Supp. 2d at 23.

[101] 491 U.S. 617 (1989).

[102] *Al-Aulaqi*, 727 F. Supp. 2d at 23.

[103] *Id.* at 24.

[104] *Id.*

[105] *Id.* at 25.

[106] *Id.*

[107] *Id.* at 26.

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parent enjoys a common law interest in maintaining a relationship with his adult child."[108]

Judge Bates next considered the two prudential factors of third party standing enumerated in *Powers* in tandem with the "alternative test" from the D.C. Circuit opinion of *Haitian Refugee Center v. Gracey*[109] (where the court held that "third party standing . . . is appropriate only when the third party's rights protect that party's relationship with the litigant"[110]).[111] Under either test, according to the judge, the plaintiff failed to show that he possessed third party standing. Judge Bates held that under *Powers*, Nasser had failed to show that his interests align with that of his son or that there was significant hindrance to Anwar's ability to protect his own legal rights.[112] The judge found no hindrance because Anwar "would not be killed if he were to present himself in a peaceful manner and seek relief in U.S. courts."[113] And again, as he did in the analysis of the "next friend" claim, the judge emphasized that evidence suggesting that Anwar would not want to vindicate his constitutional rights in a U.S. courts (including statements from Anwar that suggested that he viewed U.S. courts as illegitimate by virtue of their disrespect of Islamic law) was evidence that there was no identity of interests between Anwar and his plaintiff father.[114]

Under the *Haitian Refugee* standard, the analysis focused on whether or not the third party's rights "protect that party's relationship with the litigant."[115] Judge Bates held that not only do the Fourth and Fifth Amendment rights of Anwar fail to provide "substantive protections"[116] of a father's relationship with his adult son, but that since the alleged targeting of Anwar for assassination was not specifically

[108] *Id.* at 27.

[109] 809 F.2d 794 (D.C. Cir. 1987).

[110] Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 809 (D.C. Cir. 1987).

[111] *Al-Aulaqi*, 727 F. Supp. 2d at 29.

[112] *Id.* at 30.

[113] *Id.* at 31.

[114] *Id.* at 33.

[115] *Id.* at 34.

[116] *Id.*

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designed to interfere with the father-son relationship, any harm that would result to Nasser would simply be an "unintended side effect"[117] of the government action.

B. The Alien Tort Statute

With the constitutional claims out of the way, Nasser Al-Aulaqi's remaining claim was the allegation that the United States' "policy of targeted killings violates treaty and customary international law."[118] Under the ATS, "the 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."[119] This relatively anemic cause of action was predictably disposed of in short order.

Judge Bates began his analysis by citing the 2004 case of *Sosa v. Alvarez-Machain*,[120] which held that the ATS provides jurisdiction to federal courts for a "relatively modest set of actions."[121] While Judge Bates admitted that the plaintiff here was correct in asserting that state sponsored extrajudicial killing is both a violation of customary international law norms and is prohibited by the Torture Victim Protection Act, he identified a convenient distinction—the case at hand was distinguishable from other similar cases because it involved only a "threatened" future extrajudicial killing rather than an "actual" extrajudicial killing.[122] Pointing to the *Sosa* Court's warning that courts exercise restraint in expanding the scope of cognizable claims under the ATS, Judge Bates deemed the threat of extrajudicial killing to be too "speculative" for the purposes of the ATS's grant of jurisdiction.[123]

In any case, even if a tort had been recognized, Judge Bates reasoned that because the ATS authorizes only "aliens" to bring civil actions in federal court, and Anwar Al-Aulaqi is a U.S. citizen, Nasser Al-Aulaqi was in a catch-22 situation with respect to the ATS claim. Either it would fail because his son is a U.S. citizen and thus has no rights under the ATS, or it would fail because Nasser Al-Aulaqi

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[117] *Id.*

[118] *Id.* at 35.

[119] 28 U.S.C. § 1350.

[120] 542 U.S. 692 (2004).

[121] Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004).

[122] *Al-Aulaqi*, 727 F. Supp. 2d at 36.

[123] *Id.* at 37.

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himself could state no cause of action recognized as a tort under international law with respect to his own potential loss of his son.[124]

C. Political Question

The bulk of the Al-Aulaqi opinion had been devoted to determining that Nasser Al-Aulaqi did not have standing to sue on behalf of his son. Although all of Nasser Al-Aulaqi's claims had effectively been dismissed, Judge Bates went on to address the government's claim that the suit raised nonjusticiable "political questions."

The starting point for the analysis was the six factors the Supreme Court set forth in *Baker v. Carr*.[125] Admitting that these factors "are much easier to enumerate than they are to apply,"[126] Judge Bates began with the proposition that, given an "examination of the specific areas in which courts have invoked the political question doctrine . . . national security, military matters, and foreign relations are quintessential sources of political questions."[127] At least formally, Judge Bates recognized that the political question doctrine "was only designed to cover a "narrow" category of "carefully defined" cases, and should not be employed as "an ad hoc litmus test of [courts'] reactions to the desirability of and need for judicial application of constitutional or statutory standards to a given type of claim."[128]

Judge Bates went on to assert that judicial resolution of the issues presented by the case would require the court to decide the extent of Anwar Al-Aulaqi's affiliation with Al Qaeda in the Arab Peninsula (AQAP), the connection between AQAP and the "core" Al Qaeda, the threat posed by Anwar Al-Aulaqi, and whether or not "means short of lethal force" could be utilized by the government to address that threat.[129] Having "carefully defined" the case in this way, he went on

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[124] *Id.* at 39.

[125] *Id.* at 44.

[126] *Id.* at 45.

[127] *Id.*

[128] *Id.* at 46.

[129] *Id.* Professor Kevin John Heller has observed that this part of Judge Bates' opinion misstated Nasser Al-Aulaqi's complaint, which "did not ask the court to make those *factual* determinations . . . [Nasser Al-Aulaqi] was only asking the court to make a *legal* determination concerning the appropriate standard for the targeted killing of an American citizen." *See* John C. Dehn & Kevin Jon Heller, *Targeted Killing: The Case of Anwar Al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 187 (2011).

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to state that "these claims pose precisely the types of complex policy questions that the D.C. Circuit has historically held nonjusticiable under the political question doctrine."[130]

Judge Bates went on to analogize the matter at hand to other cases challenging the use of military force abroad. In *El-Shifa v. United States*,[131] the D.C. Circuit had ruled that a negligence case brought by owners of a Sudanese pharmaceutical plant that had been destroyed by a missile strike ordered by President Clinton was non-justiciable under the political question doctrine.[132] The court in *El-Shifa* determined that it was beyond the competence of judiciary to determine whether or not a decision by the President to use military force was well-founded.[133] The court held that "[i]f the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target."[134] Applying *El-Shifa* to the case, Judge Bates reasoned that Nasser Al-Aulaqi's suit was doing exactly that: seeking court review of the President's decision to strike a foreign target.[135] And in a remarkably casual sentence, Judge Bates went on to state that "although the 'foreign target' happens to be U.S. citizen, the same reasons that counseled against judicial resolution of the plaintiff's claims in *El-Shifa* apply with equal force here."[136]

Neither was this case distinguishable because the target of military action was an individual, rather than simply "enemy property," as in *El-Shifa*.[137] On this point, the cases cited by Judge Bates for support are emblematic of the judiciary's refusal to pass judgment on allegations of even the most extreme government action taken in furtherance of foreign policy goals.[138] For example, Judge Bates prominently

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[130] *Id.*

[131] 607 F.3d 836 (D.C. Cir. 2010).

[132] El-Shifa v. United States, 607 F.3d 836, 844 (D.C. Cir. 2010).

[133] *Id.*

[134] *Id.*

[135] Al-Aulaqi v. Obama, 727 F. Supp. 2d at 47.

[136] *Id.*

[137] *Id.* at 48.

[138] *See id.* at 48–49 (citing Harbury v. Hayden, 522 F.3d 412 (D.C. Cir. 2008) (dismissing as nonjustiable claims of an American widow who alleged that her husband had been tortured and killed by Guatemalan army officers working with the CIA in Guatemala); Gonzalez-Vera v. Kissinger, 449 F.3d

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cited the D.C. Circuit decision of *Schneider v. Kissinger*, where the court ruled that claims brought by the descendants of Chilean general Rene Schneider, alleging that the U.S. had caused the general's kidnapping, torture, and death as part of a coup to overthrow elected President Salvador Allende, were nonjusticiable. Judge Bates approvingly discussed the court's opinion:

> As the *Schneider* court explained, "in order to determine whether the covert operations which allegedly led to the tragic death of [the general] were wrongful," it would first need to determine "whether, 35 years ago, at the height of the Cold War . . . 'it was proper for an Executive Branch official . . . to support covert actions against' a committed Marxist who was set to take power in a Latin American country."[139]

Implicit in this reasoning is a presumption inherent to the view that the U.S. government has the right to intervene at will in "America's Backyard": that a "committed Marxist" is a legitimate target by virtue of his politics alone. Perhaps also unsurprising is that the *Schneider* court made no mention that Allende was "set to take power" by virtue of a democratic election. Indeed, *Schneider* and the other cases cited by Judge Bates lead one to the inevitable conclusion that as far as the federal courts are concerned, the rule of law need not apply to the government when it acts in the interest of "foreign policy."

Thus far then, the issue had been framed as a foreign policy one, and therefore presumptively covered by the political question doctrine. But Judge Bates rightly admitted the unprecedented facts at the heart of the case, writing that, "it does not appear that any court has ever—on political question doctrine grounds—refused to hear a U.S. citizen's claim that his personal constitutional rights have been violated as a result of U.S. government action taken abroad."[140] The onus was then on Nasser Al-Aulaqi to show that Anwar's U.S. citizenship should render the political question doctrine inapplicable to his claims.[141] On this point, Nasser Al-Aulaqi had

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1260 (D.C. Cir. 2006) (dismissing as nonjustiable claims alleging that Henry Kissinger and other U.S. officials cooperated with Chilean dictator Augusto Pinochet to commit human rights abuses in Chile); Bancoult v. McNamara, 445 F.3d 427 (D.C. Cir. 2006) (dismissing as nonjustiable claims by former residents of the Chagos Archipelago who alleged that the United States had caused the forcible relocation and killing of island residents in order to establish a military base).

[139] *Id.*

[140] *Id.*

[141] *Id.*

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contended that the courts have resolved claims despite the presence of a "political question" in two other contexts: habeas corpus petitions from U.S. citizens detained as enemy combatants and allegations of unconstitutional takings of property by the military.[142]

Judge Bates found those cases distinguishable from Al-Aulaqi's claim. Habeas petitions were deemed distinguishable because the "Constitution specifically contemplates a judicial role for individuals challenging their detention by the executive."[143] On the other hand, "there is no constitutional commitment to the courts for review of a military decision to launch a missile at a foreign target."[144] In other words, once Anwar Al-Aulaqi was placed on the government's hit list, he became a "foreign target" first, a U.S. citizen second.

Judge Bates also found Al-Aulaqi's claims to be "fundamentally distinct" from those that permitted the resolution of suits by U.S. citizens asserting the U.S. military had unlawfully taken their property abroad.[145] Judge Bates cited the D.C. Circuit case of *Ramirez de Arellano v. Weinberger*,[146] in which plaintiffs were permitted to challenge the U.S. Department of Defense's taking of their cattle ranch in Honduras, because it was not a challenge to "the United States military presence in Honduras," but was rather a mere "land dispute between the plaintiffs and the U.S. government."[147] In contrast, Judge Bates asserted, Nasser Al-Aulaqi's prayer for relief, if granted, would be "vastly more intrusive upon the powers of the Executive" and "would require assessment of 'strategic choices directing the nation's foreign affairs [are] constitutionally committed to the political branches."[148]

Judge Bates concluded by admitting the "somewhat unsettling nature" of the court's ultimate conclusion, but asserted that the political question doctrine "does not contain any 'carve out' for cases involving the constitutional rights of U.S.

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[142] *Id.*

[143] *Id.*

[144] *Id.* at 50.

[145] *Id.*

[146] 745 F.2d 1500 (D.C. Cir. 1984).

[147] *Al-Aulaqi*, 727 F. Supp. 2d at 50.

[148] *Id.* at 51.

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citizens."[149] Denying Nasser Al-Aulaqi's claim that his holding meant that the Executive "possesses 'unreviewable authority to order the assassination of any American whom he labels an enemy of the state,'" Judge Bates insisted that his decision merely concluded that the court "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, presents such a threat to national security that the United States may authorize the use of lethal force against him."[150]

III. CONCLUSION

Judge Bates apparently viewed his opinion as having a narrower scope that Nasser Al-Aulaqi claimed.[151] But after *Al-Aulaqi*, when *is* an Executive plan to kill a U.S. citizen reviewable by a federal court? Even if a plaintiff if determined to actually have standing to bring a claim against the government, as long as the authorization of legal force is purportedly pursuant to the protection of national security, whether here *or* abroad, the political question doctrine would appear to foreclose the possibility of review. As Professor Kevin Jon Heller has observed, after *Al-Aulaqi*,

> The best an American citizen targeted for death can do, therefore, is hope to find out about her status on the JSOC kill list so she can turn herself in before she is killed . . . although the idea that an American citizen should be forced to choose between death and potentially indefinite detention simply because the executive has decided she is a terrorist hardly seems consistent with any coherent notion of citizenship.[152]

Neither is such a result consistent with the idea of a judicial commitment to guaranteeing a citizen the right of due process. Thus the result in *Al-Aulaqi v. Obama* can be seen to reflect a judgment by the D.C. district court: the values protected by the invocation of the standing and political question doctrines are more important than Anwar Al-Aulaqi's rights under the Constitution. That these doctrines have now lead the judiciary to a point where it can confidently defer to the Executive branch's discretion to decide what level of due process a citizen need

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[149] *Id.*

[150] *Id.* at 52.

[151] *See id.*

[152] *See* Dehn & Kevin, *supra* note 129, at 187–88.

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receive before killing him should be reason enough to question their desirability. At least two major but related problems persist.

First, by using these doctrines to avoid ruling on the merits of a case, the judiciary is abandoning its longstanding duty to say "what the law is."[153] A case like *Korematsu* is historically valuable by virtue of the fact that it allows us to examine the underlying assumptions and beliefs that lead to a legal result that ultimately became a source of shame. In contrast, the use of the abstention doctrines results in a precedential void, where issues involving actual legal rights and remedies are nothing more than abstractions, subject to the whims of powerful institutions. When there are difficult decisions to be made, our legal system benefits from a clear line of legal precedent, rooted in reason, which can be subjected to criticism and comment. In these cases, a bad decision may ultimately prove to be better than no decision at all.

Second, in times of increasing exercise of Executive power, as began after the attacks of September 11th, 2001, the need for the judiciary to assert its proper role in the constitutional sphere is stronger, not weaker. Fears of conflict with the executive or the potential for "embarrassment" should not be permitted to overcome the judiciary's duty to uphold the law and guarantee that the rights of individual citizens are being respected. The *Al-Aulaqi* ruling may one day be seen as a blatant failure of the judiciary to confront the executive on a crucial matter of constitutional law. But now that Anwar Al-Aulaqi has been killed, the precedent has been set. Whether or not the President can approve the death of a U.S. citizen without the benefit of a trial may still be unconstitutional in theory. But as long as the nation's judges refuse to address the question one way or the other, that no longer matters.

But to critique the abstention doctrines is to reveal their true function. They are convenient tools for the judicial branch to tacitly approve of potentially illegal and unconstitutional government activity while remaining ostensibly neutral and legitimate in its role as arbiter of the law. Once this is acknowledged, it becomes clear that rather than protect the democratic ideal at the heart of a system of separation of powers, the doctrines of standing and political question subvert it.

Recently, there have been more shades of Orwell. Speaking to students at Northwestern University law school on March 5, 2012, Attorney General Eric

[153] *Marbury*, 5 U.S. at 178.

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Holder commented on the killing of Anwar Al-Aulaqi.[154] Although he never specifically mentioned the assassination, he asserted that the President had acted constitutionally.[155] The highest law enforcement official in the country stated: "'Due process' and 'judicial process' are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process."[156]

Who can argue with that?

[154] Attorney General Eric Holder, Attorney General Eric Holder Speaks at Northwestern University Law School (Mar. 5, 2012), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html.

[155] *Id.*

[156] *Id.*

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